Public comments overwhelmingly support the US Labor Department proposed rule addressing the inclusion of ESG criteria and proxy voting in ERISA-governed retirement plans

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Introduction

In October 2021, the US Department of Labor (DOL) announced a proposed rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, addressing the inclusion of environmental, social and governance (ESG) criteria and proxy voting considerations in ERISA-governed retirement plans. During the comment period, which ended on December 13, 2021, 144 letters were submitted on behalf of institutions, including investors, companies, advocacy groups and public officials. There were also over 22,000 comments from individuals, an unusually large number reflecting strong public interest in this proposal. The following is an analysis of the comment letters. Ninety-seven percent of commenters supported DOL reversing the 2020 rules and clarifying that the use of ESG criteria in investment selection and proxy voting is consistent with fiduciary obligations under ERISA.

In this brief, we present a numerical analysis of the public comments and discuss common themes. Also included are selected statements from the letters representing the most commonly expressed views.

Commenters overwhelmingly supported the proposal, which would revise DOL's two 2020 rules, Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights. The proposal removes the term pecuniary, introduced in the *Financial Factors* rule, and rejects the assertion that ESG criteria are not relevant to investment selection, returning to the longstanding precedent that all relevant factors must be considered. It also clarifies that prudent proxy voting is a part of the fiduciary's remit, removing language introduced in the *Fiduciary Duties* rule that constrained shareholder proxy voting by ERISA funds.

Commenters argued that most asset managers already recognize that climate and other ESG factors belong in their financial analysis alongside other relevant information. Many applauded the proposed rule's acknowledgment that ESG factors "are no different than other 'traditional' material risk-return factors" and welcomed a reversal of the 2020 rules' framing.

Commenters largely supported the proposal's revised language on qualified default investment alternatives (QDIAs). The proposed changes would allow ESG funds to be used as QDIAs, provided they are selected using a prudent process and are determined to best serve the needs of the beneficiaries.

Background

In October 2015, DOL issued a bulletin affirming that fiduciaries of private-sector retirement plans "need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social or other such factors." In addition, the bulletin stated, "Environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment." In 2016, DOL issued guidance clarifying that proxy voting was consistent with fiduciary duty.

In 2020, the prior administration issued the *Financial Factors* and *Fiduciary Duties* rules that created barriers to consideration of ESG factors in ERISA plans, especially for QDIAs, and increased regulatory burdens on fiduciaries when voting proxies.

On March 10, 2021, DOL stated that it would not enforce the two 2020 rules. Following this non-enforcement statement, the White House issued Executive Order 14080 directing DOL to "identify actions to … protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk" and "to suspend, revise, or rescind" the two 2020 rules. DOL published the proposed rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," in the Federal Register on October 14, 2021.

Findings

As noted above, 97% of commenters supported the DOL reversing the 2020 rules and clarifying that the use of ESG criteria in investment selection and proxy voting is consistent with fiduciary obligations under ERISA.

This analysis divides the comments into two primary categories: institutional comments and individual comments. Institutional comments are letters from entities including financial services firms, corporations and advocacy organizations. Individual comments are letters submitted by people in their own name or via organized petition.

Institutional comments

Of 144 institutional letters, four were submitted by corporations, 53 by asset managers or other financial service firms, and 87 by advocates (institutions including academics, lawyers, investor organizations, NGOs, public officials, trade groups, and labor organizations).

Eighty-three percent of these institutional letters were supportive of the proposed rule, with some of these recommending modifications, 14% were opposed, and 3% were mixed. All the letters from corporations and financial services were in favor of the proposed rule. Of the 87 letters from advocates, 63 were supportive (some recommending modifications), 20 were opposed, and four were mixed.

Individual comments

Individuals submitted over 22,000 comments, an unusually high level of participation reflecting a deep public interest in this proposal. Of these, 97.4% were in support of the proposed rule, with just 2.6% in opposition. All responses submitted via petitions were in favor of the proposal, with a total of 21,445 signatures. The majority of non-petition individually submitted comments (579 of 736) were opposed to the proposed rule. Forty-seven of these comments were unclear or did not specifically address the proposed rule.

Letter Excerpts

The following are a sample of excerpts from a range of organizations that illustrate common topics raised in the letters.[1] The full comment letters are linked below. The first selection includes statements in support of the proposal. The second selection includes a statement that supports the proposal, while recommending changes.

Representative statements in support

Boston Trust Walden: "The Proposed Rule clears the way for investment managers to consider ESG factors precisely because of risk, return, and fiduciary considerations. The Proposed Rule's recognition that ESG factors "are no different than other 'traditional' material risk-return factors" aligns with Boston Trust Walden's investment philosophy. Within the Proposed Rule, we are particularly supportive of paragraph (b)(4) which, as the preamble states, "clarifies and confirms that a fiduciary may consider any factor material to the risk-return analysis, including climate change and other ESG factors."

Investment Company Institute: "We also appreciate that the Department proposes to remove the 2020 Rule's restriction on qualified default investment alternatives (QDIA)… We agree with the Department's conclusion that if a fiduciary selects an investment option in accordance with the duties of prudence and loyalty as described in the Proposed Rule, and the investment meets the protective standards set out in the Department's QDIA regulation, there is no reason to foreclose plan fiduciaries from considering the fund as a QDIA simply because it expressly considers climate change or other ESG factors."

Mercer Investments: "We are broadly supportive of the regulatory direction provided in the Proposal, which we view as consistent with the core principles expressed in regulatory guidance since 1994's Interpretive Bulletin 94-1. The Proposal also aligns with the increasing recognition by investors that environmental, social and corporate governance (ESG factors) may be relevant to investment performance, and treats the investment implications of ESG no differently than other potentially significant risk/return factors. To the extent there has been a misperception among ERISA fiduciaries about the current regulation's position on the financial impact of ESG factors, we believe the Proposal could provide a helpful clarification."

[1] We do not represent any of these organizations. The quotations below are their views, not those of the authors of this paper.

Representative statement with proposed changes

Council of Institutional Investors: "Although CII's membership is generally supportive of the prudent consideration of ESG factors, we also believe that fiduciaries are in the best position to determine what factors are economically material to any particular investment. This fundamental principle is at the core of the fiduciary provisions of Title I of ERISA. We, therefore, encourage DOL to ensure that the final rule is clear that the agency does not intend to substitute its own judgment for that of fiduciaries."

Conclusion

The comment file for DOL's proposed rule on ESG criteria and proxy voting in ERISA-governed retirement plans supports the Department moving forward to finalize this rule.

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