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Trump Admin. Rolls Back Biden-Era Rules on 401(k) Plan Investments: Crypto and ESG

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The Trump administration has rescinded (or signaled that it will replace) current guidance that was issued by the Biden administration's DOL regarding (1) retirement plan investments in cryptocurrencies (and other digital assets) and (2) retirement plan fiduciaries' consideration of environmental, social, or governance (ESG) factors in plan investment decisions.

Cryptocurrency. On May 28, 2025, the DOL issued a Compliance Assistance Release ("CAR") 2025-01, which rescinds the DOL's prior guidance in CAR 2022-01. As noted in our prior Legal Alert, CAR 2022-01 warned fiduciaries of 401(k) plans that hold cryptocurrencies that they should use "extreme care before they consider adding a cryptocurrency option" and should prepare to be investigated. In addition to rescinding the prior guidance in full, CAR 2025-01 articulates the DOL's neutral position that it neither endorses nor disapproves of plan fiduciaries who conclude that it is appropriate to include cryptocurrencies among a plan's investment menu. Under this guidance, the prudence of investments in cryptocurrency and other digital assets must be evaluated based on all of the facts and circumstances as with any other plan investment.

ESG. Also on May 28, 2025, the US Department of Justice submitted a status report to the 5th Circuit on behalf of the DOL in response to an April 28th order to inform the Court "what specific actions the [DOL] will take, if any, as a result of its reconsideration of the [DOL's 2022 ESG and Proxy Voting Rule] – either to maintain the rule or rescind it." See our prior Legal Alert for in depth discussion of the 2022 ESG and Proxy Voting Rule (the "2022 ESG Rule"). The 2022 ESG Rule was challenged and initially upheld by a district court in 2023; then remanded by the 5th Circuit in mid-2024 for reconsideration and upheld again by the district court on remand. The status report states that the DOL "will engage in a new rulemaking on the subject of the [2022 ESG Rule]" as part of its Spring Regulatory Agenda. The status report, in part, resolves some uncertainty about whether the DOL would rescind the 2022 ESG Rule and resurrect an earlier Trump administration ESG rule; or if it would create an entirely new rule. The question now is to what extent the forthcoming ESG rule will deviate from the ESG rule issued by the first Trump administration in 2020.