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4 Takeaways As DOL Mulls Climate Risk For Retirees

By **Kellie Mejdrich**

Law360 (May 20, 2022, 8:24 PM EDT) -- The U.S. Department of Labor's employee benefits arm received more than 130 comments after requesting input on actions the agency could take to protect workers' retirement savings from climate-related financial risks.

The U.S. Department of Labor's Employee Benefits Security Administration requested feedback in February on specific examples of actions the agency could take to protect the pensions and life savings of workers and their families from climate-related financial risks. Comments were due by May 16.

EBSA said its request was made in response to executive actions from President Joe Biden in 2021 establishing a whole-of-government approach to climate-related financial risk.

Benefits attorneys say some of the frustration they read in comments by retirement industry groups over EBSA action on environmental, social and governance issues — so-called ESG issues — tracks with what they're hearing from sponsors of employee benefit plans regulated by the Employee Retirement Income Security Act.

"I think the sense is that it would be helpful for the department to provide guidance on the topic of ESG to bring some clarity to whether environmental, social, governance factors can be material to ERISA fiduciary decision-making, but that focusing solely on climate change, and doing so in a way that would put more burdens, particularly, on plan sponsors, is not helpful," said Elizabeth S. Goldberg, partner with Morgan Lewis & Bockius LLP.

"I think there was an overall negative reaction to the request for information. But I don't think there's an overall negative reaction to the concept of the DOL providing clarity and engaging in rulemaking on ESG in general," Goldberg said.

Here are four takeaways from the submissions for benefits attorneys.

Agency Says Request Isn't Prelude to Rules

When asked about the submissions this week, a top EBSA official said there's no commitment to rulemaking to follow the information request.

"The questions that we were asking really were aimed at identifying whether there was something that we should be doing. There's literally no commitment whatsoever that we have to do something," Ali

Khawar, acting assistant secretary for EBSA, said Thursday.

Khawar spoke with reporters after an in-person panel discussion at the Insured Retirement Institute's annual conference in Washington, D.C. IRI is a retirement financial services industry group.

Still, that was a major concern for several industry groups including the American Benefits Council, whose hundreds of members include large U.S. employers and benefit plan service providers.

"The council is concerned that a number of the potential agency actions as described in the RFI would unduly burden and interfere with the administration of retirement plans and, in some cases, could even interfere with workers' ability to achieve financial security in retirement," the ABC said May 16.

The council and the ERISA Industry Committee, or ERIC, another trade group representing large employers that administer employee benefit plans, criticized an example in EBSA's information request that proposed modifying the Form 5500 annual report, which benefit plan administrators submit to DOL, as a way to collect data on climate-related risks.

Khawar said rules weren't necessarily going to follow the request for information. "We're not, you know, searching the floor for some idea that we can turn into a rule," he said.

Plan Fiduciaries Averse to Singling Out Climate Risk

Benefits attorneys said regulators' focus on any single issue — including climate risk — raises questions for ERISA plan sponsors because their fiduciary duties emphasize a process that reduces risk overall.

Ivelisse Berio LeBeau, partner with the Wagner Law Group, said plan fiduciaries and many industry groups see EBSA's questions about possible new reporting requirements as a signal that regulations might change.

"The concern, I think, here is that by isolating issues of climate change, is there a different standard with respect to this one factor, as opposed to any other factor?" Berio LeBeau said, adding that the concern was consistent across industry group letters as well as for those advising and working with fiduciaries.

For example, IRI said in a letter to EBSA dated Monday that "climate-based financial risk should not take precedence over other financial factors in such analysis, and for fiduciaries, no individual factor should be given more weight than others."

Concern With Going Beyond ERISA

Top financial industry groups including the American Bankers Association urged EBSA to concentrate on ERISA when considering climate risk and to coordinate with the U.S. Securities and Exchange Commission, which proposed new rules on climate risk disclosure for public companies in March.

"We believe that it is not necessary for the department to take any regulatory action related to climate-related financial risk or other risks associated with climate change," the ABA said in a letter dated May 9, pointing to ERISA's requirement that plan fiduciaries have an obligation to identify and address all relevant risks.

"There's a feeling that the DOL should really stick to the question of investment decision-making, not sort of broader ways climate change might interplay with retirement," Goldberg said.

That was also the concern of the U.S. Chamber of Commerce, which told EBSA in a letter dated May 16 that "EBSA does not have authority to mandate additional reporting requirements on plans."

A retirement plan industry group called the Defined Contribution Institutional Investment Association warned in a comment letter sent to EBSA dated May 13 that new climate change reporting requirements could also increase litigation risks, given that Form 5500 is "a key source of information by plaintiffs' litigators to bring class action litigation."

"Instead of creating road maps that could increase vulnerability for ERISA fiduciaries and the compliance burdens on plans, the department's focus should be on making sure that fiduciaries are able to prudently use ESG," the group said.

ESG Rules Ahead

In a preview of complications to come for EBSA, many industry groups connected their opposition to singling out climate change from other risks with their opposition to the agency's October 2021 proposal on ESG considerations when selecting retirement plan investments.

EBSA tried to dissuade commenters from discussing the ESG proposal, noting in the RFI that the comment period for that rule ended in December. Fiduciaries under President Donald Trump's DOL were restricted from considering ESG factors under a rule finalized in October 2020, but Biden's DOL backed off those rules with the October 2021 proposal.

ERIC, the large plan sponsor group, told EBSA "it is impossible" to separate the two actions and urged the agency to change its proposed rule, highlighting concerns that the proposal "unnecessarily emphasizes ESG factors in the text in a way that could confuse otherwise prudent fiduciaries."

Meanwhile, supporters of the proposal also urged action on the ESG rule in their responses to the RFI, including the Investment Company Institute, an investment fund industry group, in a letter dated May 12.

"When it comes to the role of ERISA in protecting life savings and pensions from threats of climate-related financial risk, the most effective action the department can take is to finalize its October 2021 proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," ICI said.

Goldberg and LeBeau both said in separate interviews that they weren't surprised that groups mentioned the ESG rule given the major policy changes from one administration to the next and concerns from ERISA plan sponsors about overemphasizing a single kind of risk.

"It really has been a whiplash, particularly from the 2020 proposal, now into the current proposal," Goldberg said. "So one thing that's going on is there's a feeling of, we want clarity, not more [regulation]. We want clarity."

--Editing by Haylee Pearl.
