Pause and Refresh? DOL Delays Enforcement of Regulations on ESG Investments for ERISA Plans

March 17, 2021

On March 10, 2021, the Department of Labor announced that, until further notice, it will not enforce its recent regulations on environmental, social and corporate governance ("ESG") investing by benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The link to the Department's announcement can be found here.

As we described in a previous Debevoise Update, on June 23, 2020, the Department proposed regulations affirming that an ERISA investment fiduciary must be focused solely on the plan's financial returns and the interests of plan participants and beneficiaries in their plan benefits, meaning that fiduciaries could not take social or environmental considerations into account when making investment decisions with respect to the assets of such plans. These regulations were interpreted largely as a response to increased attention on ESG-focused investing and as a reminder that ESG considerations should not be viewed as trumping (forgive the pun) ERISA's "prudent expert" fiduciary standard and exclusive benefit rule. The Department finalized these rules on November 13, 2020.

In announcing its non-enforcement policy, the Department explained that it had considered the reactions of asset managers, investment advisers, plan sponsors and other stakeholders who expressed confusion about the application of the rules. The announcement also follows President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, issued in January, which directed federal agencies to review certain existing regulations that may be inconsistent with the environmental justice objectives described in the order.

Although the announcement signals that the Department intends to revisit the final rules, it does not indicate when or how they may be formally modified. However, until further notice, plan fiduciaries and private funds that accept investment from ERISA plans should generally be able to suspend their efforts to conform to the final rules, including any planned revisions to policies and marketing materials. Fiduciaries are nonetheless advised that the announcement does not suspend enforcement of any statutory requirements imposed on fiduciaries under ERISA, including the duties of

prudence and loyalty, and that it is still advisable to document the economic benefit to the plan of making investments having a material ESG component. Additionally, fiduciaries of individual account plans may still want to proceed cautiously with regard to offering an ESG-directed investment as an investment option to avoid potential enforcement of the regulation by participants (or plaintiff lawyers acting on behalf of a class of participants), such as might occur if an ESG-directed ETF or mutual fund made available for investment underperforms alternative investment options.

Because ERISA's fiduciary duties derive from statute rather than regulation, our expectation is that any future regulation or interpretation would, at best, remind fiduciaries that ESG factors can be taken into account only to the extent otherwise consistent with these statutory obligations. It remains to be seen whether a revised ESG regulation would permit, as consistent with these duties, the inclusion of an ESG-directed fund alongside other traditional investment alternatives (although, even if it does, the legal risk identified above would not be wholly removed).

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