

MEMO# 32547

June 23, 2020

DOL Focus on ESG Investments in Retirement Plans

[32547]

June 23, 2020 TO: ICI Members

ESG Task Force

Pension Committee

Pension Operations Advisory Committee SUBJECTS: ESG

Pension RE: DOL Focus on ESG Investments in Retirement Plans

Recent activities by the Department of Labor (DOL) suggest an increased interest in issues related to plan investments with a focus on environmental, social and governance (ESG) factors. These actions include an investigative probe and a possible proposed regulation, which we expect DOL to publish shortly.

Investigations

According to recent news reports, the New York Regional Office of the Employee Benefit Security Administration (EBSA) division of DOL has sent letters to several ERISA retirement plans that include ESG themed funds in their investment options.[\[1\]](#) The letters request a long list of information about the plan fiduciaries' selection and review process for those options.

EBSA explains in the letter that "the Department seeks to better understand the Plan fiduciaries' selection of ESG funds for inclusion in the Plan's investment options and compliance with their duty to administer the Plan prudently and solely for the purpose of providing benefits to participants and beneficiaries, and defraying reasonable expenses of administering the Plan."[\[2\]](#)

While the first letters reported have come from the New York Regional Office, we understand that DOL officials have confirmed that this probe is part of a national focus, rather than limited to one office. We expect to hear more about these information requests, particularly in light of an expected DOL proposed rule on ESG investment by retirement plans.

Proposal

On May 29, 2020, DOL sent a proposal to the Office of Management and Budget (OMB) for review. Based on the OMB website, we know that the proposal (1) is titled "Financial Factors in Selecting Plan Investments," (2) is categorized as not economically significant,

and (3) is not a project that has appeared on DOL's semiannual regulatory agenda. OMB completed its review of the proposal on June 22, so we expect to see the proposal shortly, once DOL publishes it.

DOL has not confirmed that this proposal relates to ESG investments; however, the general consensus of the retirement industry is that it relates to a Trump executive order from back in April 2019 directing DOL to review positions that might result in ESG policies discouraging oil and gas investments.^[3] Further, some have speculated that this project may be intended to codify existing sub-regulatory guidance on ESG investing into regulation through notice and comment rulemaking, which will be more difficult for future administrations to modify.^[4]

Please contact me if you have any questions or would like to discuss these issues. We will likely engage the Committees listed above once DOL's proposal is released.

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endnotes

[1] See Isenberg, David, "NY DOL Agency Launches Probe into Retirement Plan ESG Usage," *Fund Intelligence*, June 16, 2020, available at <https://fundintelligence.global/compliance/news/ny-dol-agency-launches-probe-into-retirement-plan-esg-usage/>; Schoeff Jr., Mark, "Labor Department Gathers Information on How Retirement Plans Use ESG Funds," *InvestmentNews*, June 17, 2020, available at <https://www.investmentnews.com/labor-department-gathers-information-retirement-plans-use-esg-funds-194176>.

[2] DOL uses this language in one of the letters it sent, a redacted copy of which is linked in the InvestmentNews article cited above.

[3] On April 10, 2019, the White House issued an Executive Order on Promoting Energy Infrastructure and Economic Growth (the EO). The stated goal of the EO is to promote private investment in US energy infrastructure, with a focus on crude oil and natural gas. The EO included a number of directives to DOL and appears focused on limiting the impact of ESG influences on curtailing investment in the fossil fuel energy industry. See ICI Memorandum No. 31723, dated April 22, 2019, available at https://www.ici.org/my_ici/memorandum/memo31723.

[4] Since the Clinton Administration, generally, each incoming administration has made slight modifications to the guidance on ESG investments in ERISA plans. For a summary of DOL's most recent guidance, see ICI Memorandum No. 31192, dated May 3, 2019, available at https://www.ici.org/my_ici/memorandum/memo31192.

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