DOL Issues Proposed Rule (Again) to Address Selecting Plan Investments and Exercising Shareholder Rights

October 20, 2021

On October 13, 2021, the DOL released a proposed rule which effectively provides that ERISA plan fiduciaries may consider climate change and other environmental, social, and governance ("***ESG***") factors when they make investment decisions and when they exercise shareholder rights. Under the Trump administration, in late 2020, the DOL previously issued a final rule on "Financial Factors in Selecting Plan Investments" (generally requiring plan fiduciaries to select investments and investment courses of action based solely on consideration of "pecuniary factors") and a related final rule on "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (addressing obligations of plan fiduciaries under ERISA when voting proxies and exercising other shareholder rights in connection with plan investments in shares of stock) (collectively, the "***Prior Rules***"). Subsequently, President Biden issued executive orders which directed the DOL to consider a proposed rule to suspend, revise, or rescind the Prior Rules, and in March 2021, the DOL issued an enforcement policy statement providing that, until the publication of further guidance, the DOL will not enforce the Prior Rules or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with the Prior Rules.

The new proposal effectively sets aside the Prior Rules. Notably, the proposed rule clarifies the permissibility of considering ESG factors and makes it clear that when considering projected returns, a fiduciary's duty of prudence may often require an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action. The proposed rule provides greater latitude in considering ESG factors even if they would not be "pecuniary" under the Prior Rule. The proposed rule would also remove the special rules that preclude the use of investments that consider non-pecuniary factors as qualified default investment alternatives ("***QDIAs***") and would instead apply the same standards to QDIAs as applied to other investments. The proposed rule also drops certain "tie-breaker" requirements and replaces those provisions with a standard that requires the fiduciary to conclude prudently that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon. With respect to shareholder rights/proxy voting, the proposed rule reverses several changes under the Prior Rules (*e.g.*, certain "safe harbor" examples and recordkeeping requirements) and directs fiduciaries to the generally applicable statutory duties of prudence and loyalty set forth in Section 404 of ERISA for the governing standards in these areas.

The DOL is seeking comments on its proposed rule through December 13, 2021.

The proposed rule is available here.

A fact sheet regarding the proposed rule is available here.

The DOL's news release regarding the proposed rule is available here.

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