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Trump Executive Order Threatens Pension ESG Adoption

By Fola Akinnibi April 17, 2019

President **Donald Trump** issued a “threat” last week to corporate pension plans that are embracing environmental, social and governance (ESG) investment strategies, with an executive order building on a 2018 Department of Labor (DOL) guidance that weakened the previous administration’s stance on the issue.

The president directed the Secretary of Labor, over the next six months, to review all available data on investments in the energy sector by pension plans subject to the Employee Retirement Income Security Act (ERISA). The directive, which is meant to “advance the principles of objective materiality and fiduciary duty,” came as part of a broader executive order ostensibly meant to promote energy infrastructure projects and investments in fossil fuels, as reported by *FundFire* sister publication *Ignites*.

This is “undoubtedly” related to an April 2018 DOL guidance that walked back Obama administration standards on ESG, says **Betty Huber**, an attorney and co-head of the ESG group at **Davis Polk & Wardwell**. That guidance cautioned plan sponsors against leaning too heavily on ESG factors when making investment decisions and was intended to assist with enforcement of DOL policy, whereas the Obama administration standard was much more lenient, she adds.

“What I see in the executive order, by it requiring data gathering, is a kind of threat,” says Huber. “It looks like the threat of a lawsuit is more likely as a result of this data gathering… ERISA fiduciaries should revisit the field guidance and confirm their decisions are being made in conformance with it.”

The Trump administration appears hostile to the idea of using these factors for investment decisions, says Huber.

“Last year’s field assistance bulletin by the DOL did cause some confusion for plan sponsors, because of its different emphasis on ESG investing than the position taken by the Obama administration,” says **Marcia Wagner**, an ERISA attorney at the **Wagner Law Group**. “Until the DOL actually issues any future guidance, plan sponsors should adhere as closely as possible to the 2018 DOL guidelines.”

Indeed, even the **U.S.** Government Accountability Office (GAO) released a report asking for clarification of the DOL's 2018 guidance. Plans have since gotten more comfortable with that change, but there's not yet a clear sense of how this new order will influence plan adoption of ESG or how plans will react at all, says **Anna West**, a senior v.p. and ESG practice leader at Callan.

However, it's not as if adoption of these strategies among corporate pensions and other ERISA plans is widespread. They have been slower to adopt ESG investment principles than public pensions and other types of investors, says West.

For these plans it may be harder to zero in on relevant factors and define what ESG goals they have, whereas other sectors may have more uniform participant populations or defined missions, says West.

The corporate plan space is also moving away from defined benefit options, pushing ESG to the margins, West adds. Many plans are in the process of closing or have an end goal in sight. As of 2018, defined contribution assets make up 60% of the market, as reported.

Still, there are signs of corporate plans opening up to these strategies, West says.

"There's a lot of interest in broad education, especially in the corporate sectors," says West. "We're seeing better understanding in the space of what ESG options are available."

And, barring any major changes to the law or its interpretation, ESG investing should be protected, says **Heather Slavkin Corzo**, head of U.S. policy at the **United Nations Principles for Responsible Investment**.

“It’s been the DOL’s long-standing position that fiduciaries have an obligation to integrate material economic factors into investment decision making,” says Slavkin Corzo. “It is hard to imagine the DOL will depart from this position and there is clear evidence that ESG factors are economically material.”

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