

MEMO# 33954

December 14, 2021

ICI Submits Comment Letter in Response to DOL's Proposed Amendments to 2020 Final Rules on ESG Investing and Proxy Voting

[33954]

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TO: ICI Members

Investment Company Directors

ICI Global Members

ESG Advisory Group

ESG Task Force

Global Retirement Savings Committee

Pension Committee

Pension Operations Advisory Committee

Proxy Working Group

SEC Rules Committee SUBJECTS: ESG

Pension RE: ICI Submits Comment Letter in Response to DOL's Proposed Amendments to 2020 Final Rules on ESG Investing and Proxy Voting

On December 13, the Institute sent the attached comment letter to the Department of Labor (DOL) in response to its proposal (the "Proposed Rule") addressing the selection of investments for ERISA plans and proxy voting by plan fiduciaries.[\[1\]](#) The Proposed Rule, which was issued in October, would amend two rules finalized at the end of the Trump Administration, "Financial Factors in Selecting Plan Investments"[\[2\]](#) and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights"[\[3\]](#) (together, the 2020 Rulemakings").

Proposed Rule

While the framework of the Proposed Rule is essentially the same as that of the 2020 Rulemakings, the Proposed Rule would include changes that would remove perceived barriers for fiduciaries to consider environmental, social and governance (ESG) criteria as part of a fiduciary's investment analysis.

Earlier in 2021, ICI staff communicated concerns to DOL regarding the 2020 Rulemakings. Our concerns included (1) that preamble language in the rule notice cast doubt on whether

ESG factors were really economically material and created the perception that fiduciaries would have increased risk when they considered them; (2) that the special documentation requirement in the rule was unneeded and would create a road map for lawsuits; and (3) that it was not clear how the qualified default investment alternative (QDIA) restriction would apply and that it was not needed. All of these concerns were addressed in the Proposed Rule.

ICI Comments

Our comment letter makes the following recommendations regarding the Proposed Rule:

- Our letter supports the Proposed Rule and commends DOL for its efforts to correct the misperception that fiduciaries are at risk if they include ESG factors in the financial evaluation of plan investments. The proposed amendments to the 2020 Rulemaking better reflect the realities of how fund managers incorporate ESG factors into their investment analysis and make clear that, when considered as part of the risk-return analysis, ESG factors should be treated the same as any other economic factors.
- Our letter urges DOL to remove the specific references to ESG factors from the text of the Proposed Rule[\[4\]](#) because their inclusion unnecessarily differentiates ESG factors from investment factors more generally. Singling out ESG factors in such a manner is a departure from the long-standing neutral application of fiduciary principles.
 - Such an approach risks drawing distinctions between ESG factors versus other investment factors, potentially creating confusion about definitions and inviting litigation.
 - Absent changes, the Proposed Rule risks compromising the durability of the needed revisions. Rule text that is principles-based—as opposed to prescriptive—will increase the likelihood of a rule that will endure and maintain its relevance over time.
- While the Proposed Rule provides that ESG factors can be proper components of the fiduciary's primary analysis of the economic merits of competing investment choices, our letter urges DOL to clarify that an "ESG-themed fund" can permissibly be selected based solely on risk and return (as opposed to collateral) factors (*i.e.*, without the use of the tie-breaker rule).
- The requirement to prominently display the collateral-benefit characteristic of an investment when it has been selected using the tie-breaker rule[\[5\]](#) should be eliminated because it singles out a particular investment strategy for heightened fiduciary disclosure requirements. However, if DOL decides to retain this requirement, it needs to provide two clarifications.
 - DOL should confirm that the collateral benefits to be disclosed (the "feature or features prompting the selection") are the characteristics of the fund, and not the fiduciary's reasoning in selecting the fund.
 - DOL should confirm that the prominent disclosure requirement may be satisfied by providing existing fund materials (*e.g.*, prospectus, fact sheet) that describe the characteristic of the fund.
- The language in the Proposed Rule requiring fiduciaries to compare investment options with reasonably available alternatives is unnecessary and should be deleted.[\[6\]](#)
- DOL should extend the transition relief that applied to certain provisions of the proxy voting portion of the 2020 Rulemakings. Certain provisions are scheduled to become applicable in January 2022, but investment managers may have delayed implementation due to DOL's March 2021 announcement.[\[7\]](#)

endnotes

[1] For a summary of the Proposed Rule, see ICI Memorandum No. 33832, dated October 18, 2021, *available at* <https://www.ici.org/memo33832>.

[2] For a summary of the final rule, see ICI Memorandum No. 32888, dated November 3, 2020, *available at* <https://www.ici.org/memo32888>.

[3] For a summary of the final rule, see ICI Memorandum No. 32984, dated December 15, 2020, *available at* <https://www.ici.org/memo32984>.

[4] The text of the Proposed Rule discusses ESG factors in two separate provisions. First, in the explanation of a fiduciary's "appropriate consideration" required to fulfill its investment duties, DOL states that fiduciaries should consider the projected return of the investment option "which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action" (emphasis added). Second, DOL includes a list of examples of factors that a fiduciary may consider, including climate change-related factors, governance factors, and workforce practices.

[5] The tie-breaker rule, as proposed, provides that if a fiduciary prudently concludes that competing investments equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment based on collateral benefits other than investment returns. In the case of a designated investment alternative for an individual account plan (e.g., a 401(k) plan), if the plan fiduciary makes a selection using the tie-breaker rule, then the collateral-benefit characteristic of the fund must be prominently displayed in disclosure materials provided to participants and beneficiaries.

[6] This language in the Proposed Rule was retained from the 2020 Rulemakings, and ICI's 2020 comment letter on the 2020 proposed rule also included this request. For a summary of our comment letter, see ICI Memorandum No. 32652, July 31, 2020, *available at* <https://www.ici.org/memo32652>.

[7] On March 10, 2021, DOL issued an Enforcement Policy Statement announcing that it intended to revisit the 2020 Rulemakings and will not enforce the rules while it considered further guidance. See ICI Memorandum No. 33176, dated March 10, 2021, *available at* <https://www.ici.org/memo33176>.