

Chapman Client Alert

March 16, 2021

Current Issues Relevant to Our Clients

Department of Labor Announces Non-Enforcement Policy and Intent to Review Environmental, Social and Governance Investment Rule

On March 10, 2021, the Department of Labor (the “DOL”) announced that it will not enforce its previously issued final rule regarding plan fiduciaries’ use of environmental, social and governance (“ESG”) factors in selecting investments for tax-qualified retirement plans or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with the final rule. We previously issued a Client Alert which [discussed the DOL’s final rule](#). The final rule generally provides that plan fiduciaries must select investments and investment courses of action based solely on consideration of pecuniary factors.

The final rule became effective on January 12, 2021. After significant pushback, in the final rule, the DOL eliminated ESG-specific references that had been included in the proposed rule, but still required plan fiduciaries to solely consider economic factors when selecting plan investments. Upon assuming office, on January 20, 2021, the current administration issued an executive order which directed federal agencies to consider suspending, revising, or rescinding any regulations issued or adopted by the previous administration that were inconsistent with the promotion and protection of public health and the environment. The DOL’s issuance of its non-enforcement policy regarding the final rule is in part directly in response to and consistent with such executive action.

In its non-enforcement announcement, the DOL indicated that it had heard from a variety of stakeholders, including asset managers, labor organizations and other plan sponsors, consumer groups, service providers, and investment advisers. Among the concerns that were raised by the stakeholders were that the final rule did not necessarily properly reflect ERISA’s fiduciary duties that require a fiduciary to act prudently and solely in the interest of plan participants and beneficiaries, the rulemaking may have been unnecessarily rushed, and the rule was having a chilling effect on appropriate integration of ESG factors in investment decisions. Due in part to these concerns, the DOL indicated that it intends to revisit the final rule.

Although the DOL’s non-enforcement policy is welcome relief to investment fiduciaries, it does not necessarily prevent private litigation against a fiduciary. Until the DOL enacts new regulations to revoke or modify the final rule or Congress enacts legislation to overturn or amend the rule, such rule remains the law. As a practical matter, it is possible that a court’s review could be influenced by the DOL’s non-enforcement policy. Nevertheless, such litigation risk remains until regulatory or legislative action is taken, both of which could take some time.

[For More Information](#)

If you would like further information concerning the matters discussed in the article, please contact Gary Polega or the Chapman attorney with whom you regularly work.

Gary Polega

Chicago

312.845.2994

polega@chapman.com

Chapman and Cutler LLP

Attorneys at Law · Focused on Finance®

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