of the more than 8,700 public comments on the Department of Labor's (DOL) proposed rulemaking on the consideration of environmental, social and governance (ESG) ...

Aug. 20, 2020

Several investor organizations and financial industry firms today released an analysis of the more than 8,700 public comments on the Department of Labor's (DOL) proposed rulemaking on the consideration of environmental, social and governance (ESG) considerations in ERISA-governed retirement plans. There is overwhelming opposition to the "Financial Factors in Selecting Plan Investments" proposal.

Of the 8,636 total comments in the analysis after removing the 101 extension requests and duplicates, more than 95 percent of comments opposed the DOL's proposed rulemaking. Only 4 percent of comments expressed support, and 1 percent expressed neutral views or recommended changes without clearly expressing support or opposition. Public comments were overwhelmingly opposed across individuals, investment-related groups, and non-investment-related groups. The 30-day public comment period ended on July 30.

Participating organizations in the categorization and analysis of public comments include US SIF: The Forum for Sustainable and Responsible Investment, Ceres, Intentional Endowments Network (IEN), the AFL-CIO, the Interfaith Center on Corporate Responsibility (ICCR), Impax Asset Management and Morningstar, Inc. The group summarized the comments and the constituencies that made them to provide transparency and help the public, affected parties and regulators draw appropriate conclusions from the thousands of comments submitted.

Key findings of the analysis include:

- **The vast majority of commenters were individuals, reflecting significant grass-**

rule, yet comments from this smaller group exhibited the highest levels of support. Among the 120 comments from non-investment-related firms and organizations, 37 percent of comments were in favor, a 57 percent clear majority of comments were opposed, and 6 percent were mixed or neutral.

The analysis also surfaced key themes among opposing comments:

- DOL's proposal does not make a case for a problem that requires this rulemaking and, in particular, includes no evidence that fiduciaries choose investments that are likely to have lower returns in exchange for ESG criteria being considered.
- The proposed rule largely dismisses the financial materiality of ESG issues and ignores research regarding the materiality of ESG in financial decision-making.
- The proposed rule is based on a flawed and unsupported assumption that ESG funds give up financial returns in favor of "non-pecuniary" rewards.
- Rather than subjecting fiduciaries who wish to utilize ESG criteria to additional burdens and restrictions, incorporating ESG factors into investment decisions should be considered a part of fiduciary duty.
- Excluding ESG investments from Qualified Default Investment Alternatives (QDIAs) in Defined Contribution plans is inappropriate and could harm plan participants/beneficiaries
- Singling out ESG for a heightened level of scrutiny and restriction is inappropriate.

US SIF Chief Executive Officer Lisa Woll said: "The overwhelming response reflects the growing interest in and asset flows to sustainable investing. Professionally managed assets utilizing one or more sustainable investment strategies grew 38% from 2016-2018 to more than $12 trillion. Generating more hurdles to the incorporation of ESG criteria will have a chilling effect, leading to plan participants losing access to ESG options—many of which have outperformed their indices over time and especially during the market shock related to COVID 19. Limiting plan participant options and diversification opportunities should not be the role of the

AFL-CIO Deputy Director of Corporations and Capital Markets Brandon Rees said: "This proposed rule will create unnecessary and burdensome regulations that will discourage fiduciaries from making prudent investments that generate collateral benefits for communities and economic growth for working people. We request that the Department of Labor withdraw this proposed rule in its entirety, or at least schedule a public hearing to be conducted virtually in accordance with COVID-19 public health guidelines."

Impax Asset Management LLC President Joe Keefe said: "Essentially, DOL is proposing to substitute its judgment, a judgment which may be more subject to political influences, for the judgment of investment practitioners on the ground who possess the responsibility and the expertise to design and administer retirement plans. The proposed rule effectively substitutes activist, big government fiat in place of the market."

Morningstar Head of Policy Research Aron Szapiro said: "As we said in our comment letter, the Department of Labor's approach is out of step with the increasingly mainstream practice of incorporating ESG considerations into investment research, and this analysis reinforces that reality. The rule as proposed would take away important options from retirement investors and deny them access to analysis on mitigating ESG risks."

Intentional Endowments Network Co-founder and Executive Director Georges Dyer said: "Endowments have increasingly seen the benefits of ESG investing to reduce portfolio-level and system-level risk, enhance returns, and preserve capital — and as a result, there is growing interest in exploring the integration of ESG options into their retirement plans. IEN's Sustainable Retirements Initiative supports fiduciaries in their consideration of all financially material factors, including ESG factors, into their investment processes. The DOL's proposal is likely to have the perverse effect of dissuading fiduciaries, even against their better judgment, from