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ERISA's Social Goals? ESG Considerations under ERISA

By Andrew Oringer, Steven Rabitz, Julien Bourgeois, Aryeh Zuber, and Michael Binko

A substantial portion of available global investment capital is held under private US pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). ERISA is a comprehensive and complex regulatory scheme generally applicable to private US retirement plans. The fiduciary responsibilities imposed by ERISA have been described as "the highest known to law."

For a variety of reasons, investors (and thus investment managers) are increasingly focused on environmental, social and governance (ESG) considerations in connection with the formulation of their investment strategies. ESG issues for ERISA plans have recently been propelled into the spotlight with a newly proposed regulation of the US Department of Labor (DOL). While the DOL has, under successive presidential administrations, put forth its own gloss on basic principles governing economically targeted investments (ETIs), first outlined by the DOL in 1994, the DOL has never before sought to enshrine the proper treatment of ESG considerations in actual regulatory language. In this sense alone, the DOL's latest proposal is highly significant.

Given this evolution, this article will review some basic considerations relating to the role of ESG factors in the development of investment strategies under ERISA.

Executive Summary

Basic Statutory Scheme

ERISA generally requires that a fiduciary must act "solely in the interest" of the participants and beneficiaries and "for the exclusive purpose" of providing benefits under the plan. One court characterized this duty of loyalty as requiring ERISA fiduciaries to make their decisions "with an eye single to the interests of [plan] participants and beneficiaries."

In pursuing fiduciary duties, the fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing." In effect, under ERISA, the fiduciary must act as a prudent expert.

Once the expertized fiduciary has given appropriate consideration to all applicable facts and circumstances, ERISA tends to encourage deference to the judgment of that fiduciary and tends to discourage regulators and judges from substituting their judgment. As a result, there tends to be substantial focus on the process employed by fiduciaries in furtherance of their exercise of their fiduciary duties, and ERISA practitioners often have been known to refer colloquially to "procedural prudence" in connection with a fiduciary's pursuit of the fiduciary's duties under ERISA.

Regulatory and Administrative Developments

Before ESG, as such, emerged as a mainstream topic of discussion, the DOL considered how general ERISA principles should be applied in the context of ETIs. The DOL's first comprehensive guidance addressing ESG investment issues was in Interpretive Bulletin 94-1. The Department's stated objective in issuing IB 94-1 was to state that ETI investments are not inherently incompatible with ERISA's fiduciary obligations. The preamble to IB 94-1 explained that the requirements of sections 403 and 404 of ERISA do not prevent plan fiduciaries from investing plan assets in ETI investments if the investment has an expected rate of return commensurate to rates of return of available alternative investments with similar risk characteristics, and if the investment vehicle is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan. Some commentators have referred to this as the "all things being equal" test or the "tie-breaker" standard. The DOL stated in the preamble to IB 94-1 that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such non-pecuniary considerations as the deciding factor for an investment decision.

Over time, while the basic principles identified by the DOL in this guidance have, to some extent, generally remained unchanged, there have been changes at the margins in tone and emphasis over successive presidential administrations. Thus, for example:

- In 2008 a Republican administration noted that ERISA "does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan" and that a fiduciary investing in an ETI would first have to conclude "that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan."
- A Democratic administration in 2015 indicated that ESG considerations "may have a direct relationship to the economic value of the plan's investment" and that in such instances, ESG issues "are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices." That same Democratic administration also noted that "fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors."
- A Republican administration in 2018 warned that fiduciaries "must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision," and that "[i]t does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors."

More recently, in 2019, the current administration issued an executive order directing the DOL to examine the data provided by retirement plans to identify discernable trends with respect to ESG investing. Then, in June 2020, as will be discussed in more detail below, the administration proposed a new regulation relating to the consideration of non-pecuniary factors that would have a pointed impact on the use of ESG factors in the context of investment decisions by fiduciaries of ERISA plans.

Discussion

A fundamental precept under ERISA would seem to be that, when a fiduciary invests plan assets, economic, financial and investment considerations are required to be paramount. ERISA's fundamental principles may, as relevant here, be thought of

by some as generally discouraging fiduciaries from subordinating the economic interests of participants and beneficiaries to other (non-economic) objectives.

But, as is so often the case, the general rules may well start the inquiry rather than end it. In particular, at least until the most recent proposed regulation, to one extent or another, the ever-evolving regulatory guidance seemed to point to the notion that certain ancillary considerations could be taken into account to the extent not inconsistent with a focus on investment returns and not otherwise inconsistent with a plan's fiduciary's duties.

Prior to the issuance of the proposed regulation, there were indications from the DOL under the current administration that a fiduciary choosing an investment option on behalf of an ERISA plan would need to show that any consideration of ESG factors would not be expected to diminish returns, and the fiduciary would be required to affirmatively justify the taking into account of ESG factors.

It is noted that the extent to which the analysis under ERISA will influence or otherwise affect the analysis under state and local law, and in non-US jurisdictions, is unclear, particularly where those jurisdictions and regimes permit, or even require, the consideration of ESG factors. The lack of consistency could ultimately result in additional challenges for those managers who may be subject to multiple and even inconsistent requirements or are otherwise engaged in business across dissimilar jurisdictions.

While shifts in regulatory tone and emphasis, including, significantly, the recent proposed regulation (as discussed below), have been and may continue to be significant, it may be expected that ERISA's fundamental emphasis on investment performance will remain. Fiduciaries interested in considering ESG factors may want to consider focusing on proper process, and on being able to show that due consideration has been given to appropriate investment-related factors, before embarking on any ESG-included approach.

Legal Background

Statutory Framework

ERISA is a comprehensive and complex regulatory scheme generally applicable to private US retirement plans. ERISA's fiduciary duties have been described as "the highest known to law."[1]

As relevant here, Section 404(a) of ERISA lays out a fiduciary's fundamental standard of care as follows:

(1) [Except as otherwise specified under ERISA,] a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan; [and, among other things,]

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

The "solely in the interest" and "exclusive purpose" language may be thought of as imposing a duty of loyalty on the ERISA fiduciary. One court famously characterized ERISA's duty of loyalty as requiring the fiduciary to look with "an eye single" to the interests of plan participants and beneficiaries.[2]

As to the duty of prudence, the ERISA rule, while sounding to some extent in the language of traditional negligence, uses the words "under the circumstances that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA thereby encourages fiduciaries to become familiarized with the applicable considerations—expertized, one might say—and

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to take into consideration all relevant facts and circumstances. Some colloquially refer to the ERISA prudence standard as a "prudent expert" standard, in contrast to a mere "prudent person" standard.

ERISA does not generally specify approved lists of investments or specific investment criteria that the ERISA fiduciary must use in furthering the interests of plan participants and beneficiaries. Once the expertized fiduciary has given appropriate consideration to all applicable facts and circumstances, ERISA tends to encourage deference to the judgment of that fiduciary, rather than the substitution of the judgment of regulators and judges. Indeed, ERISA's deferential approach to the judgment of responsible expert fiduciaries is arguably regarded as a model for modern approaches to fiduciary regulation. The DOL regulations provide that ERISA's prudence requirements

> are satisfied if the fiduciary . . . (i) [h]as given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (ii) [h]as acted accordingly.[3]

The regulations go on to say that "appropriate consideration" will include "a determination by the fiduciary that the particular investment . . . is reasonably designed, as part of the portfolio . . . to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment."[4]

Given the foregoing, there tends to be substantial focus on the process employed by fiduciaries in furtherance of their exercise of their fiduciary duties. Because of ERISA's deferential approach, the ability of a fiduciary to show that it has employed an appropriate process can forcefully support and validate the fiduciary's decision-making. As a result, ERISA practitioners often have been known to refer colloquially to "procedural prudence" in connection with a fiduciary's pursuit of the fiduciary's duties under ERISA.

Regulatory Guidance

Early in the development of the law under ERISA, the DOL issued a number of advisory opinions and information and other letters concerning a fiduciary's ability to consider the collateral effects of an investment.[5] In responding to these various opinion requests, the DOL established certain broad principles. The DOL stated that arrangements designed to bring areas of investment opportunity that provide collateral benefits to the attention of plan fiduciaries will not, in and of themselves, violate ERISA where the arrangements do not restrict the exercise of the fiduciary's investment discretion.[6] The DOL emphasized, however, that the existence of such collateral benefits may be decisive in evaluating an investment only if the fiduciary determines that the investment containing the collateral benefits is expected to provide an investment return to the plan commensurate to alternative investments having similar risks.[7]

Later, but still before ESG, as such, emerged as a mainstream topic of the discussion, the DOL crystallized its thinking regarding these matters in Interpretive Bulletin (IB) 94-1. In IB 94-1, the DOL considered how general ERISA principles should be applied in the context of ETIs and addressed issues relating to ETIs and their role in an ERISA plan's portfolio.

IB 94-1 defines an ETI as "any investment that is selected, in part, for its collateral benefits, apart from the investment return to the employee benefit plan investor." In IB 94-1, the DOL explained that prudence and other general fiduciary principles under ERISA noted above do not prevent plan fiduciaries from investing in ETIs if "the ETI has an expected rate of return that is commensurate to rates of return

of alternative investments with similar risk characteristics that are available to the plan, and if the ETI is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan." This standard was recognized by the DOL in later guidance (specifically, IB 2015-01) as being referred to by some commenters as the "all things being equal" test.[8]

The DOL expressly stated that the bedrock principle under ERISA is that the focus of plan fiduciaries must be on the plan's financial returns and risk to beneficiaries. Under ERISA, the plan trustee, investment manager or other responsible fiduciary, as applicable, may not use plan assets to promote social, environmental, or other public policy causes at the expense of the financial interests of the plan's participants and beneficiaries. Fiduciaries may not accept lower expected returns or take on greater risks in order to secure collateral benefits.

IB 94-1 was not the final word from the DOL on these matters. While the basic principles identified by the DOL have to some extent generally remain unchanged, there have, however, been changes at the margins in tone and emphasis, as additional guidance has been issued by successive administrations of alternating political parties.

Thus, while IB 94-1 was issued under a Democratic administration, in 2008 the DOL under a Republican administration modified and superseded IB 94-1 with IB 2008-01. IB 2008-01's stated purpose was to clarify that "fiduciary consideration of non-economic factors should be rare and, when considered, should be documented in a manner that demonstrates compliance with ERISA's rigorous fiduciary standards."

In encouraging fiduciaries to be careful when considering ETIs, IB 2008-01 noted that ERISA "does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan." IB 2008-01 emphasized that, where under "limited circumstances" investment alternatives may indeed be of equal value, plan fiduciaries prior to selecting an ETI must have "first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan."

In 2015, with a return to a Democratic administration, the DOL issued IB 2015-01. There, the DOL expressed concern that its prior guidance "unduly discouraged fiduciaries from considering ETIs and ESG factors." IB 2015-01, which replaced IB 2008-01, began to cast ESG considerations in a more affirmatively positive light as compared with the presentation in the previous IBs, stating that ESG issues "may have a direct relationship to the economic value of the plan's investment" and that in such instances, ESG issues "are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices." The preamble to IB 2015-01 also stated that, "if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from [ESG] factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote." The DOL specifically stated that "fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors. When a fiduciary prudently concludes that such an investment is justified based solely on the economic merits of the investment, there is no need to evaluate collateral goals as tie-breakers." The DOL also noted that it did not construe consideration of ETIs or ESG criteria as "presumptively requiring additional documentation or evaluation beyond that required by fiduciary standards applicable to plan investments generally." IB 2015-01 expressly permits ERISA fiduciaries to address ETIs or incorporate ESG factors in investment policy statements, integrate ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among otherwise equivalent investments, and consider whether and

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how potential investment managers consider ETIs or use ESG criteria in their investment practices.

In 2016, still under the same (Democratic) administration, the DOL issued IB 2016-01. IB 2016-01 addressed, among other things, proxy voting with respect to securities held by ERISA plans. The DOL expressed concern that prior guidance from the DOL had been "misunderstood and may have worked to discourage ERISA plan fiduciaries . . . from voting proxies and engaging in other prudent exercises of shareholder rights." Instead, the DOL encouraged plans to maintain a statement of proxy voting policy, which would be "an important part of any comprehensive statement of investment policy." Such a proxy voting policy could include "proxy voting decisions as well as policies concerning economically targeted investments or incorporating [ESG] factors in investment policy statements or integrating ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among equivalent investments." IB 2016-01 also encouraged fiduciaries to maintain an investment policy that "contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock."

The DOL explained that active monitoring and communication activity would generally concern such issues as:

> the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as governance structures and practices, particularly those involving board composition, executive compensation, transparency and accountability in corporate decision-making, responsiveness to shareholders, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (e.g., investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance.

After the 2016 election, the DOL, under a Republican administration, issued Field Assistance Bulletin (FAB) 2018-01. On its face, FAB 2018-01 is intended to provide guidance to national and regional DOL offices to assist in addressing questions they may receive from plan fiduciaries and other interested stakeholders about IB 2015-01 and IB 2016-01. More generally, though, FAB 2018-01 arguably signaled yet another shift in tone regarding the interpretation and application of underlying ERISA principles.

In FAB 2018-01, the DOL warned that fiduciaries "must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision." The DOL noted:

> It does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors. Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits. A fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a

> material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.

As to investment policy statements, the DOL warned fiduciaries from being too quick to incorporate guidelines on ESG investments into investment policy statements or to integrate ESG-related tools into its investment decision-making process. The DOL cautioned fiduciaries to comply with investment policies incorporating ESG guidelines "only insofar as the policy is consistent with . . . ERISA (including the core fiduciary obligations of prudence and loyalty). Thus, if it is imprudent to comply with the investment policy statement in a particular instance, the manager must disregard it."

The DOL also addressed qualified default investment alternatives (QDIAs) under participant-directed plans that rely on the safe harbor under Section 404(c) of ERISA.[9] (QDIAs are default investments that are used where participants do not make affirmative investment choices from among investment alternatives available under a plan.) The DOL stated that "[n]othing in the QDIA regulation suggests that fiduciaries should choose QDIAs based on collateral public policy goals," and cautioned that "the decision to favor the fiduciary's own policy preferences in selecting an ESG-themed investment option for a 401(k)-type plan without regard to possibly different or competing views of plan participants and beneficiaries would raise questions about the fiduciary's compliance with ERISA's duty of loyalty."

The DOL further noted that the selection of an ESG-themed target date fund (that is, a fund aimed at the ages of the investing individuals) as a QDIA would "not be prudent" if the fund would provide a lower expected rate of return than available non-ESG alternative target date funds with commensurate degrees of risk, or if the fund would be riskier than non-ESG alternative available target date funds with commensurate rates of return.

FAB 2018-01 goes on to make note of the DOL's statement in the preamble of IB 2015-01 that

> if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from [ESG] factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote.

FAB 2018-01 characterizes that statement as a DOL observation that "merely recognized that there could be instances when otherwise collateral ESG issues present material business risks or opportunities to companies that company officers and directors need to manage as part of the company's business plans and that qualified investment professionals would treat as economic considerations under generally accepted investment theories."

FAB 2018-01 provides some additional insights regarding shareholder engagement as addressed in IB 2016-01. Specifically, the DOL noted that IB 2016-01 was "not intended to signal that it is appropriate for an individual plan investor to routinely incur significant expenses to engage in direct negotiations with the board or management of publicly held companies with respect to which the plan is just one of many investors." IB 2016-01 was similarly "not meant to imply that plan fiduciaries, including appointed investment managers, should routinely incur significant plan expenses to, for example, fund advocacy, press, or mailing campaigns on shareholder resolutions, call special shareholder meetings, or initiate or actively sponsor proxy fights on environmental or social issues relating to such companies." Rather, only in limited circumstances would it be prudent to expend plan assets to actively engage with company management about "important corporate governance reform issues or other environmental or social issues," where such issues pose "significant operational risks and costs to business, and that are clearly connected to long-term value creation for

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shareholders," including "important corporate governance reform issues or other environmental or social issues."

2019 Executive Order

In 2019, the same Republican administration issued an Executive Order on Promoting Energy Infrastructure and Economic Growth (Executive Order).[10] The Executive Order, among other things, directed the DOL to "complete a review of available data filed with the [DOL] by retirement plans subject to [ERISA] in order to identify whether there are any discernable trends with respect to such plans' investments in the energy sector" and to "complete a review of existing [DOL] 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 returns on ERISA plan assets."

2020 Proposed Regulation

On June 23, 2020, the DOL proposed a new rule (the Proposed Regulation)[11] relating to the consideration of non-pecuniary factors that would have a pointed impact on the use of ESG factors in the context of investment decisions by fiduciaries of ERISA plans. As noted above, the DOL has never before sought to enshrine the proper treatment of ESG considerations in actual regulatory language, and, even without more the DOL's latest proposal is therefore highly significant.

The DOL refers to its ESG initiative as a "New Investment Duties Rule." As the News Release accompanying the Proposed Regulation notes, the successive iterations of interpretive advice over these years "may have created confusion" with respect to "investments selected because of non-financial objectives, such as environment, social and public policy goals, that the investments may further." According to the News Release, the proposal is designed, in part, to make clear that ERISA fiduciaries "may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-financial objectives."

In making its proposal, the DOL expressly wished to make it clear that the "fundamental principle is that an ERISA fiduciary's evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the Plan's funding policy and investment policy objectives." The DOL stated that the interests of plan participants and beneficiaries that ERISA fiduciaries are charged with pursuing must be understood to refer to "financial" rather than "non-pecuniary" benefits. Indeed, according to the DOL in the Proposed Regulation, the only appropriate "social" goal for ERISA plans is that of providing sufficient retirement savings for participants and beneficiaries, with the proposed regulation stating that "[p]roviding a secure retirement for American workers is the paramount, and eminently-worthy, 'social' goal of ERISA Plans" and that "[p]lan assets may not be enlisted in pursuit of other social or environmental objectives."

The Proposed Regulation would not specifically prohibit a fiduciary's consideration of ESG, and the DOL recognizes that "there may be instances where factors that sometimes are considered without regard to their pecuniary import … will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories." Ultimately, however, the proposed regulation, if finalized, would be expected to make it more challenging for a fiduciary to conclude that the selection of ESG products meets its prudence and "exclusive purpose" obligations under ERISA than under any preceding DOL guidance, and will push fiduciaries interested in ESG towards a more purely financial analysis of ESG factors.

Since the regulation was proposed, the DOL has reportedly collected over 8,700 comments, most

of them negative.[12] Among those opposing the proposal are asset managers and sustainable investment advocates. Others have requested that the DOL withdraw its proposal rather than amend it because of adequate existing regulations for plan fiduciaries and investment managers, making the proposal unnecessary.

In general, many of the comments address the following items: the short public comment period (just 30 days); what some commentators consider to be a mischaracterization of ESG, including arguments by several commentators that ESG risk is, in fact, a pecuniary consideration because it is fundamental to evaluating the long term performance of an investment; the lack of factual support that ESG is being misused in a way that doesn't benefit plan investments; the lack of support that ERISA fiduciaries are allocating investments on the basis of non-pecuniary criteria; that the regulation will "turn off" younger investors, who often have a strong interest in sustainable investing, from saving for retirement; and that the regulation will result in an increased burden on plan fiduciaries because of the extensive documentation requirements, which would in turn discourage the use of ESG investments.

Discussion

As indicated above, a fundamental precept under ERISA would seem to be that, when a fiduciary invests plan assets, economic, financial and investment considerations are required to be paramount. Other considerations are rendered secondary, at best. ERISA's fundamental principles may, as relevant here, be thought of by some as generally discouraging fiduciaries from subordinating the economic interests of participants and beneficiaries to other (non-economic) objectives.

But, as is so often the case, the general rules may well start the inquiry rather than end it. As the evolution of the DOL's thinking regarding ESG shows, there may be important differences in tone, emphasis, and policy outlook across successive presidential administrations.

Indeed, one arguably still-evolving concept (which, as indicated above, was arguably given credence by IB 2015-01) is the notion that ESG factors not only are not a negative consideration, but rather actually can positively affect investment performance. If it can be shown empirically that considering ESG factors can actually deliver better returns for plans, the arguments in favor of considering ESG factors would seem naturally to improve. Under that paradigm, ESG factors could be viewed as positive considerations that are permissibly taken into account.[13]

It is also worthy of note that the extent to which the analysis under ERISA will influence or otherwise affect the analysis under state and local law, and in non-US jurisdictions, is unclear. For now, there may be a greater willingness under non-ERISA law to permit, or even require, the consideration of ESG factors. The lack of consistency across different regimes could ultimately result in additional challenges for those managers who may be subject to multiple and even inconsistent requirements or otherwise engaged in business across dissimilar jurisdictions.

Conclusion

In the current regulatory environment, a fiduciary choosing an investment option on behalf of an ERISA plan should to be able to show that any consideration of ESG factors is not expected to diminish returns, and affirmatively to justify the taking into account of ESG factors. If it can be shown empirically that considering ESG can actually deliver better returns for plans, the arguments in favor of considering ESG would seem naturally to improve.

While shifts in regulatory tone and emphasis under ERISA surrounding ESG considerations have been and may continue to be significant, it may be expected that ERISA's fundamental emphasis on investment performance will remain. Fiduciaries interested in considering ESG factors may want to consider focusing on proper process, and on being able to show that due consideration has been given

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to appropriate investment-related factors, before embarking on any ESG-included approach.

Mr. Oringer and **Mr. Rabitz** are Partners, and **Mr. Zuber** and **Mr. Binko** are Associates, at Dechert LLP in New York, NY. **Mr. Bourgeois** is a Partner at Dechert LLP in Washington, DC.

NOTES

1 *See*, *e.g.*, Henry v. Champlain Enters., 334 F. Supp. 2d 252, 270–72 (N.D.N.Y. 2004) (citations omitted), vacated and remanded, 445 F.3d 610 (2d Cir. 2006); Henry v. U.S. Trust Co. of Cal., 569 F.3d 96, 100 (2d Cir. 2009); Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982), cert denied, 459 U.S. 1069; Jones v. American Gen. Life & Accident Ins. Co., 370 F.3d 1065, 1071 (11th Cir.), reh'g en banc denied, 116 F. App'x 254 (2004); ITPE Pension Fund v. Hall, 334 F.3d 1011, 113 (11th Cir. 2003); Herman v. Nationsbank Trust Co., 126 F.3d 1354, 1368 (11th Cir. 1997).

2 *Bierwirth*, 680 F.2d at 271.

3 29 C.F.R. § 2550.404a-1(b)(1).

4 29 C.F.R. § 2550.404a-1(b)(2).

5 *See* 59 Fed. Reg. 32606, n.2 (June 23, 1994) (citing a list of information letters and advisory opinions).

6 *See* DOL Adv. Op. 88-16A (Dec. 9, 1988) (noting, in the context of investments with the potential for providing collateral benefits to union members, that in considering such investments plan fiduciaries could be influenced by factors that were not related to the plan's expected investment return only if such investments were equal or superior to alternative available investments); DOL Adv. Op. 80-33A (June 3, 1980).

7 *See* 59 Fed. Reg. 32606-07 (citing DOL letter to Theodore Groom (Jan. 16, 1981); DOL letter to Daniel O'Sullivan (Aug. 2, 1982); DOL letter to James Ray (July 8, 1988); DOL letter to Stuart Cohen, (May 14, 1993)).

8 *See* 80 Fed. Reg. 65135 (October 26, 2015).

9 When a plan complies with the safe harbor, plan fiduciaries are not liable under Part 4 of Title IV of ERISA for any loss or by reason of any breach which results from such participant's or beneficiary's exercise of control, but the plan fiduciaries remain responsible for the prudent selection and monitoring of the QDIA. *See also* 29 C.F.R. § 2550.404c-5.

10 EO 13868 (Apr. 10, 2019).

11 85 FR 39113 (June 30, 2020).

12 As of August 17, 2020, form letters make up about 86 percent of the comments, according to the DOL's Website, including 7,000 from the Green Business Network and 400 from the American Sustainable Business council. *See* Beagan Wilcox Volz, "DOL Deluged with 8,000+ Letters Opposing ESG Proposal," *Ignites* (Aug. 17, 2020).

13 Indeed, in a recent non-ERISA action in Australia (McVeigh v. Retail Employees Superannuation Pty Ltd. (Federal Court of Australia 2018)), a pension plan participant sued a plan in which he was a beneficiary alleging that "[c]limate change, the physical impacts, and the transition impacts, individually or in any combination, have posed, and will increasingly continue to pose, material or major risks to the financial position of many of [the plan's] investments," and that "[t]rustee directors knew, or ought to have known, that [the plan's] climate change business risks were likely to have a material or major impact on the financial condition of the [plan]." The idea there was that ESG considerations affirmatively should have been considered in connection with investment decision-making. While such a reversal of traditional thinking and regulatory activity under ERISA does not seem to have materialized in the United States, it will be interesting to see how things progress.

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