PRI Principles for Responsible Investment

ADDRESSING ESG FACTORS UNDER ERISA

TWO LEGAL PERSPECTIVES

GROOM LAW GROUP
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Morgan Lewis

THE SIX PRINCIPLES

1 **We will incorporate ESG issues into investment analysis and decision-making processes.**

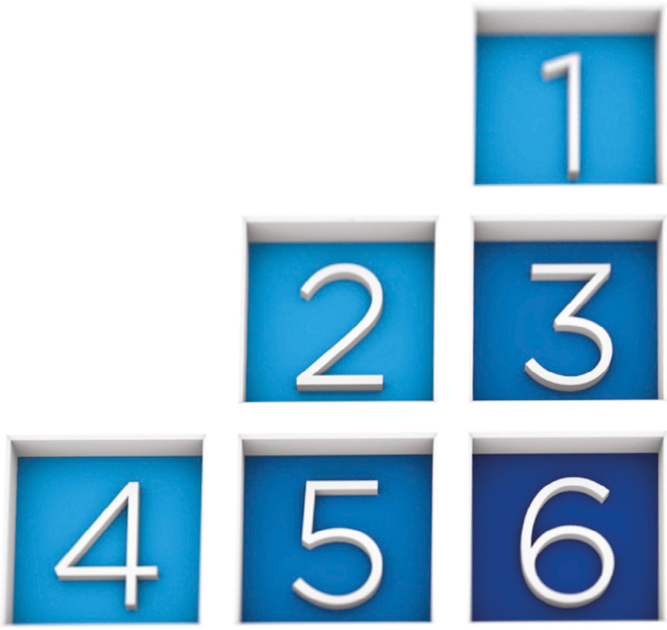
2 **We will be active owners and incorporate ESG issues into our ownership policies and practices.**

3 **We will seek appropriate disclosure on ESG issues by the entities in which we invest.**

4 **We will promote acceptance and implementation of the Principles within the investment industry.**

5 **We will work together to enhance our effectiveness in implementing the Principles.**

6 **We will each report on our activities and progress towards implementing the Principles.**



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UNEP FI, PRI and The Generation Foundation have begun a three year project to integrate sustainability into investors' fiduciary duties. The project will engage asset owners, asset managers, governments and regulatory agencies across national and international jurisdictions to harmonize a global understanding of fiduciary duty which incorporates sustainability. Building on the findings of the UNEP FI and PRI report Fiduciary Duty in the 21st Century, published in 2015, this project will focus on three primary objectives:

- In the eight jurisdictions covered in the 2015 report (Australia, Brazil, Canada, Germany, Japan, South Africa, the UK and the US), to clarify the scope of fiduciary duty such that investors take explicit account of environmental, social and governance issues in their investment practices and proactively engage with companies on these issues.
- To develop an international statement on fiduciary duty and sustainable development which would create a cohort of signatories committed to integrating sustainability into their fiduciary duties.
- To extend the original report's analysis to key Asian markets: China (including Hong Kong), India, Malaysia, Singapore and South Korea.

For more information on this project please contact: Brian Tomlinson, Associate Director, Investor Duties, PRI (brian.tomlinson@unpri.org); Will Martindale, Head of Policy, PRI (will.martindale@unpri.org); or Elodie Feller, Investment Commission Coordinator, UNEP FI (elodie.feller@unep.org)

INTRODUCTION

The PRI is pleased to present two legal perspectives on integrating environmental, social and governance (ESG) issues into investment decision-making under the Employee Retirement Income Security Act (ERISA) guidelines. Responsible investors have long believed that addressing ESG factors in the investment process is aligned with fiduciary responsibilities, and this perspective was recently confirmed by the U.S. Department of Labor's (DOL) Interpretive Bulletin 2015-01:

> "An important purpose of this Interpretive Bulletin is to clarify that plan fiduciaries should appropriately consider factors that potentially influence risk and return. **ESG issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices**. Similarly, if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote."

Given the DOL's acknowledgement of ESG issues as components of fiduciary analysis, it is now clear that investment policies and processes that incorporate ESG factors as economic considerations do not deviate from fiduciary duty, but in in fact sit squarely within the scope of modern interpretations of how fiduciaries make prudent investment decisions.

The following legal perspectives help to clarify, distinguishing between incorporating ESG issues for the purpose of enhancing long-term investment returns and making investments primarily for social purposes. We hope the guidance helps fiduciaries understand why prudence consideration calls for incorporating ESG factors in the investment process and how to do so.

The guidance provided by Morgan, Lewis & Bockius reiterates the conclusions of the Interpretive Bulletin 2015-01 and clarifies that the duty of loyalty issues raised by earlier DOL guidance on social investing and economically targeted investments (ETIs) do not apply to fiduciaries incorporating ESG factors for the purpose of enhancing long-term investment returns. Groom Law Group highlights the need for a prudent and well-documented process for all investment considerations, including those made using ESG factors, and presents a framework for such a process.

The clarification by the DOL is part of an increasing understanding in the market of the economic consequences of ESG factors in investment performance. For instance, the Sustainability Accounting Standards Board, which includes two former Securities and Exchange Commission (SEC) commissioners on its board of directors,[1] is identifying sector-specific reporting standards to improve corporate disclosure of material ESG factors.[2] This will aggregate ESG factors with others that are already treated as material considerations by the SEC under U.S. federal securities law.

An increasing number of investors are integrating ESG issues into investment policy statements, portfolio analysis and their investment decision-making process. Many of these organizations have also made a public commitment to incorporating ESG considerations through signing the Principles for Responsible Investment (PRI), a global institutional investor initiative, which has close to 1,500 signatories accounting for $60 trillion.

The PRI's work, including this publication, is designed to help investors improve their investment processes. In September 2015, in conjunction with peer organizations, the PRI published Fiduciary Duty in the 21st Century, which recommends to investors, asset consultants, and policy makers the next steps to advance fiduciary duty across eight countries: US, UK, Canada, Germany, South Africa, Brazil, Japan and Australia.

We hope that this report and legal guidance will serve as an action plan for ESG integration across the US financial services sector, and address the remaining misconceptions around ESG and fiduciary duty.

1 Mary Schapiro is Vice Chair of the Board and Elise Walter is on Board of Directors.
2 Sustainability Accounting Standards Board 2014 Annual Report.

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RESPONSIBLE INVESTMENT UNDER ERISA - FIDUCIARY RESPONSIBILITY CONSIDERATIONS

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This paper begins by describing the current state of the law based on DOL's most recent guidance, and then explains in more detail the history that previously raised questions as to whether it was appropriate for ERISA plan fiduciaries to consider ESG factors when making plan investments.

Investment decision making for privately-sponsored U.S. qualified retirement plans is governed by the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), which are interpreted and enforced by the U.S. Department of Labor (DOL). In the past, there have been questions as to whether socially responsible investments or economically targeted investments could be made by ERISA plan fiduciaries and, if so, under what conditions. Much of the guidance in this area is from the 1980s and 1990s, dealing with the types of investments and investment structures that were being proposed during that time.

By contrast, the current approach of what is known as 'responsible' investment, utilizing environmental, social and governance (ESG) factors, focuses on the long-term impact of these factors, such as climate change and executive compensation, on investment performance. As such, it generally avoids the issues and concerns raised by the previous guidance, reflecting instead the view that these factors are an integral part of a prudent investment decision-making process. For this reason, as recently affirmed by DOL, ESG factors can be appropriate investment considerations for ERISA plan fiduciaries.

NEW DOL GUIDANCE AND ITS APPLICATION TO RESPONSIBLE INVESTMENT STANDARDS

ERISA plan fiduciaries have generally been concerned about considering non-standard factors as part of their investment process, because past DOL guidance (discussed below) emphasized the need to focus on purely economic considerations to comply with the ERISA fiduciary duties of loyalty and prudence. According to DOL, the ability to generate investment returns for the plan and its participants and beneficiaries should be the primary focus, and anything else can at best be "incidental" or a "tie-breaker" between otherwise equivalent investments. This potentially meant that non-standard considerations, such as climate factors, could be subject to additional scrutiny. As a result, social investing has in the past typically been more common among non-ERISA plans, such as governmental plans and non-ERISA church plans, than among plans subject to ERISA.

However, the concept of responsible investment, as described by the UN-supported Principles for Responsible Investment, differs from the socially responsible investing or economically targeted investment (ETI) concepts addressed in the previous DOL guidance. Instead of treating environmental and the other ESG factors as intended to serve goals other than investment performance, they instead focus on the investment benefits of taking such factors into account.

Under such an approach, ESG factors are treated as material considerations in determining the prospects of a company and its ability to create long-term value. The focus is on the prudent evaluation of certain risks that, if disregarded, could adversely affect long-term investment returns. This type of approach is further supported by 2010 guidance from the SEC on the need for issuers preparing disclosure documents to consider the potential materiality to investors of climate change and its consequences, including such consequences as regulatory requirements, business trends and physical impacts.[3]

3 Commission Guidance Regarding Disclosure Related to Climate Change, SEC Release No. 33-9106 (Feb. 2, 2010).

As such, the argument in favor of incorporating ESG factors into the investment process is based on prudence considerations, not the objective of serving non-economic social goals. Investments would not be selected using these criteria to create economic benefits apart from their investment return to a plan (the source of the concerns expressed in DOL's prior guidance) but rather to develop a diversified investment portfolio designed to enhance long-term investment returns by, among other things, providing downside protection against identified risks. General concepts of prudent investing emphasize the importance of diversification and consideration of risk, as well as taking risk tolerance into account when determining investment guidelines and asset allocation, so that criteria designed to highlight potential portfolio risks would not appropriately be viewed as non-economic or "incidental" to the investment process.

APPLICATION TO PARTICIPANT-DIRECTED PLAN INVESTMENT OPTIONS

DOL has also has considered the application of its guidance to participant-directed individual account plans, such as 401(k) plans where plan participants are able to choose how to invest their plan accounts from among a menu of available investment options. A 1998 advisory opinion addressed the selection of a socially responsible mutual fund as an investment option for such a plan. The advisory opinion found that such an investment would not, in itself, be inconsistent with ERISA's fiduciary standards, citing the rule from IB 94-1 and other guidance that the decision to make an investment may not be influenced by non-economic factors unless, when judged solely on the basis of its economic value, the investment would be equal or superior to alternative available investments.[4]

DOL reiterated this guidance in its release adopting IB 2015-1, expressing the view that ERISA's fiduciary standards do not preclude consideration of collateral benefits, such as those offered by a socially responsible fund, in a fiduciary's decision to designate a plan investment alternative.[5] While DOL did not discuss the designation of investment options that include ESG factors as part of their investment criteria, as that was not addressed in the 1998 advisory opinion, presumably the same reasoning – permitting such investments based on considering ESG factors as part of an economic analysis – would apply in this context as well.

Importantly, DOL's most recent guidance, in Interpretive Bulletin (IB) 2015-1, acknowledges and affirms this distinction between consideration of ESG factors versus historical notions of social or ETI investing. DOL pointed out that ESG factors may be used "solely to evaluate the economic benefits of investments and identify economically superior investments." As such, they need not be treated as "merely collateral considerations or tie-breakers," as with ETIs, but rather can be viewed as "proper components" of a fiduciary's economic analysis.

For this reason, the duty of loyalty issues and concerns raised by the prior DOL guidance on social investing and ETIs, which assumed the objective of serving "collateral" or "incidental" goals, would not apply. Plan fiduciaries considering ESG factors in the manner described under the responsible investment standards would not do so with the objective of potentially sacrificing investment performance to advance social goals, but rather as part of an overall investment process designed to prudently consider the risk and return characteristics of comparable investments. Because the duty of loyalty issue would thus not arise, whether it is consistent with ERISA's fiduciary responsibility rules to incorporate ESG factors would be a function mainly of prudence considerations. As described in the DOL guidance, these considerations include the role the investment plays in the plan's investment portfolio, diversification, liquidity, anticipated return and level of risk, as well as a comparison based on these factors to other available investments. If a plan fiduciary reasonably concludes that ESG factors are relevant to inform an analysis of, for example, level of risk or diversification, then they can properly serve a role as part of a prudent investment process.

4 DOL Adv. Op. 98-04A (May 28, 1998).

5 80 Fed. Reg. at 65,137.

THE EVOLUTION OF ERISA AND THE DOL GUIDANCE

Morgan Lewis

ERISA FIDUCIARY DUTIES OF LOYALTY AND PRUDENCE

DOL's past guidance on social investing and ETIs has focused primarily on whether these investment approaches can be consistent with the ERISA fiduciary duty of loyalty, which provides that an ERISA fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" of the plan.[6] DOL has consistently interpreted this language to prohibit plan fiduciaries from subordinating the interests of plan participants and beneficiaries in their retirement income to unrelated objectives.

Also relevant is the ERISA fiduciary duty to act prudently.[7] According to DOL, the prudence requirement is satisfied with respect to plan investments if (1) the fiduciary making an investment has given appropriate consideration to the relevant facts and circumstances and (2) the fiduciary acts accordingly. This includes, according to DOL, giving appropriate consideration to the role that the investment plays in the plan's investment portfolio with regard to such factors as diversification, liquidity and risk and return characteristics.[8]

SOCIAL INVESTING

The issue of using ERISA plan assets to achieve purposes other than, or in addition to, providing benefits to plan participants and beneficiaries first arose in the late 1970s, shortly after ERISA was passed. Social investing, as this process became known, aimed at investing assets in order to achieve what were considered to be socially responsible objectives, such as ending apartheid in South Africa or stimulating local economies, as opposed to seeking solely to maximize investment returns.

Beginning in 1980, DOL explained through speeches, advisory opinions and information letters its views on whether social investing could be consistent with ERISA's fiduciary responsibility rules. The general rule that emerged was that "A fiduciary may not subordinate the interests of participants and beneficiaries in their retirement income to unrelated objectives," so that, in deciding whether and to what extent to make a particular investment, "a fiduciary must ordinarily consider only factors relating to the interest of plan participants and beneficiaries in their retirement income." Under this standard, a decision to make an investment may not be influenced by other factors, such as a desire to stimulate the construction industry and generate employment, "unless the investment, when judged solely on the basis of its economic value to the plan, would be equal or superior to alternative investments available to the plan."[9] In a 1993 letter, DOL elaborated that it would not be inconsistent with ERISA's duty of loyalty requirement "for plan fiduciaries to follow an investment course of action that reflects non-economic factors, so long as application of such factors follows primary consideration of a broad range of investment opportunities, and the investment course of action ultimately taken is as at least as economically advantageous as any alternative course of action."[10]

Some of the DOL guidance applied this standard to investment funds specifically intended to make socially beneficial investments. According to DOL, "if the socially beneficial investment meets objective investment criteria which are appropriate to the goals of [an investment fund], it may be considered in the same manner as other investments which meet these criteria." However, an investment program for social purposes that excludes other investment possibilities without consideration of their economic and financial merit would be inconsistent with ERISA's fiduciary standards.[11]

ECONOMICALLY TARGETED INVESTMENTS

DOL INTERPRETIVE BULLETINS 94-1 AND 2008-1

In June 1994, DOL issued IB 94-1 to clarify its position regarding the application of the ERISA fiduciary provisions to a decision to invest in an "economically targeted investment (ETI)."[12] IB 94-1 defined an ETI as an investment selected for the economic benefits it creates apart from its investment return to the employee benefit plan – essentially, the same concept as the previously-described social investing.

6 ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

7 ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

8 29 C.F.R. § 2550.404a-1, as described in 29 C.F.R. § 2509.2015-1.

9 See DOL Letter to Ralph P. Katz (Mar. 15, 1982) (emphasis added); see also DOL Letter to William J. Chadwick (July 1, 1982); DOL Adv. Op. 85-36A (Oct. 23, 1985); DOL Info. Ltr. to James S. Ray (July 8, 1988), DOL Adv. Op. 88-16A (Dec. 19, 1988); DOL Info. Ltr. to General Motors Corporation (May 14, 1993).

10 DOL Info. Ltr. to General Motors Corporation (May 14, 1993).

11 See DOL Letter to Daniel E. O'Sullivan (Aug. 2, 1982). See also DOL Info. Ltr. to John C. Lapinski, WSB 81-092 (Aug. 3, 1981) (DOL cautioned fiduciaries of a fund, which conditioned an investment on exclusive use of participating employers and union labor, by describing its position that fiduciaries may not limit potential investment opportunities for non-economic reasons); DOL Info. Ltr. to Jeffrey S. Dubin, WSB 81 020 (Jan. 19, 1981) (same).

12 Interpretive Bulletin 94-1, 29 C.F.R. § 2509.94-1, 59 Fed. Reg. 32,606 (1994).

According to IB 94-1, DOL had construed the ERISA fiduciary responsibility provisions to prohibit a fiduciary from subordinating the interests of participants and beneficiaries and their retirement income to unrelated objectives. The DOL regulation on the prudence requirement indicates the factors that must be given appropriate consideration by a plan fiduciary when making an investment decision. The bulletin stated that other facts and circumstances relevant to the prudence of an investment or investment course of action include the expected return on alternative investments with similar risks available to the plan. Because every investment necessarily causes a plan to forego other investment opportunities, "an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return."

IB 94-1 concluded that the fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally. Therefore, according to DOL, if the fiduciary standards as described in IB 94-1 were met – that is, by the plan fiduciary first determining that the investment offering "collateral" benefits is expected to provide an investment return to the plan commensurate with alternative investments having similar risks – "the selection of an ETI, or the engaging in an investment course of action intended to result in the selection of ETIs, will not violate section 404(a)(1)(A) and (B) and the exclusive purpose requirements of section 403 [i.e., the ERISA fiduciary duties of loyalty and prudence]."

In 2008, DOL replaced IB 94-1 with IB 2008-1,[13] which DOL indicated was intended to clarify, through explanation and examples, "that fiduciary consideration of non-economic factors should be rare and, when considered, should be documented in a manner that demonstrates compliance with ERISA's rigorous fiduciary standards." The revised IB emphasized that, to comply with ERISA's duty of loyalty standard, fiduciaries selecting an ETI must first have concluded that alternative options are "truly equal" based on a quantitative and qualitative economic analysis, because a "less rigid" rule would risk compromising or subordinating the interests of plan participants and beneficiaries. Therefore, DOL said, it believed that fiduciaries relying on factors outside of a plan's economic interests "will rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value."

MOST RECENT ETI GUIDANCE: INCLUDING CLARIFICATION ON THE ROLE OF ESG FACTORS IN A PRUDENT INVESTMENT PROCESS

In October 2015, DOL replaced IB 2008-1 with IB 2015-1,[14] reinstating the original language of IB 94-1 regarding ETIs. According to DOL, it believed that IB 2008-1 had unduly discouraged ERISA plan fiduciaries from considering not only ETIs, but also ESG factors, by setting a "high but unclear standard of compliance for fiduciaries" in these areas. In releasing the new guidance, the DOL clarified that where ESG factors are used solely to evaluate the economic benefits of investments, the ETI investing guidance regarding the ERISA duty of loyalty does not apply.

In particular, DOL said, it was concerned that the 2008 guidance may have dissuaded fiduciaries from "(1) pursuing investment strategies that consider environmental, social, and governance factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior investments, and (2) investing in ETIs even when economically equivalent."[15] DOL emphasized that ESG issues "may have a direct relationship to the economic value of the plan's investment," in which case they are "not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices." Thus, "if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote," and thus without the need to treat the investment as "inherently suspect" or "in need of special scrutiny."[16]

13 29 C.F.R. § 2509.08-1, 73 Fed. Reg. 61,734 (2008).

14 29 C.F.R. § 2509.2015-01, 80 Fed. Reg. 65,135 (Oct. 26, 2015).

15 80 Fed. Reg. at 65,136 (emphasis added).

16 *Id.* (emphasis added). DOL further clarified that it does not view ERISA as presumptively requiring that ETIs and ESG criteria be supported by additional documentation or evaluation beyond that required by fiduciary standards applicable to investments generally. As a result, plan fiduciaries should maintain records on such investments sufficient to demonstrate compliance with ERISA's fiduciary provisions, with the appropriate level of documentation depending on the facts and circumstances. *Id*

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ESG AND FIDUCIARY DUTY

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ERISA requires fiduciaries to adopt well-reasoned and well-documented investment processes. Based on DOL Guidance, this section presents a framework for a prudent process to considering ESG criteria in investment and divestment decisions.

The Employee Retirement Income Security Act of 1974, as amended (ERISA), applies stringent fiduciary duty provisions to those making investment decisions on behalf of private retirement and welfare benefit plans. Statutes governing the investment-making authority of fiduciaries to public retirement systems are often interpreted in light of ERISA. Investing in line with environmental, social and governance (ESG) criteria implicates several of ERISA's fiduciary duty provisions. With a well-reasoned and well-documented process, as outlined below, it is possible for fiduciaries to carry out their responsibilities while investing in line with ESG criteria.[17]

ERISA requires fiduciaries to act with the care, skill, prudence and diligence a hypothetical prudent person would use.[18] ERISA also requires fiduciaries to act "solely" in the interest of participants and beneficiaries and for the "exclusive purpose" of providing benefits and paying reasonable administrative expenses.[19]

Thankfully, the U.S. Department of Labor (DOL) has issued guidance, recently updated, concerning how fiduciaries could consider ESG criteria at any juncture in the decision-making process while still satisfying their fiduciary duties.[20] The fiduciary would need to follow a decision-making process in accordance with DOL guidance.

ESG-CRITERIA INVESTMENT

When plan fiduciaries choose to invest taking into account ESG criteria, a prudent fiduciary would adopt the following approach: plan fiduciaries may take ESG criteria into consideration with every investment decision, since they are legitimate investment elements within risk and return.[21] The only question is: How do they affect risk and return?

If ESG criteria arguably lead to a positive outcome of reducing risk and/or increasing return in a particular investment (e.g., clean energy), this adds potential value to an investment. The plan fiduciaries are still required to find that the overall investment is prudent. The DOL guidance rules that under ERISA, fiduciaries can't restrict their search to "positive" ESG investments but are required to broaden their consideration to include other potentially prudent investments within the overall plan portfolio. Likewise, if ESG criteria arguably leads to a negative outcome of increasing risk and/or reducing return in a particular investment (e.g., the environmental harm of fracking), this subtracts potential value from the investment. In both situations where ESG criteria would be used to reach a decision that the investment is prudent, the "everything being equal test" needn't be used because the decision would be made based upon economic factors.

If plan fiduciaries wish to avoid an otherwise prudent investment because of non-economic factors, they can reject the investment by replacing it using the "everything being equal" test, in which the plan fiduciary would select an available alternative to fulfill the same portion of the plan's overall portfolio with reasonably equivalent or similar economic features, including risk, return, diversification and liquidity characteristics. Similarly, if a particular investment is otherwise prudent, it can be favored due to non-economic factors if it satisfies the "everything being equal" test. DOL guidance clarifies that plan fiduciaries may invest in economically-targeted investments based, in part, on their

17 The Department of Labor has stated that it does not view "consideration of [economically-targeted investments] or ESG criteria as presumptively requiring additional documentation or evaluation beyond that required by fiduciary standards applicable to plan investments generally. As a general matter, the Department believes that fiduciaries responsible for investing plan assets should maintain records sufficient to demonstrate compliance with ERISA's fiduciary provisions. As with any other investments, the appropriate level of documentation would depend on the facts and circumstances." DOL Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments, IB 2015-01 (Oct. 22, 2015).

18 ERISA section 404(a)(1)(B).

19 ERISA section 404(a)(1)(A).

20 DOL Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments, IB 2015-01 (Oct. 22, 2015). We are not aware of recent litigation on the application of ERISA's fiduciary standard to consideration of ESG criteria in investment decisions.

21 The DOL recently acknowledged that "[e]nvironmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment" and that, if they do, the issues may be considered in "the fiduciary's primary analysis of the economic merits of competing investment choices." Id.

collateral benefits so long as the investment is economically equivalent, with respect to return and risk to participants and beneficiaries over the relevant time horizon, to investments without such collateral benefits.

ESG-CRITERIA DIVESTMENT

When a plan is already invested in an ESG-disfavored investment, fiduciaries should undergo a two-step process in considering whether to divest from the disfavored investment, as they would with any investment in their portfolio.

First question: Is it prudent to hold the investment? The first step in determining whether to continue to hold any investment requires considering the economic features of the investment. The plan fiduciary should begin by asking whether it is prudent to hold the investment. To answer it, prudence and loyalty rules require the fiduciary to analyze the investment solely on its economic merits. For example, the fiduciaries must review the risk and return features of the investment in addition to the investment's diversification and liquidity characteristics. In terms of procedure, the fiduciaries should conduct a thorough review of all aspects of the investment (including ESG factors), seek up -to -date and accurate reports and information on which to base their review, hire outside experts where necessary, and thoroughly document their analysis.

If after satisfactory completion of procedural and substantive prudence requirements, an investment professional concludes that it is not prudent for the plan to hold the investment, the investment must no longer be held in the portfolio. For example, as a part of an investment professional's analysis, if he or she concludes that the risk of holding a security in the plan's portfolio is too high because of anticipated major litigation that could potentially lead to large judgments against the company, the professional may conclude that the sale of the security is best for the plan's portfolio. Sale of the security could then be completed in a manner that is prudent from a trading and investment standpoint (for example, total liquidation of all securities held with no new purchases or the sale of such securities over a certain period of time within a general price range).

Second question: Is it imprudent to sell the investment? If the answer to the first question is "yes, it is prudent to hold on to the investment or to invest further," or if the answer is not clear, and the fiduciaries still have reason to consider selling the stock, the question is whether it is imprudent to divest the investment. It would not be imprudent to divest the investment if the fiduciary's investment analysis (including considering transaction costs associated with the sale of the investment) identifies other potential available investments that are equally advantageous from an economic perspective in that they offer reasonably similar risk and return characteristics. As previously mentioned, this comparability approach is known as the "everything being equal" test. It requires a rigorous approach involving close examination of the risks and returns of the scrutinized investments.

CONCLUSION

The DOL's recent updated guidance will encourage some to consider looking into ESG factors when making investment decisions. Plan fiduciaries must still follow a well-reasoned process to determine whether to invest or divest, and may wish to review and consider revising their current investment policy statements to the extent that they would like to explore new investment strategies.

The Principles for Responsible Investment (PRI) Initiative

The PRI works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance issues and to support signatories in integrating these issues into investment and ownership decisions.

The six Principles were developed by investors and are supported by the UN. They are voluntary and aspirational, offering a menu of possible actions for incorporating ESG issues into investment practices. In implementing the Principles, signatories contribute to developing a more sustainable global financial system.

More information: www.unpri.org

PRI Principles for Responsible Investment

The PRI is an investor initiative in partnership with UNEP Finance Initiative and the UN Global Compact.

United Nations Environment Programme Finance Initiative (UNEP FI)

UNEP FI is a unique partnership between the United Nations Environment Programme (UNEP) and the global financial sector. UNEP FI works closely with over 200 financial institutions that are signatories to the UNEP FI Statement on Sustainable Development, and a range of partner organisations, to develop and promote linkages between sustainability and financial performance. Through peer-to-peer networks, research and training, UNEP FI carries out its mission to identify, promote, and realise the adoption of best environmental and sustainability practice at all levels of financial institution operations.

More information: www.unepfi.org

UNEP FINANCE INITIATIVE

UN Global Compact

Launched in 2000, the United Nations Global Compact is both a policy platform and practical framework for companies that are committed to sustainability and responsible business practices. As a multi-stakeholder leadership initiative, it seeks to align business operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption, and to catalyse actions in support of broader UN goals. With 7,000 corporate signatories in 135 countries, it is the world's largest voluntary corporate sustainability initiative.

More information: www.unglobalcompact.org

United Nations Global Compact