ERISA FIDUCIARY RULE UPDATE – DOL NONENFORCEMENT OF ESG INVESTMENTS AND PROXY VOTING RULES

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As we reported in our February 2021 Employee Benefits Newsletter, new rules developed under the Trump administration regarding the circumstances in which fiduciary investment advisers are allowed to receive compensation for advice to ERISA-covered benefit plans, plan participants, and IRAs; and to engage in principal transactions, took effect in February. There has been no indication that the new administration's Department of Labor ("DOL") will not fully enforce those rules. However, the DOL announced this month that it will not enforce two other fiduciary rules issued under the prior administration. Specifically, the DOL announced that until it published further guidance, the DOL will *not* enforce or otherwise pursue enforcement actions against any fiduciary based on a failure to comply with either –

- The final rules that restrict retirement plan fiduciaries from considering non-pecuniary environmental, social and governance ("ESG") factors when selecting the investments to be offered to plan participants (see our article describing the ESG rules in our December 2020 Employee Benefits Newsletter), or
- The final rules making it clear that an ERISA fiduciary's proxy vote or exercise of other shareholders rights should not consider environmental, social, and corporate governance or other similar considerations in a manner that would subordinate the pecuniary factors being considered (see our article describing the ESG rules in our February 2021 Employee Benefits Newsletter).

Having received feedback from various stakeholders, the Biden DOL has decided it will revisit those two rules, which potentially signals a greater willingness to recognize the importance of ESG factors when a fiduciary selects and manages plan investments. This nonenforcement policy, however, does not preclude the DOL from otherwise enforcing any statutory requirement under ERISA, including the fiduciary duties of prudence and loyalty.

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