

MEMO# 32652

July 31, 2020

ICI Submits Comment Letter in Response to DOL Proposal on ESG Investments

[32652]

July 31, 2020 TO: ICI Members
Investment Company Directors
ESG Task Force (Global)
ESG Working Group (US)
Pension Committee
Pension Operations Advisory Committee SUBJECTS: ESG
Pension RE: ICI Submits Comment Letter in Response to DOL Proposal on ESG Investments

The Institute sent the attached comment letter to the Department of Labor (DOL) in response to its proposed regulation on Financial Factors in Selecting Plan Investments (Proposed Rule).^[1] In June, DOL issued the Proposed Rule, intending to clarify its stance on selecting environmental, social and governance (ESG) investments for retirement plans.^[2] DOL intends the Proposed Rule to “codify” DOL’s current position on ESG investing and clarify previous guidance on the subject that DOL says “may have created confusion.” Unfortunately, concerns have been raised that the Proposed Rule went well beyond merely codifying DOL’s prior guidance and could have significant unintended consequences.

Proposal

The Proposed Rule broadly treats any fund that includes environmental, social, corporate governance, and/or “any similarly oriented assessments or judgments in their investment mandates” as “ESG investments” that are subject to heightened scrutiny and increased administrative burden. In addition to the heightened standards applicable to ESG investments, the Proposed Rule would add new requirements applicable to all plan investments, including a troubling requirement to compare each plan investment to all “available alternative investments or investment courses of action” with regard to certain specified factors.

ICI Comments

ICI developed its response to the Proposed Rule with the help of a working group of members formed for this purpose. ICI made clear its support for the ERISA tenet that, when making decisions on investments on behalf of a retirement plan, ERISA plan fiduciaries must be focused on the financial rather than non-pecuniary interests of the plan’s participants and beneficiaries. However, our letter identifies a number of concerns and

urges DOL to withdraw the Proposed Rule. More specifically, the letter makes the following key points:

- **The Proposed Rule ignores the fact that ESG considerations are often pecuniary in nature.** DOL acknowledges that some investing takes ESG considerations into account for economic reasons. However, the Proposed Rule would subject such investments (any investment alternative that includes any one of the ESG considerations (or similarly oriented assessments) in its investment mandates) to heightened scrutiny, *even if considered precisely because of risk, return and fiduciary considerations*. Our letter explains that mutual funds' portfolio managers and analysts—even those of funds that do not include ESG-related terms in their names or market themselves as “ESG funds”—routinely include ESG considerations in their decision making to enhance performance, manage investment risks, and identify emerging investment risks and opportunities.
- **The Proposed Rule would have adverse consequences and is not supported by evidence of a problem.** DOL bases the Proposed Rule on the presumption that investments that incorporate ESG considerations generally perform worse, have more risk, and are more expensive. DOL speculates, without evidence, that the growing emphasis on ESG investing and other non-pecuniary factors—particularly in Europe—“may be” prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defraying reasonable plan administration expenses. However, the Proposed Rule could harm plans and plan participants by imposing costs and burdens on plan fiduciaries, increasing litigation risk against plans, and greatly decreasing the universe of investments that are available to plan participants.
- **DOL should not single out one investment category for special treatment.** Until now, the same fiduciary standard has applied to every kind of investment. For example, DOL recently issued an information letter that explains how the fiduciary standards for investment selection would apply in the case of private equity investments in 401(k) plans.^[3] In contrast, the Proposed Rule singles out one investment category for increased scrutiny and additional administrative requirements. This is inconsistent with long-standing DOL precedent and will have far-reaching impact on the selection of all plan investment options—going well beyond just ESG funds.

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[Attachment](#)

endnotes

^[1] The Proposed Rule was published at 85 Fed. Reg. 39113 (June 30, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-06-30/pdf/2020-13705.pdf>.

^[2] See ICI Memorandum No. 32552, dated June 24, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32552.

[3] See ICI Memorandum No. 32506 (June 3, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32506.

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