

DOL Final Investment Duties Rule Permits Plan Fiduciaries to Consider Climate Change and Other Environmental, Social, and Governance Factors

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PRACTICES Climate Change and Corporate Sustainability, Environmental, Social and Governance, Employee Benefits and Executive Compensation

Under a new DOL fiduciary rule issued on November 22nd (the “**Final ESG Rule**”), retirement plan fiduciaries may consider environmental, social, and governance factors (“**ESG considerations**”) when selecting participant investments and exercising shareholder rights, including, without limitation, voting on shareholder resolutions and board nominations. Although the DOL previously recognized in non-regulatory guidance that under appropriate circumstances ERISA does not preclude plan fiduciaries from making investment decisions with ESG considerations, in 2020, the DOL scaled back such advisory guidance (the “**Prior ESG Rule**”) by providing that such investment decisions must be based solely on pecuniary factors. The Final ESG Rule modifies much of the Prior ESG Rule and provides that the same fiduciary legal standards apply to all plan investments, including qualified default investment alternatives.

In the Final ESG Rule, the DOL emphasized that the following investment principles continue to apply: (i) the duties of prudence and loyalty require plan fiduciaries to focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries to objectives unrelated to the provision of benefits under the plan; and (ii) the fiduciary management of plan assets that are shares of stock include the management of shareholder rights appurtenant to those shares, such as the right to vote proxies. The DOL indicated that relevant risk-return factors may include the economic effects of climate change and other ESG considerations. Further, when constructing a plan investment menu, according to the Final ESG Rule, plan fiduciaries do not violate their fiduciary duties solely by taking into account participants’ preferences in determining whether to add a plan investment option based on ESG considerations, which could be relevant in leading to greater plan participation.

Another modification of the Prior ESG Rule is the so-called “tiebreaker” option for managers when making a decision between two competing investments. In the Final ESG Rule, plan fiduciaries are no longer required to determine whether plan investments are indistinguishable based on financial factors, with required supporting documentation, before applying such a test. Rather, the standard now requires that if the plan fiduciary concludes that competing investments equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting an investment based on collateral benefits other than investment returns.

Most of the Final ESG Rule will become effective 60 days after its publication in the Federal Register, with the exception of a one-year delayed applicability date for certain proxy voting provisions.

The Final ESG Rule is available [here](#).