accountability counsel

July 29, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

RE: Proposed rule on Financial Factors in Selecting Plan Investments (RIN 1210-AB95)

To whom it may concern:

On behalf of Accountability Counsel, we are submitting comments in response to the Department of Labor's (DOL) Proposed Rule on Pension Plan Fiduciaries' duties under the Employee Retirement Income Security Act of 1974 ("ERISA") when incorporating Environmental, Social, and Governance ("ESG") factors in investments, which was published in the Federal Register on June 30, 2020. Accountability Counsel has serious concerns regarding the impact that the Proposed Rule will have on fiduciaries' ability to consider ESG factors in pension fund investments.

Accountability Counsel is an international non-profit organization that advocates for people harmed by internationally financed projects and works to strengthen accountability mechanisms across institutions. Our work has illustrated that international financial institutions can manage not only human rights risks but also financial risks by applying ESG policy and accountability frameworks to their investment portfolios. We believe that pension fund fiduciaries can likewise mitigate risks by making responsible investments that appropriately consider ESG factors.

The proposed rule is not forward-thinking and does not support current investment trends. Over the past few years, there has been a drastic increase in ESG-based investing, including a fourfold increase from 2018 to 2019 alone.[1] By strictly consigning ESG considerations to a "tie-breaker" role, the proposed rule suggests that fund managers are flouting their fiduciary duties and investing in ESG factors to advance non-pecuniary, political reasons. However, the reason for the increase in ESG due diligence is simple - not only are investments that integrate ESG considerations as profitable as other investments, but as the recent COVID crisis has shown, they are also more resilient during market downturns.[2] Thus, contrary to the assumption in the proposed rule that ESG strategies sacrifice financial returns, factoring in ESG considerations serves to mitigate longer-term investment risks.

Where investment managers proactively seek to understand potential risks, and build tools to prepare for and respond to unforeseen or unintended adverse environmental or social impacts caused by investments, they shield investment assets from financial and reputational liabilities.

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[1] As recognized in the Proposed Rule. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (proposed June 30, 2020).

[2] SUSTAINABLE INVESTING: RESILIENCE AMID UNCERTAINTY, BLACKROCK (2020) 3, https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf.

In fact, in a 2018 survey by US SIF, when asked about their motivations for incorporating ESGs into their investment process, three-quarters of fund managers cited their desire to increase returns, and fifty-eight percent cited their fiduciary duty.[3]

The proposed rule places substantial burdens on fiduciaries who want to utilize ESG investment options. The proposed rule also requires that fiduciaries document and justify their reasoning whenever they utilize ESG investments. This additional requirement acts as an unnecessary barrier to selecting ESG investments by treating them as suspect. The federal government should not punish fund managers for using all the information available to them to make the most profitable, responsible investments they can. Indeed, this is precisely the kind of behavior that the government should be promoting.

Relegating ESGs to suspect "tie-breakers" and improperly assuming investment managers utilize ESGs to further their own non-pecuniary, political agenda is misguided and dangerous. Rather than protecting pension funds from poor fiduciary decision-making, the proposed rule may put funds at even greater risk by incentivizing fiduciaries to choose riskier options that don't properly account for ESG factors.

Conclusion

The proposed rule mischaracterizes ESG integration and fails to distinguish between ESG integration and economically targeted investing. If the Proposal is finalized in its current form, we are concerned that fiduciaries will struggle to fulfil their obligations to integrate all financially material risk factors while also trying to respond to the language in the Proposal that appears aimed at preventing fiduciaries from taking account of these same risks.

Institutional investors have a duty to act in the best long-term interests of their beneficiaries. If the proposed rule goes into effect, however, it will undermine the long-term best interest of pension plan beneficiaries. We therefore support the comment submitted by Jon Lukomnik of Sinclair Capital, and over 25 other signatories from civil society, academia, and the private sector, and we strongly urge the Department of Labor to withdraw the proposed rule and replace it with a rule that does not undermine ESG risk factors.

Respectfully Submitted,

Accountability Counsel
1875 Connecticut Ave NW
10th Floor
Washington, DC 20009
Web: accountabilitycounsel.org

[3] 2018 Report On US Sustainable, Responsible, and Impact Investing Trends, US SIF (2018).