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Legal Alert: DOL Opens ESG Door: What Does It Mean for Plan Fiduciaries?

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Department of Labor ("DOL") Secretary Walsh recently announced final regulations in a blog post titled "Removing Barriers to Considering ESG Factors in Retirement Plan Investments." While the rules open the door to more employer retirement plans taking into account environmental, social, and governance ("ESG") factors in investment decisions, fiduciaries still need to be careful to ensure that their fiduciary processes reflect appropriate consideration of ESG factors. The new rules also address how fiduciary standards apply to voting proxies and exercising other shareholder rights with respect to plan investments.

As ESG investing has grown in popularity, it has attracted controversy. The Securities and Exchange Commission ("SEC") has adopted an "all-agency" approach to ESG disclosures. The controversies have been particularly pronounced in the context of public pension funds, which are not subject to the fiduciary duties of ERISA. On August 4, 2022, nineteen Republican state attorneys general signed a letter accusing Blackrock of breaching duties of loyalty and prudence in managing state pension funds and violating antitrust laws as a result of its support of carbon neutrality. (Blackrock denied these claims in a response released in September.) On December 1, 2022, the CFO for the state of Florida announced that the Florida State Treasury would begin divesting $2 billion from Blackrock.

Given the political controversy, any expansion of ESG investing into 401(k) plans and private pension plans can be expected to be controversial. While the new regulations are intended to level the playing field for ESG investing, they provide no safe harbors for retirement plan fiduciaries. As a result, fiduciaries will need to carefully document prudent fiduciary processes regardless of whether they are specifically considering investment strategies or decisions that involve ESG factors.

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