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

Re: RIN 1210-AC03: *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*

To whom it may concern:

The National Association of Manufacturers (“NAM”) appreciates the opportunity to provide comment to the Department of Labor (“DOL”) on RIN 1210-AC03, the proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.¹

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states—and the millions of people who make things in America. More than two-thirds of manufacturing workers participate in a workplace retirement plan.² These employees depend on sound investment decisions made on their behalf for a secure retirement.

The sole duty of plan managers making investment and proxy voting decisions in both defined benefit and defined contribution plans is to provide long-term returns that will support millions of manufacturing workers and their families in their retirement years. As such, the NAM was a strong supporter of the two rules the DOL finalized in 2020 to clarify that fiduciaries under the Employee Retirement Income Security Act (“ERISA”) have an obligation to act solely in the interest of plan beneficiaries and for the exclusive purpose of providing benefits to participants and their families.

These regulations—the November 2020 rule on Financial Factors in Selecting Plan Investments³ and the December 2020 rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights⁴—provided clarity to ERISA fiduciaries on how to appropriately incorporate pecuniary environmental, social, and governance (“ESG”) factors into their investment decisions and outlined the due diligence required of fiduciaries when exercising proxy voting rights, including when relying on third-party service providers like proxy advisory firms. The rules’ protections were designed to ensure that

¹ *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57272 (14 October 2021). RIN 1210-AC03, available at <https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf>.

² *National Compensation Survey: Employee Benefits*. Bureau of Labor Statistics, March 2018. Available at <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.pdf>.

³ *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (13 November 2020). RIN 1210-AB95, available at <https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf>.

⁴ *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 81658 (16 December 2020). RIN 1210-AB91, available at <https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf>.

ERISA fiduciaries continue to act in the best interests of the millions of manufacturing workers who depend on their pensions for a secure retirement.

In our comments on the 2020 rules, we said that the financial factors rule would “protect plan participants by ensuring that ERISA fiduciaries are making reasoned investment decisions based on all material information, including pecuniary ESG factors, available to them”⁵ and that the proxy voting rule would “ensure that manufacturing workers depending on their pensions for a secure retirement are protected when their plan managers are considering proxy votes.”⁶ The NAM continues to support these important goals, and we are disappointed that the DOL has proposed to rescind several critical protections from the 2020 rules. We are further concerned that the proposed rule appears to define most ESG factors as *de facto* relevant to ERISA fiduciaries’ investment decisions, irrespective of their relationship to the financial performance of the pension plans fiduciaries are charged with managing.

The NAM respectfully encourages the DOL to reconsider its proposed changes to the 2020 financial factors and proxy voting rules. In particular, we support retaining the financial factors rule’s emphasis on the importance of basing investment decisions on pecuniary considerations, as well as the proxy voting rule’s requirements for fiduciaries relying on proxy advisory firms. Maintaining the 2020 rules would protect manufacturing workers by ensuring that ERISA fiduciaries focus solely on pension plan participants’ long-term financial best interests, defined by the Supreme Court to encompass only pecuniary goals and benefits.⁷

I. Prudence and Loyalty in Selecting Plan Investments

The recent rise in the popularity of investing based on ESG factors that may or may not be related to pension plan participants’ long-term financial best interests highlights the need for enhanced clarity from the DOL on ERISA fiduciaries’ duties of prudence and loyalty when selecting plan investments. The NAM is deeply concerned that the proposed rule would rescind the 2020 financial factors rule’s “pecuniary factors” test and prioritize ESG investing strategies over the retirement security of pension plan participants and beneficiaries.

A. The proposed rule eschews the 2020 financial factors rule’s content-neutral emphasis on pecuniary factors in favor of a “thumb on the scale” approach in support of ESG investing.

The 2020 financial factors rule requires that an ERISA fiduciary’s evaluation of an investment or an investment course of action be based only on “pecuniary factors.”⁸ It further clarifies that fiduciaries “may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives” nor “sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals.”⁹ Pecuniary factors are defined as those which the fiduciary prudently expects “to have a material effect on the risk and/or return of an investment based on appropriate investment horizons.”¹⁰ The NAM strongly supported

⁵ NAM Comments on RIN 1210-AB95 (30 July 2020). *Available at* <https://documents.nam.org/tax/namesgcomments.pdf>.

⁶ NAM Comments on RIN 1210-AB91 (5 October 2020). *Available at* <https://documents.nam.org/tax/namdolproxycments.pdf>.

⁷ *See, e.g., Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).

⁸ 29 CFR 2550.404a-1(c)(1).

⁹ *Ibid.*

¹⁰ 29 CFR 2550.404a-1(f)(3).

the 2020 rule on the grounds that a focus on pecuniary factors is the appropriate standard for ERISA fiduciaries charged with protecting the retirement security of millions of manufacturing workers.¹¹

The proposed rule claims that it is designed to clear up any “uncertainty surrounding whether a fiduciary under ERISA may consider ESG and other factors in making investment and proxy voting decisions” under the pecuniary factors standard.¹² The rule repeatedly cites “concerns” and “confusion” raised by certain stakeholders regarding “whether climate change and other ESG factors may be treated as ‘pecuniary’ factors under the [financial factors rule].”¹³

Yet the 2020 rule is quite clear in this regard. The financial factors rule is explicit that “there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories.”¹⁴ It further “expressly acknowledge[s] that ESG factors and other similar considerations may be pecuniary factors and economic considerations”¹⁵ and states that these issues “should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments.”¹⁶

Similarly, the proxy voting rule “recognizes, rather than ignores, the economic literature and fiduciary investment experience that show a particular ‘E,’ ‘S,’ or ‘G’ consideration may present issues of material business risk or opportunities.”¹⁷ It also clarifies that, under the 2020 rules, “the relevant question is not whether a factor under consideration is ‘ESG,’ but whether it is a pecuniary factor relevant to the exercise of a shareholder right or to an evaluation of the investment or investment course of action.”¹⁸

In our comments on the financial factors rule, we applauded these clarifications, noting that “ESG factors may be material to an investment or an investment course of action” and that the NAM “appreciates that the proposed rule is explicit that in such instances an ERISA fiduciary can, and should, consider those factors in determining how to act in plan beneficiaries’ best interests.”¹⁹ Manufacturers are leaders in combatting climate change, ensuring clean air and water, promoting diversity and inclusion, providing workforce development and training opportunities, and more—and the NAM believes that these efforts, to the extent relevant to a business’s financial performance, can be appropriate pecuniary considerations for ERISA fiduciaries.

In short, it is abundantly clear that the 2020 financial factors rule allows for ERISA fiduciaries to make investment and proxy voting decisions based on ESG factors that present material business risks and opportunities and are relevant to a company’s financial performance. Yet the proposal alleges that the 2020 rule is “putting a thumb on the scale against the consideration of ESG factors,

¹¹ See, e.g., NAM Financial Factors Letter, *supra* note 5, at 2 (“ERISA fiduciaries cannot select investments based on non-pecuniary ESG factors when plan participants’ retirement savings are at stake.”).

¹² Proposed Rule, *supra* note 1, at 57275.

¹³ *Ibid.*

¹⁴ Financial Factors Rule, *supra* note 3, at 72848.

¹⁵ *Id.* at 72855.

¹⁶ *Id.* at 72847.

¹⁷ Proxy Voting Rule, *supra* note 4, at 81662 fn. 30.

¹⁸ *Ibid.*

¹⁹ NAM Financial Factors Letter, *supra* note 5, at 2.

even when those factors are financially material.”²⁰ In response, the proposal puts its own thumb on the scale, rescinding the financial factors rule’s guidance on pecuniary factors—a content-neutral analysis designed to help fiduciaries make investment decisions based on beneficiaries’ financial best interests—and replacing it with explicit endorsements of individual climate change and ESG factors that fiduciaries “may often” need to consider.²¹

The NAM is extremely concerned by the DOL’s explicit support for specific investing strategies and its willingness to eschew the 2020 rule’s content-neutral guidance in favor of a prescriptive ESG approach that could endanger the retirement security of pension plan participants and beneficiaries. The NAM respectfully encourages the DOL to maintain the 2020 financial factors rule’s guidance related to pecuniary factors and to reconsider the proposed rule’s explicit endorsement of ESG investing and the corresponding drastic changes to ERISA fiduciaries’ obligations to millions of manufacturing workers and their families.

B. The proposed rule endorses a specific, prescriptive, ESG-focused approach to ERISA plan managers’ fiduciary obligations.

ERISA fiduciaries’ duty of loyalty requires that they act with a “single-minded focus” on beneficiaries’ long-term best interests.²² Although, as noted, protecting beneficiaries’ long-term best interests may well include consideration of pecuniary ESG factors, many ESG-focused funds have a stated goal of subordinating investor return or increasing investor risk for the purpose of achieving political or social objectives. In such instances, pursuing an ESG fund’s social goals increases costs to plan participants and puts their retirement security at risk.

Moreover, investing and proxy voting decisions based on non-pecuniary ESG factors raise specific conflict-of-interest concerns in the ERISA context given that the political values on which these decisions are based are those of the plan manager rather than the views of any particular plan participant, or the participants as a whole. Non-pecuniary ESG investing and proxy voting decisions could involve the prioritization of plan managers’ political goals over the views of plan participants that may or may not hold the same values, as well as the subordination of the participants’ retirement savings goals in service of political pursuits.

Yet despite these clear risks to plan participants and beneficiaries—which the 2020 rule was designed to mitigate while still allowing for ESG investing that supports long-term investment returns—the proposed rule is explicit in its support for a new, prescriptive model for ESG investing by ERISA fiduciaries. The proposed rule would insert into an ERISA fiduciary’s investment prudence duties a *de facto* requirement that the fiduciary conduct “an evaluation of the economic effects of climate change and other environmental, social, or governance factors.”²³ It further would codify an itemized list of recommended ESG factors that the DOL considers to be appropriate for ERISA fiduciaries to consider; this extensive, prescriptive list would include factors such as: economic effects of climate change, physical and transitional risks of climate change, effects of climate-related regulations and policies, board composition, executive compensation, workforce diversity and inclusion, workforce training and skills development, equal employment opportunity, and labor

²⁰ Proposed Rule, *supra* note 1, at 57275.

²¹ See, e.g., Proposed Rule, *supra* note 1, at 57276 (“The Department proposes additional language in paragraph (b)(2)(ii)(C) specifying that consideration of the projected return of the portfolio relative to the funding objectives of the plan may often require an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action.”).

²² Financial Factors Rule, *supra* note 3, at 72848.

²³ Proposed Rule, *supra* note 1, at 57302 (paragraph (b)(2)(ii)(C)).

relations.²⁴ This level of specificity is especially concerning given that the investment duties regulation is otherwise focused on high-level best practices and broadly applicable due diligence requirements. The proposed rule cross-references this list elsewhere in the regulation, enmeshing ESG considerations throughout an ERISA fiduciary's decision-making process.²⁵ Fiduciaries are left with little choice but to interpret this approach as a mandate to incorporate ESG factors into investment decisions, irrespective of their materiality.

The investment duties regulation as currently constructed contains no specific recommendations with regard to fiduciaries' consideration of investment alternatives. Rather, fiduciaries are simply required to act in participants' and beneficiaries' best interests and with the requisite care, skill, prudence, and diligence. The proposed rule would add a new, extensive, explicit list of DOL-endorsed factors that fiduciaries would be encouraged to incorporate into their decision-making processes. The proposed rule notes that the Department would prefer to "avoid regulatory bias,"²⁶ but the DOL's biased, "thumb on the scale" in favor of these factors could not be clearer. This is all the more alarming given the clear risks that non-pecuniary ESG investing presents to plan participants and beneficiaries.

Manufacturing workers depend on pension plan managers' dedication to the principle that they "must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals."²⁷ The NAM is disappointed that the DOL has proposed to reorient fiduciaries' obligations, claiming to maintain the requirement that fiduciaries "may not subordinate the interests of the participants and beneficiaries"²⁸ while at the same time explicitly endorsing specific ESG investment criteria in the preceding paragraph.²⁹

The NAM respectfully encourages the DOL to reconsider its proposed changes to the 2020 financial factors rule. The 2020 rule was clear that ESG factors may be appropriately considered by ERISA fiduciaries to the extent they are financially material to an investment decision. Rather than clearing up "confusion" about the role of ESG issues in ERISA fiduciaries' decision-making processes, the proposed rule would explicitly elevate ESG above other considerations (as opposed to the 2020 rule's reliance on a content-neutral pecuniary vs. non-pecuniary analysis)—ultimately exposing plan participants' retirement security to unnecessary risk.

II. Proxy Voting and Exercise of Shareholder Rights

The NAM's comment letter in response to the 2020 proxy voting rule described the impact that proxy advisory firms can have on the corporate governance decisions of U.S. public companies and, correspondingly, on the retirement security of millions of pension plan participants and beneficiaries.³⁰ We continue to have significant concerns about proxy firms' conflicts of interests, one-size-fits-all approaches to corporate governance, lack of transparency, errors and misleading statements, resistance to engagement with public companies, and problematic "robo-voting" practices.³¹ The 2020 rule recognizes that proxy firms "now play a more significant role in the proxy

²⁴ *Id.* at 57302 (paragraphs (b)(4)(i-iii)).

²⁵ *See, e.g., id.* at 57303 (paragraph (c)(2)).

²⁶ *Id.* at 57277.

²⁷ Financial Factors Rule, *supra* note 3, at 72848.

²⁸ Proposed Rule, *supra* note 1, at 57303 (paragraph (c)(1)).

²⁹ *Id.* at 57302 (paragraph (b)(4)).

³⁰ *See* NAM Proxy Voting Letter, *supra* note 6, at 6.

³¹ *See id.* at 7.

voting process”³² and thus endeavors to “better regulate proxy advisory firms and the proxy advisory process.”³³ The NAM appreciates that the proposed rule maintains several guidelines and requirements for ERISA fiduciaries utilizing the services of proxy advisory firms, and we respectfully encourage the DOL to maintain the full suite of critical protections in the 2020 rule if the new proposal is finalized.

A. The NAM supports the requirement that an ERISA fiduciary exercise prudence and diligence in its selection and monitoring of proxy advisory firms.

The 2020 proxy voting rule requires that ERISA fiduciaries “[e]xercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with exercises of shareholder rights.”³⁴ The NAM strongly supported this requirement, which reminds pension plan managers of the importance of appropriate oversight of proxy firms and other proxy service providers. The NAM appreciates that the proposed rule maintains this requirement, as it is critical that plan participants and beneficiaries be protected from proxy firms’ conflicts of interests, errors, and other methodological weaknesses by appropriate due diligence on the part of ERISA fiduciaries.

The proposed rule solicits feedback³⁵ on whether the requirement that fiduciaries exercise prudence and diligence in selecting and monitoring proxy service providers is necessary—as well as the related requirements that fiduciaries act solely in accordance with the economic interest of the plan, consider any costs involved, not subordinate the interests of plan participants and beneficiaries to unrelated goals, and evaluate the material facts that form the basis for proxy votes.³⁶ As we said in 2020, the NAM “strongly supports this due diligence framework, and we applaud the DOL for providing ERISA fiduciaries with a series of concrete steps they can take to protect pension plan participants when considering and casting proxy votes on their behalf.”³⁷ It is critical that this framework be maintained if the proposed rule is finalized, including the provision related to the selection and monitoring of proxy advisory firms.

B. The NAM supports the requirement that an ERISA fiduciary determine that a proxy firm’s guidelines are consistent with its fiduciary obligations before following the firm’s recommendations.

The NAM appreciates that the proposed rule maintains the 2020 proxy voting rule’s clarification that an ERISA fiduciary “may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without a determination that such firm or service provider’s proxy voting guidelines are consistent with the fiduciary’s obligations.”³⁸ As we discussed in our previous comments, it is crucial that ERISA fiduciaries have a full understanding of proxy firms’ voting guidelines and recommendations before relying on their advice.³⁹ This provision works in conjunction with the aforementioned requirement that fiduciaries prudently monitor proxy service providers, ensuring that plan managers understand the substance of the relevant voting policies as well as the firms’ processes and procedures.

³² Proxy Voting Rule, *supra* note 4, at 81660.

³³ *Id.* at 81669.

³⁴ 29 CFR 2550.404a-1(e)(2)(ii)(F).

³⁵ See Proposed Rule, *supra* note 1, at 57282.

³⁶ See *id.* at 57303 (paragraphs (d)(2)(ii)(A-E)).

³⁷ NAM Proxy Voting Letter, *supra* note 6, at 3.

³⁸ 29 CFR 2550.404a-1(e)(2)(iv).

³⁹ See, e.g., NAM Proxy Voting Letter, *supra* note 6, at 9.

The requirement that a fiduciary understand a proxy firm's voting guidelines should also reduce plan managers' overreliance on proxy firms' automatic vote submission services. By definition, outsourcing voting decisions to a proxy firm means that the fiduciary is not appropriately reviewing the application of the firm's voting guidelines to the proxy ballot issue under consideration. So-called "robo-voting" presents clear risks to plan participants and beneficiaries given proxy firms' one-size-fits-all policies—so the NAM supports the DOL's decision to maintain this critical provision.

The proposed rule solicits comments on whether it is necessary to require that plan managers determine that proxy firms' guidelines are consistent with ERISA's fiduciary obligations before relying on their recommendations.⁴⁰ Given the significant issues identified by the Department related to the services provided by proxy advisory firms, it is important that this requirement be maintained. It is critical that fiduciaries make certain that a reliance on proxy firms' recommendations does not endanger the retirement security of the plan participants and beneficiaries on whose behalf they are acting.

C. The NAM encourages the DOL to maintain the 2020 rule's requirement that an ERISA fiduciary prudently monitor the proxy voting activities of a proxy firm to which it has delegated proxy voting authorities.

The NAM is concerned that the DOL has proposed to eliminate the requirement that a fiduciary "prudently monitor" the activities of a proxy firm to which it has delegated proxy voting authorities.⁴¹ This provision requires a plan fiduciary to verify that the firm's activities are "solely in the interests of the participants and beneficiaries," "for the exclusive purpose of providing benefits to participants and beneficiaries," and "prudently designed to serve the plan's economic interest."⁴² The rule proposal states that the DOL feels these requirements are redundant with the general provision on fiduciaries' selection and monitoring obligations for third-party service providers, including proxy firms.⁴³

The NAM appreciates that the DOL attempts to clarify that "[t]he revised text does not represent a change in the Department's view or requirements under the current regulation" with respect to the prudent monitoring requirement.⁴⁴ The NAM is hopeful that, if finalized, the proposed rule is implemented in such a way that supports this interpretation. However, we would prefer to maintain the 2020 rule's explicit requirement that fiduciaries closely monitor proxy firms that exercise delegated voting authority on the plan's behalf. The proposed rule expresses the DOL's concern that the provision may imply "special obligations above and beyond the statutory obligations of prudence and loyalty"⁴⁵—but the NAM believes it is reasonable and justified to single out delegated voting authority as particularly deserving of due diligence and prudent monitoring.

Though the general requirement to monitor service providers is broadly applicable, fully outsourcing proxy voting decisions and the execution of proxy votes (both of which are common under proxy firms' "robo-voting" services) raises specific concerns for prudent fiduciaries. It is appropriate that the investment duties regulation remind ERISA fiduciaries of their obligations in such scenarios in order to ensure that plan participants are protected when critical decisions are left to third parties that do not have the same fiduciary obligations as plan managers. As such, the NAM respectfully encourages the DOL to maintain this aspect of the 2020 proxy voting rule.

⁴⁰ See Proposed Rule, *supra* note 1, at 57282.

⁴¹ 29 CFR 2550.404a-1(e)(2)(iii).

⁴² 29 CFR 2550.404a-1(e)(2)(i-ii); 29 CFR 2550.404a-1(e)(3).

⁴³ See Proposed Rule, *supra* note 1, at 57281.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

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The NAM appreciates that the DOL has proposed to maintain several important facets of the 2020 proxy voting rule. However, we are extremely concerned by the DOL's "thumb on the scale" approach in rescinding much of the 2020 financial factors rule and replacing its critical protections with a new approach to ERISA fiduciaries' duties and obligations to pension plan participants and beneficiaries. The NAM respectfully encourages the Department to reconsider these changes and instead to focus its efforts on safeguarding the retirement security of the millions of people who make things in America.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a prominent loop at the end of the last name.

Chris Netram
Vice President, Tax and Domestic Economic Policy