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DOL Issues Proposed Rule on ESG Investing for Retirement Plans

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The Department of Labor ("DOL") recently released its Proposed Rule on the consideration of environmental, social, and governance ("ESG") factors in investment decisions. The Proposed Rule is set to be published on Tuesday, November 24, 2026, and would amend the ESG regulations published by the Biden administration in 2022.

Background. In 2022, the DOL under the Biden administration published Final Regulations regarding ESG factors in investment decisions that were largely neutral. See our prior blog post for a more detailed discussion of the 2022 regulations. In 2025, President Trump issued Executive Order 14366, which directed the Secretary of Labor to update the 2022 regulations. The new Proposed Rule responds to the Executive Order's directive.

The DOL's new Proposed Rule makes two notable changes to the 2022 regulations:

1. removing the "tiebreaker" test; and
2. removing the participant preference consideration.

Removing the "Tiebreaker" Test. The "tiebreaker" test is a longstanding part of the ESG standard, providing that if a fiduciary was unable to distinguish between investment alternatives, the fiduciary could rely on non-pecuniary factors, such as ESG, to break the tie. The DOL explained the rationale behind removing the test is to more closely follow the plain meaning of ERISA's duty of loyalty and to avoid abuse, including a plan fiduciary's use of the tiebreaker test to "pursue personal preferences or objectives unrelated to financial benefits under the plan."

Removing the Participant Preference Consideration. The 2022 regulations added a provision that fiduciaries do not violate their duty of loyalty because they take the participants' preferences into account when deciding on investment options for the plan. The DOL expressed in the Proposed Rule that it is concerned that this provision may mislead fiduciaries into taking participant preferences into account over a determination on the economic merits of the investments. By removing the participant preference consideration, the DOL believes the Proposed Rule more accurately comports with ERISA's standard that plan fiduciaries act in the participants' best interests.

The Proposed Rule includes requests for comment on how the changes would impact retirement plan investors. The DOL also noted that it would take into account updated regulations of the SEC regarding proxy disclosures of shareholder proposals in finalizing the amendments to the ESG regulations.