Can ERISA Fiduciaries Use ESG? Yes, and Case Law Can Provide Some Guidelines

A Practical Guidance® Practice Note by Elizabeth S. Goldberg, Morgan Lewis & Bockius LLP

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This practice note discusses the evolving impact of "environmental, social, and governance" (ESG) factors on employee benefit plans. Over the last few years, employee benefit plans have found increased interest from plan sponsors, participants, and investment professionals in considering ESG factors when investing retirement plan assets. See Brian Croce, Investors Want More from the Biden White House, Pensions & Investments (Mar. 22, 2021); Ron Lieber, How to Get Socially Conscious Funds into Your 401(k) (N.Y. Times, Jan. 10, 2020). For cross-practice area content in LexisNexis Practical Guidance regarding ESG issues, see Environmental, Social, and Governance (ESG) Resource Kit.

This interest fits within a broader trend in ESG investing. See Parnassus Investments, Report on US Sustainable and Impact Investing Trends 1 (2020). In general, there is increasing discussion about ESG investing opportunities (outside the retirement plan space) and, more broadly, a societal focus by cultural and business institutions on ESG-related concerns. See Remi Rosmarin, Sustainability Sells: Why Consumers and Clothing Brands Alike Are Turning to Sustainability as a Guiding Light (Business Insider, Apr. 22, 2020).

Yet, even as there is greater focus on ESG factors in retirement plan investing, there is uncertainty as to the legal standards that apply to retirement plans regulated by the Employee Retirement Income Security Act of 1974, as amended (ERISA). That uncertainty is due largely to a regulatory back-and-forth by the U.S. Department of Labor (DOL). This regulatory ping-pong in the DOL's stance on ESG has caused confusion about the position that the DOL will take in the future when ERISA fiduciaries apply ESG criteria to investments.

In the absence of such regulatory clarity, court cases can provide an additional framework for evaluating the proper use of ESG factors in ERISA investment decision-making. This practice note identifies those cases and extrapolates guidelines from the case law to advise fiduciaries on how to consider ESG factors without violating ERISA's fiduciary duties.

Case law points to greater risk if ESG is used as the primary criterion for investment decision-making. However, there is support in case law that ERISA's fiduciary duties do not preclude incorporating ESG factors as additional investment factors or considering ESG impact as a collateral benefit. This is particularly true if the ESG factors can be used in a manner that delivers a financial benefit to the plan (such as greater investment return potential or reduced risk) and if the ESG factors are applied through a robust process. As with any type of investment decision, fiduciaries will need to take care to apply a prudent process and singularly focus on the best interests of plan participants. But, as outlined in this practice note, there is case law that provides a road map for using ESG in a manner that satisfies those ERISA fiduciary duties.

ERISA Regulation of ESG and Back-and-Forth by the DOL

ESG generally refers to the use of factors that consider environmental footprint (such as pollution and sustainability); social goals (such as divesting from certain companies, industries, or countries); or corporate governance (such

as company and board diversity). The use of ESG factors to inform investment decisions can range from minimal, such as applying some combination of ESG factors to inform the general economic analysis, to more direct, such as applying ESG screens or selecting ESG-specific funds in a plan's designated investment options (with the latter usage sometimes referred to as "economically targeted investments" or "ETIs").

The primary law that regulates employer-sponsored retirement plan investment decision-making in the United States is ERISA. Although ERISA does not apply to the retirement plans of public and government employees, many such plans incorporate ERISA's fiduciary standards.

Under ERISA, parties that are fiduciaries to such plans are required to make prudent investment decisions with loyalty to the interests of the plan and its participants. These twin responsibilities are referred to as ERISA's "fiduciary duties."

The first of these two duties, ERISA's duty of loyalty, requires fiduciaries to base investment decisions on the interest of the plan's participants and for the exclusive purpose of providing benefits. ERISA § 404(a)(1)(A) (29 U.S.C. § 1104(a)(1)(A)). The second duty, ERISA's duty of prudence, requires a fiduciary to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA § 404(a)(1)(A) (29 U.S.C. § 1104(a)(1)(B)).

An ERISA plan fiduciary who is selecting or monitoring an investment for an ERISA plan may only apply an ESG factor if that application complies with these two fiduciary duties. At its simplest level, the fiduciary cannot consider an environmental, social, or governance criterion without a prudent process or without regard to the retirement income interests of the plan's participants. Under this framework, an ERISA fiduciary could risk violating ERISA if he or she uses ESG solely to achieve a political or social outcome without demonstrating the criterion was part of an appropriate investment process and in the plan's interests.

Beyond this general construct, however, there is uncertainty as to how ESG factors fit within this "fiduciary duty" framework, including uncertainty as to how a fiduciary determines if ESG factors are prudent and in the best interests of the plan.

This uncertainty exists in part because the primary regulator of ERISA's fiduciary duties, the DOL, has spent the last 25 decades issuing varying interpretative guidance that changes in each presidential administration. At a high level, Democratic DOLs generally view ESG as not inconsistent with ERISA's fiduciary duties and provide guidance that outlines proper ESG usage. Republican DOLs have been more cautious on the use of ESG and especially more resistant to the premise that ESG can be a material investment criterion. For a more in-depth discussion of the regulatory back-and-forth on ESG investing, see DOL Announces Nonenforcement Policy for New ESG and Proxy Voting Rules (Morgan Lewis, Mar. 10, 2021) and Latest Volley in ESG Back and Forth: DOL Finalizes "Financial Factors" Rule.

Most recently, in the final days of the Trump administration, the DOL released a regulation titled the "Financial Factors in Selecting Plan Investment" rule (the "Financial Factors Rule") that imposed new standards related to the use of ESG by ERISA plans. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,846 (Nov. 13, 2020). The regulation interpreted ERISA's fiduciary duties and added a requirement to the duty of loyalty that investment decisions be based only on "pecuniary factors," except in very limited circumstances. As a result, the rule framed the fiduciaries' duties as permitting only economic usages of ESG except in limited circumstances, and imposed gatekeeping (in the form of procedural and documentation requirements) around those limited circumstances. In issuing the rule, the DOL drafted a regulatory preamble that seemed to directly attack ESG.

The Financial Factors Rule has been viewed by some as creating challenges for retirement plan usage of ESG. Simultaneously, the DOL spent much of 2020 conducting enforcement examinations of ERISA plans on their use of ESG factors. For background on approval of the Trump-era rule, see DOL Rule Limiting Socially Conscious Investing Awaits OK.

But with the arrival of a Democratic administration, the DOL has once again changed course on its interpretation of ESG. In March, the DOL announced a nonenforcement policy of the Financial Factors Rule, and, in May, President Biden issued an Executive Order requiring the DOL to reconsider the rule. See DOL News Release and 86 Fed. Reg. 27,967 (May 25, 2021) (Executive Order on Climate-Related Financial Risk) and DOL Move Bodes Well For Socially Conscious 401(k) Investing. As of the writing of this practice note, the DOL has been reported to have submitted a new proposed ESG rule to the White House's Office of Management and Budget. See John Manganaro, ESG Regulation Submitted to OMB by DOL (Plan Sponsor, Aug. 10, 2021).

The DOL's back-and-forth position on ESG has created significant confusion about the stance that the DOL will take in the future on ERISA's fiduciary standards and ESG. In May, legislators in Congress weighed into the fray and introduced

a bill, the Financial Factors in Selecting Retirement Plan Investment Act, explicitly amending ERISA to allow for the use of ESG factors in ERISA-regulated investments. Financial Factors in Selecting Retirement Plan Investments Act, 117 S. 1762, 2021 S. 1762; and see Ted Godbout, Bill Seeks to Provide Legal Certainty for ESG Factors, National Association of Plan Providers (May 21, 2021); Lawmakers Propose Amending ERISA To Allow ESG Investing.

The passage of this bill would put a clear end to the regulatory ping-pong, but the political feasibility of that remains unclear as of the writing of this practice note.

While ERISA fiduciaries can expect new rulemaking in this area (imminently), there likely will remain some uncertainty around ERISA's treatment of ESG. Save for an amendment to ERISA through congressional legislation, there is no guarantee that the DOL will not, in the future, reverse course again on its interpretation regarding the proper use of ESG. There is also a risk of private litigation, given that the ERISA-plaintiffs' bar is very active in filing breach-of-fiduciary-duty claims in general.

Case Law as a Framework for ESG

Even while this uncertainty persists, there may be a strong desire by plans, participants, and investment professionals to move forward on using ESG factors or funds in ERISA plan investments, particularly given the interest of some employee populations in pursuing ESG investing goals. Rachel Mann, It's Good for the Planet and It's Good for Your Portfolio: Encouraging Millennial Participation in 401(K) Plans Through Lowering Barriers to ESG Investing (A.B.A. Employee Benefits Committee Newsletter, Jan. 11, 2021).

In this climate of uncertainty regarding the DOL's interpretations, case law may be able to provide an additional framework for evaluating how, and whether, to utilize ESG factors. For ERISA fiduciaries who don't want to rely solely on DOL interpretations, case law can provide that additional road map—or at least supplement the DOL's regulatory interpretations.

What Case Law Tells Us about ESG

Case law can thus be instructive for ERISA plan fiduciaries considering how to use ESG factors and funds while still complying with their fiduciary duties. While there are a limited number of cases, the few cases that examine ESG under ERISA (or, as discussed below, analogous legal standards) provide some insight into how a court might evaluate ESG usage against ERISA's fiduciary standards.

From the limited relevant case law, certain key principles emerge that can provide a framework for an ERISA plan fiduciary seeking to use ESG.

Decision-Making Based Solely on ESG Goals May Risk a Violation of ERISA's Fiduciary Duties

As a starting point, the case law highlights that decisions based solely on ESG factors—such as purely on a desire to address climate change or discrimination—are more likely to risk a breach of ERISA. This type of usage could be, for example, a screen that selects investment options based only on ESG criteria. Existing case law suggests that this type of decision-making made solely, or even primarily, to support an ESG goal risks a violation of ERISA, especially the duty of loyalty.

For example, there are a number of cases in which a union plan is found in violation of the duty of loyalty because investment decisions were made largely to support the union and union member jobs.

Blankenship v. Boyle

For example, the case *Blankenship v. Boyle* is instructive. Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971). This case arose under the Labor Management Relations Act (LMRA), rather than under ERISA, but the LMRA sets out a duty of loyalty that is analogous to ERISA. The court found that pension plan trustees violated their legal duties of loyalty by making an investment in stock of electric utility companies. The court found that the investment was selected to support the union and participating employers in the union, specifically by "assisting them in their efforts to force public utilities to burn Union-mined coal." Blankenship, 329 F. Supp. at 1105. In addition, the court determined that the plan's trustees held plan assets in cash for longer periods than needed, without interest, at a bank that was owned by the union in order to benefit the union. Blankenship, 329 F. Supp. at 1096. The court found that these types of social goals (i.e., the goals of supporting the union and its members) were impermissible under the fiduciary duties, even though the defendants argued that they delivered a benefit to the plan's participants. Id. The court's view was that while these investments likely would have provided a "social" benefit to participants, this was not material to the participants' retirement investing needs; such retirement investing should be the primary evaluation criteria rather than other "social" benefits to the union and the participants' union interest. Id.; see also Withers v. Tchrs.' Ret. Sys., 447 F. Supp. 1248, 1256 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1210 (2d Cir. 1979) ("*Blankenship* was thus a case in which the trustees pursued policies which may incidentally have aided the beneficiaries of the fund but which were intended, primarily, to enhance

the position of the Union and the welfare of its members, presumably, through the creation and/or preservation of jobs in the coal industry.").

Davidson v. Cook

In a similar LMRA case, the court in *Davidson v. Cook* found that union plan trustees violated their duty of loyalty when they made an investment decision motivated by the "desires and needs" of the union rather than by the exclusive purpose of providing plan benefits. Davidson v. Cook, 567 F. Supp. 225, 237 (E.D. Va. 1983).

Fifth Third Bancorp v. Dudenhoeffer

More recently, and in a direct ERISA case, the Supreme Court made a statement in dicta that some have read as interpreting ERISA's benefits, and therefore the duty of loyalty, as being focused solely on financial benefits. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 421 (2014). In discussing what constituted benefits for purposes of an employee retirement plan, the Court noted that:

> Read in the context of ERISA as a whole, the term "benefits" . . . must be understood to refer to the sort of financial benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. . . . The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.

Id. Some, including the Trump-era DOL in the preamble to the Financial Factors Rule, interpreted this language to mean that social benefits to an employee—such as employee ownership—are not appropriate factors for ERISA fiduciaries to consider when fulfilling their duty of loyalty. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,846 (Nov. 13, 2020) (describing the DOL's interpretation of the *Fifth Third Bancorp* case as, "when making decisions on investments and investment courses of action, plan fiduciaries must be focused solely on the plan's financial returns."). On the one hand, the Court's statement was dicta; on the other hand, it provides further support that the Court may find an ERISA breach if a fiduciary selects an investment solely for a nonfinancial benefit, such as solely for an ESG goal that has no financial materiality to the plan's investments.

ESG Options That Are Unreasonably Expensive Could Be More Vulnerable to a Fiduciary Breach Claim

Another factor in evaluating the consideration of ESG in ERISA plans is investment cost. In general, ERISA case law affirms that the costs of the investment to the plan (including to participants) can be a material criterion in the evaluation of prudence and loyalty.

This consideration applies equally to ESG investing. For example, ESG options that are overly expensive (relevant to comparable alternative) might be more vulnerable to ERISA liability. The DOL flagged this issue in the preamble to the Financial Factors Rule. See 85 Fed. Reg. 72847, 85 Fed. Reg. 72848 ("ESG funds often come with higher fees, because additional investigation and monitoring are necessary to assess an investment from an ESG perspective . . . ERISA fiduciaries must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals.").

Many ESG funds are actively managed, rather than passively managed, and actively managed funds often have higher fees than passively managed funds. See Christine Idzelis, Active Funds Dominate ESG—But Their Market Share Is Slipping (Institutional Investor, Sept. 30, 2020); John Bogle, The Arithmetic of "All-In" Investment Expenses (70 Fin. Analysts J. 13, 13 (2014) ("Compared with costly actively managed funds, over time, low-cost index funds create extra wealth of 65% for retirement plan investors.").

Such higher costs could create an additional risk for ESG investing (and therefore cost should be a material part of an ERISA fiduciary evaluation of ESG funds). But see Susan N. Gary, *Conflicts and Opportunities for Pension Fiduciaries in the ESG Environment* 10 (Pension Research Council Symposium, April 29–30, 2021) (on file with the author) ("While it is true that there is a difference in fees between actively managed funds and passive funds, that difference is not specific to funds that integrate ESG factors."). See The Origins of ESG in Pensions: Strategies and Outcomes (Pension Research Council Symposium, April 29–30, 2021); Susan N. Gary, Best Interests in the Long Term: Fiduciary Duties and ESG Integration, Univ. of Colo. Law Review.

On the Other Hand, a Collateral ESG Benefit Is Not Inconsistent with ERISA's Fiduciary Duties

But, on the other hand, there are cases that affirm that the mere existence of a collateral benefit, including an ESG benefit, will not create an automatic violation of ERISA. Instead, these cases recognize that a fiduciary can consider a secondary benefit—including an environment, social, or governance benefit—collaterally if there are other factors that support the prudence and loyalty of an investment decision.

Donovan v. Walton

A key case on this point is *Donovan v. Walton*. The case involved a multiemployer plan's use of ERISA plan assets to finance construction of an office building on land owned by the plan and lease of space in the building to a union that participated in the fund. The plan required construction

workers on the project to be contributing employers to the plan in order to support the creation of union jobs. The plan fiduciaries based this decision on the perceived investment benefits, as well as on the perceived incidental "social" benefits of supporting the union and the plan. Examining these facts, the court held that there was no violation of the duty of loyalty due to the incidental "social" benefit to the union. Donovan v. Walton, 609 F. Supp. 1221, 1245 (S.D. Fla. 1985), *aff'd sub nom*. Brock v. Walton, 794 F.2d 586 (11th Cir. 1986). The court wrote that ERISA's duty-of-loyalty-and-exclusive-benefit requirement "simply does not prohibit a party other than a plan's participants and beneficiaries from benefiting in some measure from a prudent transaction with the plan." Donavan, 609 F. Supp. at 1245. The court also found no violation of prudence. Donovan, 609 F. Supp. at 1239–40.

Board of Trustees v. Baltimore

Another instructive case is *Board of Trustees v. Baltimore*, where a city ordinance required that all public investment plans, including a public pension plan, divest from South African companies. Bd. of Trs. v. Mayor & City Council of Balt. City, 317 Md. 72, 80–81 (1989).

The trustees of the city employees' pension fund sued the city, arguing that this social consideration would require them to violate their fiduciary duties of loyalty and prudence. Bd. of Trs., 317 Md. at 109. Although the case involved a government plan, the applicable law applied similar standards to ERISA, and the court referenced ERISA.

The court found no violation of the duty of prudence because the plaintiff was unable to "demonstrate that divestiture will impair the portfolio's equity performance." Bd. of Trs., 317 Md. at 104. The court explained that simply requiring the plan to screen out investments in South Africa did not impermissibly limit the universe of available investment options. The court looked at the performance of various South Africa–free investment options and held that "a diversified S.A.F. [South Africa–free] portfolio can be managed consistently with the duty of prudence" and that divestiture did not imprudently increase risk to the fund or decrease income to the beneficiaries. Id. The court cited a litany of sources to support dicta that "a trustee's duty is not necessarily to maximize the return on investments but rather to secure a 'just' or 'reasonable' return while avoiding undue risk." Bd. of Trs., 317 Md. at 106–07 (citing King v. Talbot, 40 N.Y. 76, 86 (1869)); Withers, 447 F. Supp. at 1254, *aff'd*, 595 F.2d at 1210; III Scott on Trusts, § 227.3; Restatement (Second) of Trusts § 227 cmt. (e) (1957); Dobris, *Arguments in Favor of Fiduciary Divestment of "South African" Securities*, 65 Neb. L. Rev. 209, 232 (1986); Ravikoff & Curzan, Social Responsibility in Investment Policy and The Prudent Man Rule, 68 Cal. L. Rev. 518, 519 (1980). Cf. Troyer, Slocombe & Boisture, Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds, 74 Geo. L. J. 127, 156–57 (1985).

The court in Board of Trustees v. Baltimore thus held that this social consideration did not inherently require fiduciaries to violate their duty of loyalty to the plan. In so holding, the court found that the ordinance was actually squarely within the requirement that fiduciaries act "solely in the interest of the beneficiaries and for the exclusive purpose . . . of providing benefits." Bd. of Trs., 317 Md. at 110. The court argued that there was a strong argument that investing in companies with "a proper sense of social obligation" could be the best investment in the long term. Id.

These cases highlight that if the investment can be made in a manner that otherwise satisfies the fiduciary duties of prudence and loyalty, the consideration of collateral ESG factors is permissible.

The Use of ESG Is More Likely to Be Deemed Compliant with ERISA's Fiduciary Standards If a True Financial Benefit Can Be Shown

There are a few cases that go even further and support a view that the use of ESG on its own can be consistent with ERISA's duties of loyalty and prudence if there is a demonstrated financial benefit to the plan.

This is illustrated by *Withers*, which, although not an ERISA case, is highly instructive. In that case, the fiduciaries loaned plan assets to the City of New York by purchasing bonds that were, on their faces, low-quality and low-rated, and did not meet the diversification requirements for the plan's portfolio. Withers, 447 F. Supp. at 1255–56, aff'd, 595 F.2d at 1210. The plaintiffs challenged this decision because they argued that it was an imprudent investment (given the poor quality of the bonds) and was done to support the social goals of helping the city and supporting jobs of participants in the plan rather than being in the best interests of the plan.

The court disagreed, holding that the loan was not a violation of the duty of loyalty or prudence (under state law analogous to ERISA). In so ruling, the court credited the fiduciaries' view that this was a good investment for ensuring the maintenance and growth of the plan's assets. Id. The fiduciaries had argued that they made the loan because they determined that, unless they helped the City of New York remain solvent through these loans, there would be no inflow of assets into the plan because the city was the largest contributor into the plan. Id. Thus, the loan was both prudent and in the interests of the plan from an asset-growth perspective because it would ultimately increase the plan's assets if the city remained

solvent. The city was, of course, an incidental beneficiary of that decision, since the loan saved the city from bankruptcy, but the plan's fiduciaries won because they were able to convince the court that there was ultimately and primarily a financial benefit to the loan that was both prudent and in the best interests of the participants.

The *Withers* court accepted that there was no breach because it was able to view the motives as financial (in the interests of the participants), even if there was also an incidental social benefit external to the plan. *Withers* thus provides a road for avoiding a breach of ERISA when using ESG factors by documenting such ESG factors' financial benefit to the plan.

As with Any ERISA Investment, Process Matters to Support ESG Usage

As with any ERISA investment, a robust process is key to establishing that the use of ESG complies with ERISA. For example, in *Donovan* (which, as described above, survived a legal challenge even though there was a "social" benefit factor to the investment), a key element of the court's conclusion that no violation of ERISA occurred was its finding of a robust process leading up to the investment decision. The court noted the deep engagement in the investment research process and the utilization of investment consultants and other experts who helped ensure that the decisions were financially sound and, therefore, prudent. Donovan, 609 F. Supp. at 1239–40. The court cited process steps that particularly supported procedural prudence, including the engagement of investment consultants, independent counsel, and other experts to assist in the plan's investment project. Id. The *Donovan* court referenced this extensive research and reliance upon experts when holding that the fiduciary decision to invest in real estate development complied with ERISA's fiduciary duties, even if there was an incidental "social" benefit of supporting the union. Id. Thus, this case highlights that a court may be more likely to view the use of ESG factors as ERISA compliant if the investment is made through a robust process.

Conclusion

In sum, for fiduciaries considering using ESG factors in ERISA plan investing (including using or offering an ESG fund), case law can provide guidelines for complying with ERISA's fiduciary duties.

The cases reviewed in this practice note suggest that there is greater risk if ESG is used as the primary criterion for investment decision-making. However, case law also supports the view that ERISA's fiduciary duties do not preclude incorporating ESG factors as additional investment factors or considering ESG as a collateral benefit. There is also case law that goes further and finds that ESG on its own can be consistent with ERISA's duties if there is a demonstrated financial benefit to the plan. As with any type of investment decision, fiduciaries will need to take care to apply a prudent process and singularly focus on the best interests of plan participants. But, as outlined herein, case law provides a road map for using ESG in a manner that satisfies those ERISA fiduciary duties.

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