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New DOL Rule Enables Consideration of ESG Factors in Investing, Plus the SEC Continues its ESG Enforcement Push in the Absence of Final SEC Rules

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On November 22, 2022, the U.S. Department of Labor (DOL) announced a final rule promulgated by the Employee Benefits Security Administration that allows retirement plan fiduciaries to consider environmental, social and governance (ESG) factors in investment choices. The new rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," will take effect sixty days after its publication in the Federal Register, although certain proxy voting provisions will not take effect until one year after publication. The rule was issued in response to President Biden's Executive Order 14030, which directs the federal government to highlight and consider policies to protect the retirement funds of American workers and families from ESG threats such as climate-related financial risk.

"Today's rule clarifies that retirement plan fiduciaries can take into account the potential financial benefits of investing in companies committed to positive environmental, social and governance actions as they help plan participants make the most of their retirement benefits." Labor Secretary Marty Walsh

Although DOL's new rule does not require plan fiduciaries to credit ESG factors in investments, it does allow them to assess ESG-related benefits while still adhering to the principle that fiduciaries must not accept reduced returns or greater risks to secure collateral benefits.

DOL's rule may be the precursor to much broader SEC regulations. The SEC is widely expected to issue new ESG-related rules of its own, having proposed a set of regulations on this subject at multiple points earlier this year. Indeed, earlier this week, a group of Attorneys General for seventeen states submitted a letter to the Senate Committee on Banking, Housing, and Urban Affairs and House Committee on Financial Services lending their support for the SEC's proposed ESG rules.

Meanwhile, the SEC's Division of Enforcement continues its aggressive push on the ESG front. On

November 22, 2022, the SEC filed a settled administrative proceeding against an asset manager for alleged policies and procedures failures involving two mutual funds and one separately managed account strategy marketed as ESG investments. To settle the charges, the asset manager agreed to pay a multi-million dollar penalty. As agency rulemaking across the government evolves to provide more clarity in the ESG realm, companies can expect the SEC to continue to bring ESG-related actions.

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