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DOL Signals Plan to Embrace ESG Investing

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On Wednesday, March 10, 2021, the Department of Labor announced that, pending further guidance, it will not enforce two recent regulations that many viewed as deterring retirement fund managers from socially conscious investing.[1] Wednesday's statement likely foreshadows guidance or even further rulemaking by the DOL to affirmatively support investments in such Environmental, Social and Governance (ESG) funds.

The regulations in question—which were released in the waning days of the Trump administration over a groundswell of objections from asset managers[2] —did not expressly prohibit retirement plan managers from considering ESG factors in administering 401(k)s, pension plans and other retirement plans.[3] But they obligated managers to look only to "pecuniary factors" like risk and return, rather than ESG factors, when selecting investments, voting proxies or exercising other shareholder rights.

Since the regulations took effect in January 2021, multiple sources have reported on their chilling effect on ESG investing.[4]

In announcing its decision to suspend enforcement of the current regulations, the DOL explained that the regulations "created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights."[5]

The DOL cautioned that Wednesday's move was an interim step. According to Principal Deputy Assistant Secretary for the Employee Benefits Security Administration Ali Khawar, the DOL "intend[s] to conduct significantly more stakeholder outreach" in order to fashion more ESG-friendly rules, "while continuing to uphold fundamental fiduciary obligations."

Although the DOL's announcement is a welcome one for socially conscious investors, plan managers must remain alert for fiduciary duty issues. The fact that the DOL is not currently enforcing these regulations does not otherwise relieve plan fiduciaries of potential litigation risk in the event an ESG investment is nonetheless unsuitable for the plan. Fiduciaries should also keep in mind that the DOL intends to issue future guidance that could impact decisions made in the interim. While all signs point to the DOL expressly permitting selection of ESG funds, the specifics remain unclear.

Bracewell has a multi-disciplinary team focused on ESG issues. We advise and support our clients drawing on our expertise in environmental strategies, securities matters, regulatory issues, government enforcement, commercial litigation, and crisis management, and we are at the forefront of the transition to sustainable energy. Please contact your Bracewell team member for more information.

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1 **Statement Regarding Enforcement of Final Rules on ESG Investments and Proxy Voting**.

2 Wall St. J., ***Labor Department Curbs Sustainable Investing in 401(k)s*** (Oct. 30, 2020).

3 ***Financial Factors in Selecting Plan Investments***; ***Fiduciary Duties Regarding Proxy Voting and Shareholder Rights***.

4 Wall. St. J., ***Wall Street Lobbies to Bring More ESG Funds Into 401(k)s*** (Mar. 3, 2021); Forbes, ***Why Socially Responsible Investing Is Likely To Gain Momentum Under Biden*** (Dec. 14, 2020)

5 Press Release, ***US Department of Labor Releases Statement on Enforcement of Its Final Rules on ESG Investments, Proxy Voting by Employee Benefit Plans*** (Mar. 10, 2021)