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Could There Be Changes to ERISA Fiduciary Requirements Under the Biden Administration?

By Amanda M. Connelly

President Biden nominated Marty Walsh, Mayor of Boston, as Secretary of Labor, and as his nomination remains pending, questions arise on what changes will be made regarding ERISA fiduciary rules that were established under the Trump Administration.

One rule that will likely be reviewed, and possibly changed, is a final rule regarding the “environmental, social and governance” (ESG) factors used by fiduciaries to determine Employee Retirement Income Security Act (ERISA) investments. These factors continuously have been reviewed by Republican and Democratic Departments of Labor—most recently by the Trump Administration, which established the “Financial Factors in Selecting Plan Investments” final rule. The Financial Factors Rule generally prohibits ERISA fiduciaries from considering “non-pecuniary” factors for plan investments. This Rule received criticisms because it has been perceived as possibly deterring the use of the ESG factors. Therefore, on January 20, 2021, the Biden Administration issued a directive to review the Financial Factors Rule, suggesting that change may be coming.

A second rule that will likely be reviewed is the Proxy Voting Rule, which became effective on January 15, 2021. The Proxy Voting Rule clarifies that ERISA fiduciaries are not required to vote on every proxy or exercise every shareholder right, and instead, fiduciaries have discretion on whether to vote proxies or exercise shareholder rights. Like the Financial Factors Rule, critics of the Proxy Voting Rule believe it can be seen as deterring the use of the ESG factors. Because the Proxy Voting Rule and the Financial Factors Rule have overlap, many believe the Proxy Voting Rule also will be reviewed.

An additional rule that at first was expected to be stopped by the Biden Administration is the Fiduciary Rule Exemption. The Fiduciary Rule Exemption became effective on February 16, 2021, and seeks to improve investment advice and enhance financial choices for workers and retirees. Under the Rule, fiduciaries are required to tell retirement investors that they are acting as fiduciaries and must act in the best interest of the retirement investors. While many speculated that the Biden Administration would stop this Rule due to the effective date not being until many weeks after President Biden took office, the Biden Administration instead has indicated it will seek to improve the exemption and continue to define who is an investment advice fiduciary. Therefore, continued changes and additional guidance on the Fiduciary Rule Exemption are likely to be issued under the Biden Administration.

Roetzel will continue to monitor developments in this area. For more information and insight on this matter, please contact one of the listed Roetzel attorneys.

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