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White House Issues Executive Order Affecting DOL's ESG Investing, Proxy Voting Guidance

[31723]

April 22, 2019 TO: ICI Members

Global ESG Task Force

ICI Global Retirement Savings Committee

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: White House Issues
Executive Order Affecting DOL's ESG Investing, Proxy Voting Guidance

On April 10, 2019, the White House issued an Executive Order on Promoting Energy Infrastructure and Economic Growth (the "EO").[\[1\]](#) The goal of the EO is to promote private investment in US energy infrastructure, with a focus on crude oil and natural gas.

Among other directives intended to accomplish this goal, the EO directs the Department of Labor (DOL) to (1) review data filed by retirement plans to identify trends with respect to plans' investments in the energy sector and (2) review existing DOL guidance on proxy voting by plan fiduciaries. This section of the EO, titled "Environment, Social, and Governance Issues; Proxy Firms; and Financing Energy Projects Through the United States Capital Markets," also discusses the concept of materiality and emphasizes "that companies owe a fiduciary duty to their shareholders to strive to maximize shareholder return, consistent with the long-term growth of a company."

Background

DOL has issued, and regularly updates, guidance on plan fiduciary standards both for voting proxies and considering environmental, social, and governance (ESG) factors when investing plan assets.

In 2016, DOL issued Interpretive Bulletin (IB) 2016-01,[\[2\]](#) which restated plan fiduciaries' duties regarding the voting of proxies on securities held in ERISA-covered retirement plans, and the exercise of other shareholder rights. The bulletin explains ERISA's requirement that, "in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives."

DOL also has issued guidance, most recently in 2015 and 2018, on taking ESG factors into

account for plan investments. The recent EO does not directly address DOL's guidance on ESG investing, although it may be relevant to the EO's focus on ESG issues.

DOL's 2015 guidance (IB 2015-01[3]) explained that the fiduciary standards applicable to ESG investing are no different than the standards applicable to plan investments generally. Plan fiduciaries may not sacrifice investment returns or take on additional investment risk as a means of using plan investments to promote collateral social policy goals; however, when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as tie-breakers for an investment choice. Further, in some cases, otherwise collateral ESG issues may present material business risk or opportunities to companies, which qualified investment professionals would treat as economic considerations under generally accepted investment theories.

In 2018, DOL issued Field Assistance Bulletin (FAB) 2018-01,[4] providing clarifications on both of the above topics. Regarding plans' exercise of shareholder rights, the FAB focused on plan expenditures for proxy voting and other shareholder engagement and when a cost benefit analysis may be warranted. Regarding ESG investment considerations, the FAB emphasized that "plan fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral goals." DOL also addressed the treatment of ESG factors as economically relevant in decision-making and the use of ESG-themed investment options in 401(k) plans.

Executive Order

The EO directs DOL to do the following, within 180 days of the date the EO was issued:

1. Complete a review of available data filed with DOL by retirement plans subject to the ERISA in order to identify whether there are discernible trends with respect to such plans' investments in the energy sector;
2. Provide an update to the Assistant to the President for Economic Policy on any discernable trends in energy investments by such plans; and
3. 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 return on ERISA plan assets.

While DOL has data regarding plan investments from Form 5500 filings, it may be challenging to identify trends from this data alone. The Schedule H (Financial Information)[5] requires plans to list all investment assets held at the end of the year, and all investment assets acquired and disposed of during the plan year. This information is filed in PDF format and is not easily searchable. In addition, it may not be readily apparent from the data whether the investment includes investments in the energy sector.

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endnotes

[1] The Executive Order is *available at* <https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/>.

[2] See ICI Memorandum No. 30522, dated January 13, 2017, available here: https://www.ici.org/my_ici/memorandum/memo30522.

[3] See ICI Memorandum No. 29448, dated October 27, 2015, available here: https://www.ici.org/my_ici/memorandum/memo29448.

[4] See ICI Memorandum No. 31192, dated May 3, 2018, available here https://www.ici.org/my_ici/memorandum/memo31192.

[5] The Schedule H is required to be filed by plans covering 100 or more participants and by certain investment entities that file the 5500 (Direct Filing Entities, or DFEs).

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