THE U.S. IMPACT INVESTING ALLIANCE
Private Capital for Public Good

Factsheet on Recommended Regulatory Action to Support President Biden's Climate Agenda
U.S. Impact Investing Alliance | February 2021

Summary: The U.S. Impact Investing Alliance is supportive of President Biden's Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (E.O. 13990), which represents an important step forward in the fight for climate action. This order "directs all executive departments and agencies (agencies) to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and to immediately commence work to confront the climate crisis."

In accordance with the President's Order, the Office of Management and Budget, along with the Departments of Labor and Treasury and the Securities and Exchange Commission, should review the following five recent agency actions that impede the ability of investors to account for the myriad impacts of the climate crisis.

- U.S. Department of Labor, RIN 1210-AB95, "Financial Factors in Selecting Plan Investments"
- U.S. Department of Labor, RIN 1210-AB91, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights"
- U.S. Securities and Exchange Commission, RIN 3235-AM50, "Exemptions From the Proxy Rules for Proxy Voting Advice"
- U.S. Securities and Exchange Commission, RIN 3235-AM49, "Procedural Requirements and Resubmission Thresholds under Exchange Act"
- U.S. Treasury Department, Office of the Comptroller of the Currency, RIN 1557-AF05, "Fair Access to Financial Services"

Investors play an increasingly important role in promoting environmental, social and economic sustainability. The practices developed in recent years – termed variously as impact investing, ESG investing or sustainable finance – help to realign market incentives to account for positive and negative externalities, including those that contribute to climate change. These practices are rooted in robust data and evidence that demonstrate the financially and socially material impacts of everything from carbon emissions to harmful labor practices.

Unfortunately, a number of recent Federal regulations threaten to limit investors' abilities to consider these types of impact factors. These regulations would codify outdated and backwards notions of financial materiality, fiduciary duty and portfolio theory. In addition to creating uncertainty, they each pose a threat to the country's long-term environmental and economic resilience. If they are allowed to stand, markets would be left ill-equipped to respond to the pressing global challenges we face, and the rights of investors, workers and other stakeholders would be suppressed. Reversing these harmful actions is an essential step toward ensuring that America's capital markets are aligned with the urgent work of combatting the climate crisis.

More detail on each of these rulemakings is provided below.

U.S. Department of Labor

In 2020, the previous administration rushed to finalize two new rules that will discourage the consideration of long-term systemic risks and factors – such as those related to the environment and climate crisis – within retirement and pension plans regulated under the Employee Retirement Income Security Act (ERISA). These actions were taken in response to Executive Order 13868 of April 10, 2019 ("Promoting Energy Infrastructure and Economic Growth"), which President Biden has now revoked. The Alliance encourages the Biden Administration to examine these actions under the new Executive Order that conflict with the Administration's goals to "bolster resilience to the impacts of climate change."

Financial Factors in Selecting Plan Investments
Current Phase: In effect as of January 12, 2021
Concern: Would make it more difficult for ERISA-regulated fiduciaries to select ESG strategies for retirement and pension plans.
Recommendation: Clarify that ESG factors are considered "pecuniary" and allow ESG investments to be included as Qualified Default Investment Alternatives.

Fiduciary Duties Regarding Proxy Voting and Shareholder Rights
Current Phase: In effect as of January 15, 2021
Concern: Would institute burdensome documentation requirements to discourage ERISA-regulated fiduciaries from voting proxies on ESG issues. Could actually cause a breach of fiduciary duty in discouraging engagement on material issues.
Recommendation: Revise or rescind the rule as necessary to ensure that ERISA-regulated fiduciaries are not discouraged from voting proxies on issues related to factors related to environmental and other long-term considerations.

Additional Resources:

- Alliance Public Comments on Financial Factors rule
- Alliance Public Comments on Fiduciary Duties Rule
- "Why Recent Regulatory Actions Will Harm 401k Plan Sponsors, Participants," Fran Seegull, August 25, 2020.
- "US SIF, Investor Organizations And Financial Industry Firms' Analysis Of Public Comments On Department Of Labor ESG Proposal Shows Landslide Of Opposition," August 20, 2020.

U.S. Securities and Exchange Commission

The previous administration instituted two rulemakings that significantly undermine shareholder engagement rights. Shareholders play a vital role in holding corporations accountable on issues related to the environment and climate change by putting forth shareholder proposals and voting proxies on relevant issues. Accordingly, these two rules from the SEC threaten key private sector mechanisms for promoting accountability on environmental issues in the private sector, something the Biden Administration should act quickly to rectify.

Exemptions From the Proxy Rules for Proxy Voting Advice
Current Phase: In effect as of November 2, 2020
Concern: Codifies proxy voting advice as a solicitation and encourages prior review of proxy voting

materials by issuers, undermining the independent process.
Recommendation: Consider rescinding or revising the rule to ensure the independence and integrity of the proxy voting system is maintained.

Procedural Requirements and Resubmission Thresholds under Exchange Act
Current Phase: In effect as of January 4, 2021
Concern: Raises the ownership and support threshold requirements for submitting and resubmitting shareholder proposals. The new requirements for resubmitting proposals are especially concerning, given that ESG proposals tend to take time to gain traction and support.
Recommendation: Consider rescinding or revising the rule to protect smaller shareholder engagement with corporations, and specifically remove the resubmission barriers to ensure that shareholder proposals growing in support are not arbitrarily excluded from the process altogether.

Additional Resources:

- Alliance Comments on Proxy Rules and Procedural Requirements rules
- SEC Commissioner Allison Herren Lee's Statement on the Amendments to Rule 14a-8, September 23, 2020.

U.S. Department of Treasury

In 2020, the Office of the Comptroller of the Currency put forth a new rule that discourages financial institutions from considering material factors and risks, such as climate change, in their lending and investment decisions. Instead of ensuring that all consumers have fair access to financial services, this rule unnecessarily exposes banks—and therefore the financial system—to systemic risks.

Fair Access to Financial Services
Current Phase: Finalized as of January 14, 2021; not yet in effect
Concern: The rule would essentially require banks to finance the fossil fuel industry, despite the significant material risks posed by such transactions.
Recommendation: Delay the effective date (currently set for April 1, 2021) and rescind the rule altogether.

Additional Resources:

- Waters and 22 Committee Democrats Urge OCC to Withdraw Proposal to Force Banks to Serve Gun Manufacturers and Fossil Fuel Companies, December 29, 2020.

About the U.S. Impact Investing Alliance

The U.S. Impact Investing Alliance is nonprofit organization committed to catalyzing the growth of impact investing in the United States. Members of the Alliance's boards and councils include individual and institutional investors collectively owning hundreds of billions of dollars of invested assets, in addition to asset and fund managers collectively managing trillions of dollars in assets. The Alliance defines impact investing broadly to include those investments that create financial returns alongside measurable and positive social, economic or environmental impacts across asset classes. Learn more at www.impinvalliance.org.