DOL Finalizes Investment Duties Rule

November 10, 2020

On October 30, 2020, the DOL finalized their "Financial Factors in Selecting Plan Investments" rule. The finalized rule comes after the DOL proposed this rule in June of 2020. (See our July 7, 2020, edition of *Compliance Corner* for the article on the proposed rule.) The finalized rule essentially adopts the proposed rule with some modifications that were made in response to public comments.

The finalized rule makes the following modifications to ERISA's current investment duties rules:

- The final rule adopts the proposed rule's restatement of ERISA's duty of loyalty, and continues to treat the original regulations' provisions on prudence as a safe harbor.
- The final rule confirms that ERISA fiduciaries must evaluate investments based solely on pecuniary factors — which are factors that are expected to have a material effect on the risk and return of an investment. Loyalty prohibits fiduciaries from subordinating the interests of participants to unrelated objectives.
- The final rule still requires fiduciaries to consider reasonably available alternatives to meet their duty of prudence, but they don't have to scour the marketplace or look at an infinite number of possible alternatives to do so.
- In situations where a fiduciary will use non-pecuniary factors to choose between investments that are indistinguishable based on pecuniary factors, the fiduciary must document their analysis and evaluation. Specifically, with respect to the "tie-breaker" rule, fiduciaries must document all of the following:
  - Why pecuniary factors alone did not provide a sufficient basis to select the investment
  - How the selected investment compares to the alternative investments with regard to certain factors
  - How the chosen non-pecuniary factors are consistent with the interests of participants
- The final rule states that the duties of prudence and loyalty apply to a fiduciary's selection of a designated investment alternative, but it does not prohibit fiduciaries from considering and including investment alternatives that support non-pecuniary goals as long as participants can choose from a broad range of investment alternatives.
- The final rule prohibits plans from designating a fund that was chosen for non-pecuniary reasons as the qualified default investment alternative (QDIA).

Notably, in response to comments received by the DOL, the final rule did not contain any specific references to environmental, social and governance (ESG) investments. Based on those comments, the DOL concluded that the lack of precise or generally accepted definitions of ESG made the use of the term inappropriate for this rule. Instead, the final rule focuses on pecuniary and non-pecuniary factors.

The final rule is effective 60 days after publication in the Federal Register. Plan fiduciaries have until April 30, 2022, to amend their plan documents and operation to reflect the rule's requirements.

Plan sponsors should consult with their adviser on the implications of the final rules.

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