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In Trump Era, Ethical Investing Requires Extra Care

By **Emily Brill**

Law360 (May 11, 2018, 9:14 PM EDT) -- The Trump administration's recent guidance on socially conscious investing likely won't deter employee benefit plan administrators from factoring ethics into investment decisions, but it could dampen Obama-era enthusiasm for ethical investing by reminding employers that if they fail to put the bottom line first, they may be courting an ERISA lawsuit.

Rather than stake a new position on ethical investing, the recent U.S. Department of Labor guidance offered a caveat to the agency's 2015-2016 policy, which encouraged plan administrators to factor ethics into their assessment of whether an investment makes financial sense. Under the new policy, released via an April field assistance bulletin, DOL said plan administrators "must not too readily" assume the amount of good or bad a company does in the world affects its bottom line.

If they do make this assumption without proof to back it up, they're opening themselves up to the possibility of being sued for breach of fiduciary duty under the Employee Retirement Income Security Act, the guidance says.

Attorneys say plan administrators shouldn't take this possibility lightly. Even though plaintiffs firms haven't zeroed in on ethical investing as a potential trigger for fiduciary breach suits the way they have focused on plan fees and self-dealing, there's no reason why they couldn't, Paul Hastings LLPemployment partner Eric Keller said.

"My personal view is any time you [ethically invest] as a fiduciary, you're potentially sticking your neck out," Keller said.

If a fund chosen because of its impact on the world underperforms, Keller said, "that's evidence the plaintiffs bar will use — they will look at whether an investment that you picked performed as well as other investments that you didn't pick."

It might not just be the plaintiffs bar that's looking, Morgan Lewis LLP employee benefits partner Julie Stapel said: The Department of Labor could scrutinize a plan administrator's ethical investments, too.

"The DOL could bring a lawsuit, the DOL could make adverse findings if it did an audit or exam," Stapel said. "There are certain penalties under ERISA for breach of fiduciary duty."

Though the DOL's recent guidance hammers home the fact that financial concerns must outstrip ethical

concerns in investing, the agency has always required plan administrators to place their clients' financial interest above any other factors that go into making investment decisions.

When the agency first released guidance on ethical investing in 1994, it warned plan administrators that they could only choose an ethical investment if its financial performance matched or surpassed that of comparable investments that weren't chosen because of "environmental, social or governmental factors." If two investments performed roughly equally, plan administrators could look to the amount of good a company does in the world as a "tiebreaker," the DOL wrote.

In 2015, the agency told plan administrators that ethical concerns could serve as "more than mere tiebreakers" when these concerns affect a company's financial viability.

"You think: What is the future of oil going to be?" said Seth Safra, an employee benefits partner at Proskauer Rose LLP. "Is that really a social consideration, or is it a consideration that, partially because of social factors and government regulation, oil is going to face headwinds? It sort of becomes an economic factor."

Safra said that last month's DOL guidance on ethical investing doesn't substantially alter the 2015 policy. More than anything, it amounts to a change in tone, Safra said.

"Every single piece of guidance, even though it's ostensibly overriding prior guidance, has started with the same basic proposition that you can't subvert economic interests for social or other reasons," Safra said.

The most recent guidance simply plays up the fact that plan administrators must look hard at an ethical investment's financials before they decide whether it makes sense, and they can't make any assumptions, he said.

"If we're talking about oil, the oil companies are also investing significant amounts of money in new technologies, so the fact that a company might produce a product you don't like for social reasons does not mean it's going to find itself going out of business," Safra said. "It's a much more complex analysis than that."

Stapel said the DOL's current guidance marks "a shift in the tone and the focus" of the agency's stance on ethical investing to express "a little bit more skepticism" about the role ethics play in the economics of an investment.

"I describe this issue as something of a pingpong match between presidential administrations," Stapel said. "This would be the first volley from the Trump administration."

She said that even though the guidance marked more of a shift in attitude than a break from precedent, that shift will still have consequences for the way plan administrators approach ethical investing.

"What the DOL says does matter to plan fiduciaries — they take it very seriously," Stapel said. "Even though in many ways this guidance represents differences in tones and emphasis, that's going to make a difference in the way people are thinking about this."

--Editing by Katherine Rautenberg and Breda Lund.

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