

**MEMO# 33176**

March 10, 2021

# **DOL Issues Enforcement Policy Statement on ESG and Proxy Voting Final Rules**

[33176]

March 10, 2021 TO: ICI Members  
Investment Company Directors  
ICI Global Members  
Bank, Trust and Retirement Advisory Committee  
ESG Advisory Group  
ESG Task Force  
ICI Global Retirement Savings Committee  
Pension Committee  
Pension Operations Advisory Committee  
Proxy Working Group  
SEC Rules Committee SUBJECTS: ESG  
Pension RE: DOL Issues Enforcement Policy Statement on ESG and Proxy Voting Final Rules

On March 10, 2021, the Department of Labor (DOL) issued an Enforcement Policy Statement<sup>[1]</sup> announcing that it will not enforce its two recently finalized rules, “Financial Factors in Selecting Plan Investments” and “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.”<sup>[2]</sup> The statement indicates that:

Until it publishes further guidance, the Department will not enforce either final rule or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with those final rules with respect to an investment, including a Qualified Default Investment Alternative, or investment course of action or with respect to an exercise of shareholder rights. This enforcement statement does not preclude the Department from enforcing any statutory requirement under ERISA, including the statutory duties of prudence and loyalty in section 404 of ERISA.

In the accompanying press release, Principal Deputy Assistant Secretary for the Employee Benefits Security Administration Ali Khawar stated:

These rules have created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments, and that they may need to have special justifications for even

ordinary exercises of shareholder rights...We intend to conduct significantly more stakeholder outreach to determine how to craft rules that better recognize the important role that environmental, social and governance integration can play in the evaluation and management of plan investments, while continuing to uphold fundamental fiduciary obligations.

Leading up to this action, on January 20, President Biden signed an Executive Order directing all agencies to review recently adopted climate-related regulations.<sup>[3]</sup> Secretary of Labor nominee Marty Walsh indicated that this review would cover both of these DOL final rules.<sup>[4]</sup> In February, ICI, along with other trade associations, participated in a “listening session” with DOL staff regarding these rulemakings. The trade associations expressed the need for DOL to issue a temporary non-enforcement policy. The group also voiced support for DOL’s reexamination of the rule and offered to provide assistance and ongoing input.

ICI will continue to follow these actions closely and engage with DOL regarding future actions. Please contact us if you have any questions or comments.

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Associate General Counsel - Retirement Policy

#### endnotes

[1] The Enforcement Policy Statement is *available at* <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf>; DOL’s press release is *available at* <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310>.

[2] The final rule “Financial Factors in Selecting Plan Investments” (sometimes referred to as the ESG rule), released on October 30, 2020, amends the existing regulation on fiduciary standards for selecting and monitoring investments and was intended to provide clear regulatory guideposts for retirement plan fiduciaries in light of recent trends involving environmental, social and governance (ESG) investing. For a summary, see ICI Memorandum No. 32888, dated November 3, 2020, *available at* [https://www.ici.org/my\\_ici/memorandum/memo32888](https://www.ici.org/my_ici/memorandum/memo32888). The final rule “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,” released on December 11, 2020, amends DOL’s “Investment Duties” regulation to address the application of ERISA’s fiduciary duties of prudence and loyalty to the exercise of shareholder rights, including proxy voting, proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms. For a summary, see ICI Memorandum No. 32984, dated December 15, 2020, *available at* [https://www.ici.org/my\\_ici/memorandum/memo32984](https://www.ici.org/my_ici/memorandum/memo32984).

[3] The Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, dated January 20, 2021, is *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

[4] Marty Walsh made this statement in a written response to a question asked in connection with his February 4, 2021 confirmation hearing before the Senate HELP

Committee. The committee voted to approve his nomination on February 11, and the nomination now awaits a vote of the full Senate.

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