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DOL Issues Non-Enforcement Policy for ESG and Proxy Voting Rules

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As 2020 drew to a close, the Department of Labor ("DOL") finalized a number of regulations relating to the fiduciary duties that apply to ERISA plan investments, including: (1) a final rule generally restricting fiduciaries from selecting plan investments on the basis of "non-pecuniary" factors, such as environmental, social, and corporate governance ("ESG") factors, and specifically prohibiting the use of a qualified default investment alternative with investment objectives, goals or strategies involving any ESG factors (the "Final ESG Rule"), and (2) a final rule generally restricting plan fiduciaries from considering ESG factors in voting proxies or exercising other shareholder rights with respect to plan investments (the "Final Proxy Voting Rule").

When President Biden took office, he immediately issued Executive Order 13990, which directed federal agencies to reconsider any Trump Administration regulations that may be inconsistent with the public policies of promoting and protecting public health and the environment.

In light of Executive Order 13990, the DOL has issued an indefinite non-enforcement policy with respect to both the Final ESG Rule and the Final Proxy Voting Rule. As a result, the DOL will not enforce the Final ESG Rule or Final Proxy Voting Rule or otherwise take enforcement action against fiduciaries based on these rules until the DOL publishes further guidance. In announcing this non-enforcement policy, the DOL cited to comments that it received from stakeholders questioning, among other things, whether the DOL sufficiently considered public comments about how ESG considerations may appropriately factor into investment decisions.

Under the non-enforcement policy, ERISA plan fiduciaries will still be held to the general standards of prudence and loyalty under ERISA. In addition, the DOL's non-enforcement policy would not necessarily affect consideration of the Final ESG Rule or Final Proxy Voting Rule with respect to a fiduciary breach claim brought by participants.

The DOL intends to issue further guidance relating to the Final ESG Rule or Final Proxy Voting Rule but has not yet provided a timetable for this guidance.