# DOL RULE ON ESG INVESTMENTS NOT TO BE ENFORCED

Last fall, the Department of Labor (DOL) put up guardrails related to the inclusion of "nonfinancial" objectives, including those related to Environmental, Social and Governance (ESG) investments in plans by publishing Financial Factors in Selecting Plan Investments (i.e. the ESG Rule) on November 13, 2020. After strong pushback from asset managers, plan sponsors and participants alike, the DOL eliminated ESG-specific references in the final regulation, which became effective January 12, 2021.

However, on March 10, 2021 the DOL announced it would not enforce the rules or pursue enforcement actions against plan sponsors for failure to comply with the rules until it publishes further guidance.

## Role as Plan Fiduciary

Part of being a retirement plan fiduciary involves acting prudently and selecting diversified investments for the plan in such a manner as to minimize the risk of large losses, unless doing so is not prudent. It also must do so solely in the best interest of plan participants and beneficiaries to exclusively provide benefits to participants and beneficiaries and defray reasonable expenses of administering the plan. The DOL has never wavered on its position that retirement plan fiduciaries must focus on financial returns of the plan when fulfilling the duties of prudence and loyalty.

## Why the ESG Terminology Was Removed

The DOL decided to remove all ESG terminology from the Final Regulation on the grounds that such terminology can be imprecise and ambiguous – the term lacks a precise definition. It also was concerned about the risk of constraining the criteria that a fiduciary would consider in making a prudent judgment. As a result, the Final Regulation instead mandates fiduciaries to focus on whether any particular factor is pecuniary.


This means that plan fiduciaries have oversight of financial considerations having a material effect on the risk and/or return of an investment within the plan's investment objectives and funding policy. Removal of the ESG terminology no longer prohibits selection or consideration of certain investment strategies as long as such decisions are based solely on material economic considerations including those that may come from ESG factors.

## Expanded Duty of Prudence Language Shouldn't Affect Fiduciary Processes Followed

As part of a plan fiduciary's responsibility, the expanded language now under review states the fiduciary must compare any investment option (whether or not it incorporates ESG factors) against other similar investments.



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This is unlikely to require substantial changes to the process followed by most ERISA fiduciaries and asset managers. In addition, there is a strong emphasis on plan fiduciaries and asset managers weighing any factors related to an investment that could have a material effect on the investment's risk/return profile. In other words, fiduciary investment decisions must be based on "economically impactful and/or financially material" reasons.

## Consult with Your Team

The upward trend in ESG Investing among institutional asset managers comes with much intrigue and many questions. We recommend reaching out to your recordkeeper to help identify which options might be available to you and your retirement plan.

The Retirement Plan Solutions team at Mariner Wealth Advisors is also available to you to offer advice and guidance. Both retirement professionals can help ensure you meet your fiduciary responsibilities as it relates to diverse investment options.

**Sources**
"Department of Labor Announces Non-Enforcement Policy"
"DOL Finalizes Rule on ESG Considerations for ERISA Plan Investments"
"Financial Factors in Selecting Plan Investments"