MEMO# 34138

May 12, 2022

ICI Submits Comment Letter in Response to DOL RFI on Potential Agency Actions to Address Climate-Related Financial Risks to Retirement Savings

[34138]

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TO: ICI Members
Investment Company Directors
ICI Global Members
ESG Advisory Group
ESG Fund Disclosure Working Group
ESG Public Company Disclosure Working 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 RFI on Potential Agency Actions to Address Climate-Related Financial Risks to Retirement Savings

On May 12, 2022, the Institute sent the attached comment letter to the Department of Labor (DOL) in response to its Request for Information (RFI) seeking public comment on what actions, if any, DOL should take under federal law to protect retirement savings and pensions from risks associated with changes in climate.[1]

Background

In May 2021, the White House issued an Executive Order on Climate-Related Financial Risk ("Executive Order").[2] In response to the Executive Order, in October 2021, DOL released a proposal (the "Proposed Rule") addressing the selection of investments for ERISA plans and proxy voting by plan fiduciaries.[3] The Proposed Rule would clarify the manner in which ERISA fiduciaries may permissibly consider ESG factors in their evaluation of ERISA plan investments. Most significantly, the Proposed Rule would correct the misperception that fiduciaries are at risk if they include ESG factors—including climate-related risk considerations—in the financial evaluation of plan investments. ICI submitted a letter in support of the Proposed Rule.[4]

DOL also issued the RFI in response to the Executive Order. The RFI is broadly drafted and addresses ERISA plans, non-ERISA plans for federal employees (Federal Employees' Retirement System (FERS), including the Thrift Savings Plan (TSP)), as well as IRAs (including state sponsored automatic-IRA arrangements). Throughout the RFI, DOL suggests various agency actions it could take to address climate risk. For example, it suggests collecting data from ERISA plans on climate-related financial risks to retirement plans and their service providers, collecting this information through the Form 5500 or otherwise. DOL suggests that it could publish its own data on climate-related financial risks for use by plan fiduciaries. DOL also suggests that it could have a role in providing education to plan participants or IRA owners regarding climate-related financial risks, including warnings about greenwashing.

ICI Comments

Our comment letter makes the following recommendations regarding the RFI:

- The most effective action DOL can take is to finalize its Proposed Rule to clarify the way ERISA fiduciaries may consider ESG factors—such as climate-related risk factors—in evaluating plan investments.
- The Securities and Exchange Commission (SEC) has proposed new climate risk disclosures from corporate issuers and is expected to propose new requirements for funds and investment advisers, which may also include new climate risk disclosure requirements.[5] Once finalized, we expect these initiatives to produce additional information that would be available to investors, including plan fiduciaries.
- In general, we have the following three overarching concerns with the potential courses of action that DOL suggests in the RFI:
    - that the potential courses of action will lead to an overemphasis of climate risk considerations over other legitimate and critical risk considerations in a manner that would mislead plan participants and cause ERISA fiduciaries to place undue focus on climate risk relative to other important risk considerations;
    - that the RFI questions wrongly imply that there is an agreed-upon approach or metrics for assessing climate risks, and an agreed upon hierarchy of their importance; and
    - that the potential courses of action, including requiring plan reporting, would be premature and unhelpful and would result in the same sequencing problems experienced by the European Union.

- We strongly urge DOL not to collect additional information from ERISA plans on climate-related financial risk at this time. Doing so will increase the administrative burdens on plans and plan service providers and increase the threat of litigation against plans. Ultimately, it will harm the ability of US workers to save for retirement, by increasing plan participants' costs and discouraging plan adoption.
- Non-ERISA savings arrangements, such as IRAs, are not more vulnerable to climate risk. Investment managers generally consider climate risk for the assets they manage, whether ERISA or non-ERISA. The fact that ERISA's prudence and loyalty obligations do not apply to IRAs should have no impact on whether investment decision-making involving IRAs incorporate climate risk as part of its investment analysis.
- DOL should consider the efficiency of sponsoring and publishing its own climate risk research to be used by plan fiduciaries when other more uniformly used sources are available.

- Regarding potential education on climate-related financial risk, DOL should not overemphasize climate risk to the detriment of participant understanding of other risks. This has the potential to mislead, rather than help, participants.

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endnotes

[1] For a summary of the RFI, see ICI Memorandum No. 34033, dated February 14, 2022, available at https://www.ici.org/memo34033.

[2] Executive Order on Climate-Related Financial Risk (May 20,2021) available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/. Section 4a of the EO directs DOL to "identify agency actions that can be taken under [ERISA], [FERS], and any other relevant laws to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk." Section 4c of the EO directs DOL to "assess — consistent with the Secretary of Labor's oversight responsibilities under the Federal Employees' Retirement System Act of 1986 and in consultation with the Director of the National Economic Council and the National Climate Advisor — how the Federal Retirement Thrift Investment Board has taken environmental, social, and governance factors, including climate-related financial risk, into account."

[3] For a summary of the Proposed Rule, see ICI Memorandum No. 33832, dated October 18, 2021, available at https://www.ici.org/memo33832. The Proposed Rule would amend two rules finalized at the end of the Trump Administration, "Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights."

[4] For a summary of ICI's letter, see ICI Memorandum No. 33954, dated December 14, 2021, available at https://www.ici.org/memo33954.

[5] For a summary of SEC's proposal, see ICI Memorandum No. 34086, dated March 24, 2022, available at https://www.ici.org/memo34086.
