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Regulation: Department of Labor Rule On ESG Investing

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Regulation

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On Tuesday, November 22, the U.S. Department of Labor (DOL) **announced** a final rule overturning previous restrictions on the ability of retirement plan fiduciaries to consider ESG-related factors in their investment decisions. The **final rule**, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, builds on **Executive Order 14030** signed by President Biden on May 20, 2021. The Rule clarifies that, consistent with the fiduciary duties of prudence and loyalty under the Employee Retirement Income Security Act (ERISA), retirement plan fiduciaries may consider ESG factors when selecting investment and exercising shareholder rights, such as voting proxies.

According to the **fact sheet** accompanying the announcement, the Rule provides that "a fiduciary's duty of prudence must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis and that such factors may include the economic effects of climate change and other ESG considerations on the particular investment or investment course of action."

Secretary of Labor Marty Walsh stated that "today's rule clarifies that retirement plan fiduciaries can take into account the potential financial benefits of investing in companies committed to positive environmental, social and governance actions as they help plan participants make the most of their retirement benefits."

A majority of the rule will take force 60 days after it is published in the Federal Register. However, there is a delayed application of one year after publication for some proxy voting provisions to provide "fiduciaries and investment managers additional time to prepare."

Taking the Temperature: The DOL Rule reflects a view, frequently articulated by large institutional asset managers, that climate change and other ESG factors can be material to the companies in which they invest and therefore are properly considered as part of the investment process. However, the Rule also has been cited as another salvo in the

ongoing politicization of climate change and ESG generally, particularly in the asset management area. As we have discussed, state treasurers have withdrawn assets from firms over their consideration of ESG factors in investment decisions and barred institutions from underwriting syndicates due to supposed anti-energy views. Asset managers are left to walk an increasingly narrow line through these competing views on the appropriate role of climate considerations in the investment process.