CONTEMPORARY COMPLIANCE ISSUES 2018

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NEW GUIDANCE ON ETIs AND ESG INVESTING

- DOL has provided guidance on "Economically Targeted Investments" ("ETIs"), and "Environmental, Social, and Governance Investing" ("ESG") on four occasions.
- "Economically Targeted Investments" ("ETIs") are investments made by plan fiduciaries that are intended to help participants in ways other than by directly providing plan benefits.
- "Environmental, Social, and Governance Investing" ("ESG") is when fiduciaries take indirect and non-investment considerations into account in selecting investments.

NEW GUIDANCE ON ETIs AND ESG INVESTING

- Pre-Guidance: Debate whether a fiduciary could take anything other than direct investment considerations into account in investing plan assets.
- Clinton Era: IB 94-1 adopts the "all things being equal" standard.
- Bush Era: IB 2008-1 nominally retains standard, but generally requires a "contemporaneous economic analysis."
- Obama Era: IB 2015-1
  - Retains standard, but rejects the chilling effect of IB 2008-1.
  - Acknowledges that ESG factors may provide positive economic value.
- Trump Era: FAB 2018-1
  - Retains standard.
  - Cautions against assuming positive economic value.

NEW GUIDANCE ON PROXY VOTING

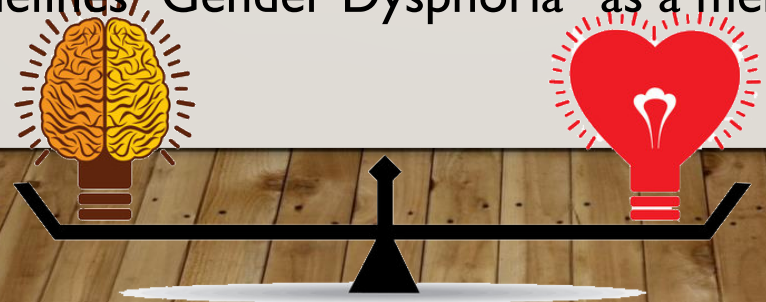
- Clinton Era: IB 94-2
  - Voting proxies is a fiduciary function.
  - Trustees are obligated to either vote or to periodically monitor the fiduciary charged with voting.
  - Economic objections must not be "***subordinate*** . . . to unrelated objectives."
  - Bush Era: IB 2008-2 – "[O]bjectives, considerations, and economic effects unrelated to the plan's economic interests ***cannot be considered***."
- Obama Era: IB 2016-1 – Returns to "subordinate" standard.
- Trump Era: FAB 2018-1
  - Generally agrees with Obama-era guidance, but only because it's cheap.
  - If there is any substantial expense, it better be justified as adding value.

STUDENT LOAN REPAYMENT – 401(k) PLAN PLR 201833012

- Plan provides a 5% employer matching contribution for any participant who contributes at least 2% of compensation.
- Request:
  - Each pay period, the Employer would make a 5% nonelective "Student Loan Repayment" ("SLP") contribution for any participant who repays student loans with 2+% of comp.
  - If the participant did not repay student loans but did contribute at least 2% to the Plan, the employer would make a 5% "true-up" matching contribution at the end of the year.
  - Participant could enroll/disenroll in program at any time.
  - No participant could receive a matching contribution during any pay period in which she/he received an SLP contribution.
- IRS Ruling: Arrangement does not create a prohibited "contingent" contribution.
- Caution: May complicate ADP/ACP testing.

TRANSGENDER COVERAGE AND PROHIBITED DISCRIMINATION

- Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)
  - Requires that mental health benefits be provided on par with non-mental health benefits.
  - "Mental health benefits means benefits with respect to . . . mental health conditions . . . . Any condition defined by the plan . . . as being or as not being a mental health condition must be . . . consistent with generally recognized independent standards of current medical practice (for example, the most current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM), the most current version of the ICD, or State guidelines)."
  - DSM-5 (2013) defines "Gender Dysphoria" as a mental health condition.



TRANSGENDER COVERAGE AND PROHIBITED DISCRIMINATION

- ACA Section 1557
  - "An individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 504 of the Rehabilitation Act of 1973, be . . . subjected to discrimination under any health program or activity, any part of which is receiving Federal financial assistance . . . ."
  - Regulations explicitly provided that failure to cover gender dysphoria on the same basis as any other condition was sex discrimination under Section 1557.
  - In *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016), the court issued a nation-wide injunction barring enforcement of the portions of the regulation relating to either gender dysphoria or abortion because the agencies "exceeded their authority."
  - In *Tovar v. Essentia Health*, 2018 WL 4516949 (D. Minn. Sept. 20, 2018), the court concluded that refusal to treat gender dysphoria was a violation of 1557 on its face.