

# DOL Issues Proposed Rule to Amend the Investment Duties Regulation

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July 14, 2020

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The DOL recently issued a proposed rule to amend the investment duties regulation at found at 29 CFR 2550.404a-1 (the **Regulation**). The proposed rule would provide investment guidance to ERISA plan fiduciaries in light of recent trends in environmental, social, and governance (**ESG**) investing. ERISA requires plan fiduciaries to act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and paying reasonable administrative expenses and prudently selecting investments for the plan. In the past, the DOL has periodically issued guidance addressing fiduciary duties under ERISA with respect to ESG-based investment decisions, including Interpretive Bulletin 94-1, which described a tie-breaker standard, whereby ESG considerations could be the deciding factor when competing investments served the plan's economic interests equally. Later Interpretive Bulletins emphasized that it would be a violation of ERISA to accept reduced returns in favor of ESG goals, but that in certain cases, ESG factors could themselves be pecuniary factors that plan fiduciaries could prudently consider. The proposed rule amends the Regulation to set forth the DOL's position on ESG investing, utilizing the DOL's prior guidance but making some important changes. The proposed rule amends the Regulation in the following ways:

1. Plan fiduciaries must select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action, and not on the basis of non-pecuniary factors.
2. To satisfy their duty of loyalty, plan fiduciaries may never subordinate the interests of plan participants and beneficiaries in their retirement income to non-pecuniary goals.
3. To meet their duties of prudence and loyalty, plan fiduciaries must compare investments or investment courses of action to other available investments or investment courses of action based solely on economic factors.
4. ESG factors may only be considered if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposed rule adds investment analysis and documentation requirements in the event that plan fiduciaries are relying upon the tie-breaker standard in order to safeguard against plan fiduciaries improperly making decisions based on non-pecuniary factors.
5. For participant directed plans, the proposed rule discusses the duties of prudence and loyalty and the requirements when considering adding ESG investments. The proposed rule prohibits the use of ESG investments as QDIAs.

The DOL is seeking comments on the proposed rule until July 30, 2020. The proposed rule is available [here](#). The fact sheet is available [here](#). The DOL's news release is available [here](#).