

LEGAL UPDATE

DOL Rule Permits Consideration of Climate and ESG Factors and Codifies Proxy Voting Responsibilities

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On November 22, 2022, the Department of Labor (DOL) issued a final rule modernizing and revising the long-standing Investment Duties Regulation. Among other things, the final rule clarifies that ERISA plan fiduciaries must consider facts and circumstances that could affect the risk/return of investments, which may include the economic effects of climate change and other environmental, social, or governance factors (ESG factors). ERISA fiduciaries may also consider collateral benefits when choosing between comparable investments and may consider participant preference when selecting investment menu alternatives. The final rule also clarifies and provides guidance for fiduciary exercise of proxy votes and other shareholder rights. The rule generally applies to investments made and investment courses of actions taken after January 30, 2023, though two of the proxy voting provisions take effect on December 1, 2023.

In finalizing the rule, the DOL has closed debate on whether and how ERISA fiduciaries can consider ESG factors or other collateral benefits in investment decisions. There is considerable challenge ahead, however, as ESG factors are being developed in real time, a challenge that will affect not only plan fiduciaries but also investment managers, advisors, and service providers.

[Editor's Note: In consideration of providing comprehensive coverage of Secure 2.0, we are providing an abbreviated Legal Update in this issue. The topic introduced above will be covered in more detail in future issues of 401k Advisor.]

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