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Department of Labor Guidance and Regulations on Selecting Private-Sector Pension Plan Investments

Introduction

The fiduciary standards in the Employee Retirement Income Security Act of 1974 (ERISA; P.L. 93-406, as amended) require that individuals who make decisions for private-sector pension plans (referred to as *fiduciaries*) adhere to specified standards of conduct. The standards include an obligation to act prudently and for the exclusive purpose of providing benefits to participants and beneficiaries. Individuals who choose plan investments are subject to these fiduciary standards, which apply to both *defined benefit* (DB) plans and *defined contribution* (DC) plans (such as a 401(k) plan).

Over the years, investors—including pension plan sponsors and participants—have taken an interest in investment features beyond the standard risk and return relationship. Examples of such investments include those that consider the effects of climate change (e.g., preferring renewable energy companies to fossil fuel companies), a firm's supply chain practices (e.g., ensuring that seafood is not caught with forced labor), faith-based approaches (e.g., investing based on the Bible or Sharia law), or corporate governance structures (e.g., considering the diversity of a corporation's board of directors). These investments have been referred to with various names, such as *economically targeted investments*; *socially responsible investments*; and *environmental, social, and governance (ESG) investing*. Policymakers' opinions vary as to the appropriateness of these types of investments within pension plans. Some Members of Congress are interested in facilitating these investments; others are interested in limiting them.

Earlier DOL Guidance

In 1994, 2008, and 2015 the Department of Labor (DOL) issued guidance in the form of Interpretive Bulletins (IBs) and, in 2018, a Field Assistance Bulletin, on the extent to which pension plan fiduciaries can consider factors beyond an investment's risk and return relationship. The guidance generally emphasized that investment decisions must be made with the objective to provide economic benefits to plan participants. The guidance also described scenarios in which consideration of investments that have goals beyond providing income to participants could be consistent with a fiduciary's duties. For example, if a plan found that two investments were equal on an economic basis, then the plan could—but would not be required to—choose based on noneconomic factors. DOL, in IB 2015-01, construed that ERISA prohibits "a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives."

November 2020 Regulation

On November 13, 2020, under the First Trump Administration, DOL issued a final rule relating to the selection of investments by a pension plan fiduciary. The rule said that the evaluation of an investment by a pension plan fiduciary must be based on economic factors only—called *pecuniary factors*—and that a pension plan could not subordinate the interests of participants and their retirement income to non-pecuniary objectives.

The regulation defined a pecuniary factor as "a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA." The fiduciary could use non-pecuniary factors in instances where the fiduciary was unable to choose based on pecuniary factors alone, though DOL noted that such situations would be "rare." DOL referred to this as a *tie-breaker scenario*. If a plan made a tie-breaker decision based on non-pecuniary factors, the regulation required that the plan document its decision-making process.

The regulation specifically addressed *participant-directed* individual account plans: DC plans in which individuals choose their investments from options provided by the plan sponsor. It noted that these plans were not prohibited from including an investment option that supported non-pecuniary goals, provided that (1) fiduciary duties were followed; (2) the investment decision was based on pecuniary factors; and (3) if non-pecuniary factors were used to choose among investments selected using pecuniary factors, the decision-making process was documented.

The regulation explicitly prohibited an investment that supported non-pecuniary goals from being included as part of a Qualified Default Investment Alternative (QDIA), which is an investment alternative used in DC plans with automatic enrollment features. Participants who are automatically enrolled in DC plans and who do not make a choice about their accounts' investments have their contributions placed in a QDIA.

On March 10, 2021, under the Biden Administration, DOL issued an Enforcement Policy Statement stating that it would not enforce the November 2020 final rule or pursue enforcement actions and that it intended to revisit the rule in the future.

December 2022 Regulation

On December 1, 2022, under the Biden Administration, DOL issued a final rule that it said would clarify the

application of fiduciary duty when selecting plan investments. DOL said that the November 2020 regulation had a "chilling effect and other potential negative consequences" on the appropriate use of ESG factors in investment decisions in pension plans. The final rule became effective on January 30, 2023.

Among other provisions, DOL noted the final rule

- retains what it calls, "the core principle" that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan.

- deletes the "pecuniary/non-pecuniary" terminology in the 2020 regulation. DOL indicated it did so based on concerns that the terminology caused confusion and had a chilling effect on financially beneficial choices.

- amends the 2020 regulation to, according to DOL, make it clear that a fiduciary's determination with respect to an investment or investment course of action must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis. DOL indicated that the factors could include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.

- removes the provisions in the 2020 regulation for QDIAs such that, under the final rule, the same standards apply to QDIAs as to investments generally.

- amends the 2020 regulation's "tie-breaker" test, which permits fiduciaries to consider collateral benefits as tiebreakers in some circumstances. DOL indicated that the 2020 regulation imposed a requirement that competing investments had to be indistinguishable based on pecuniary factors alone before fiduciaries could have turned to collateral factors to break a tie. DOL also noted that the 2020 regulation imposed a special documentation requirement on the use of such factors. The final rule 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. In such cases, the fiduciary is not prohibited from selecting an investment based on collateral benefits other than investment returns.

- removes the 2020 regulation's special regulatory documentation requirements in favor of ERISA's generally applicable statutory duty to prudently document plan affairs.

- adds a new provision that, as indicated by DOL, clarifies that fiduciaries do not violate their duty of loyalty solely because they take participants' preferences into account when constructing a menu of investment options for participant-directed individual account plans.

DOL indicated that if accommodating participants' preferences led to greater participation and higher deferral rates then it could lead to greater retirement security. DOL indicated that giving consideration to whether an investment option aligns with participants' preferences can be relevant to furthering the purposes of the plan.

Response to DOL December 2022 Regulation

On January 26, 2023, a coalition of 25 states filed suit to block the rule saying that DOL overstepped its authority under ERISA to issue the rule. In February 2025, a federal judge upheld the rule and in April 2025, a panel of federal judges declined to put an indefinite pause on the rule. The second Trump administration included a revision to the rule as part of its spring regulatory agenda.

In the 118th Congress, H.J.Res. 30, which would have used the Congressional Review Act (CRA; enacted in P.L. 104-121) to nullify the 2022 regulation, was passed by the House and Senate, and vetoed by President Biden on March 20, 2023. The House failed to override the veto.

Legislation in the 119th Congress

In the 119th Congress, H.R. 2988 and S. 3086 contain provisions relating to, among other things, the extent to which a plan fiduciary could consider non-pecuniary factors when selecting plan investments. The provisions related to the selection of plan investments largely mirror the November 2020 regulation. Under the bills, plan fiduciaries could not subordinate pecuniary factors to other factors and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals. If pecuniary factors were insufficient to select a plan investment, a fiduciary could consider non-pecuniary factors as the deciding factor, provided the fiduciaries document their decision-making processes, as specified in the bills. With regard to participant directed DC plans, a fiduciary could include an investment alternative based on non-pecuniary factors, provided (1) the plan meets the other requirements of ERISA and (2) the investment is not used as a QDIA.

H.R. 2988 would also require that plans choose people or companies that provide services to the plan "without regard to race, color, religion, sex, or national origin" and require disclosures to participants in plans with brokerage window. A brokerage window allows plan participants the opportunity to invest in a wider variety of financial securities than is typically offered by a DC plan. H.R. 2988 would exclude brokerage windows and similar investment arrangements from the term *designated investment alternatives* in the plan. In addition, H.R. 2988 addresses proxy voting and the exercise of shareholder rights that were the subject of a 2020 regulation and are discussed in CRS In Focus IF12362.

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