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Hon. Martin Walsh  
Secretary  
United States Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

Re: Consumers' Research Comment on Notice of Proposed Rulemaking in *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, RIN 1210-AC03

Dear Secretary Walsh:

Consumers' Research is an independent nonprofit organization which educates about and stands for the interests of American consumers, including the statutory right to a just and effective retirement system. We write in the interest of millions of American workers who depend on their pension plans for retirement. We oppose the rule proposed in the above-captioned matter because it would endanger the savings of workers and channel their funds to promote causes many of them oppose, all in violation of law.

### INTRODUCTION

This rulemaking is about whether employers and investment managers may divert the retirement savings of American workers to promote environmental and social change. The rulemaking is not about whether American businesses should use their own money to promote the policy views they favor. It is not about whether, when workers themselves manage their retirement portfolios, they should do so to promote their favored causes. Still less is it about the substance of the environmental and social changes that are sought. It raises just one question: should employers and investment managers decide for workers whether and how to channel their money to support change?

Congress has answered that question in the negative. In enacting the Employee Retirement and Income Security Act of 1974 (ERISA), Congress recognized that for many Americans, the best way to save for retirement is to work together with colleagues and employers through an employee pension plan. But doing so raises the prospect of divergent interests: employers often differ from their employees and employees often differ among each other about questions of all sorts, including important policy questions. Congress's solution was to focus the plans that operate under ERISA on one goal and one goal only: "the interest of participants in employee benefit plans and their

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beneficiaries.”<sup>1</sup> That is ERISA’s touchstone. ERISA’s focus on this purpose does not, of course, detract from all the other purposes Americans pursue with their business and personal finances; it means just that ERISA and the plans that operate under it do not have a role in pursuing these other purposes.

To achieve its goal, ERISA contains stringent restrictions on the fiduciaries who manage Americans’ retirement accounts. Fiduciaries must “discharge [their] duties ... solely in the interest of the participants and beneficiaries ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries,” in addition to “defraying reasonable expenses of administering the plan.”<sup>2</sup> These restrictions make ERISA fiduciaries unlike other investment managers. While Americans may turn to other managers to help them achieve a wide array of aims, the role of an ERISA fiduciary is much more focused. He or she has just one objective: securing financial benefits for the plan’s participants and beneficiaries.<sup>3</sup>

Over time, however, interest has grown in using the funds and securities in ERISA-regulated accounts for other purposes, and especially for the pursuit of environmental and social change and for corporate governance that promotes such change. This call to use retirement funds to promote change is part of a broader interest in ESG investing in many sectors of finance. Many of the desired changes have to do with public matters on which Americans disagree vehemently.

This growing interest gives cause for concern. First, pursuing goals other than financial benefits for workers and their beneficiaries can lead fiduciaries to make investments they would not make if financial benefits were their only objective, and this can lead to lower returns and thus greater risk of hardship in retirement. Second, because employees in nearly every workplace differ on the contested issues of the day, American workers may find the funds they have contributed toward their retirement being channeled toward causes they oppose.

In response to concerns that ERISA accounts were being used for other purposes than providing a secure retirement, in 2020 the Department issued two regulations. The first, *Financial Factors in*

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<sup>1</sup> 29 U.S.C. 1001(b).

<sup>2</sup> *Id.* 1104(a)(1); *see also id.* 1103(c) (“the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan”).

<sup>3</sup> *See, e.g., Fifth Third Bancorp*, 134 S. Ct. 2569, 2468 (2014).



*Selecting Plan Investments*<sup>4</sup> (the “Financial Factors Rule”), reiterated ERISA’s directive that fiduciaries must pursue only financial benefits for participants and beneficiaries; clarified that fiduciaries may not give any consideration to factors that do not bear on such benefits except as a tie-breaker between investments that equally achieve financial goals; explained that when fiduciaries use this tie breaker they must document the propriety of doing so; and required that investment approaches that rely on the tie breaker may not be used as a default option for participants who have not actively managed their portfolio. The second, *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*<sup>5</sup> (the “Proxy Voting Rule,” and together with the Financial Factors Rule the “2020 Rules”), clarified that fiduciaries must vote proxies appurtenant to shares held for ERISA participants and beneficiaries subject to the same duties of prudence and loyalty as apply to the making of investments; it also spelled out some of the contours of those duties.

On March 10, 2021, the Department announced a policy of non-enforcement of these regulations pending reconsideration.<sup>6</sup> On October 14 it issued the instant NPRM.

### SUMMARY OF ARGUMENT

The NPRM proposes a rule that violates ERISA and the Administrative Procedure Act (APA), breaks faith with the millions of Americans who depend on their pension plans to enjoy a secure retirement, and directs the funds of workers to the support of causes which they strongly oppose.

First, the NPRM violates the cardinal principle of reasoned decision-making: an agency must look at all aspects of a problem and offer reasons for its proposed solution. Here, the NPRM focuses on maximizing fiduciary discretion, but it does not even mention, let alone make peace with, its effects on the prime objective of the 2020 Rules: protecting participants and beneficiaries from losses occasioned by divided loyalty. That is an egregious failure because ERISA is designed to protect participants and beneficiaries; it cares about fiduciary discretion only as a vehicle for achieving the goal that the NPRM slights. But the NPRM devotes far more attention to the interests of fiduciaries than to the workers

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<sup>4</sup> 85 Fed. Reg. 72846.

<sup>5</sup> 85 Fed. Reg. 81658.

<sup>6</sup> News Release, “US Department of Labor Releases Statement on Enforcement of Its Final Rules on ESG Investments, Proxy Voting by Employee Benefit Plans” (Mar. 10, 2021), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310>.



they are duty-bound to protect; indeed, the NPRM does not even acknowledge the costs to workers of losing the 2020 Rules' protections and the upending of their decades of settled expectations about how pension plans work.

Moreover, the objective to which the NPRM silently sacrifices worker returns is not even real; while the Department cites anonymous stakeholders who claim that the 2020 Rules would have inhibited them from ESG investments, the Rules' regulatory text maintains a strict neutrality as among lawful investments and investment strategies, and their preambles reinforce that neutrality. A regulation aiming at a problem is "highly capricious if that problem does not exist."<sup>7</sup> Ironically, it is the NPRM that threatens to inhibit lawful investment strategies by placing a heavy thumb on the scale in favor of ESG investing; if the NPRM's concern about the 2020 Rules' prejudice against ESG investments is well-taken, then the NPRM's much stronger statements in favor of ESG investments make it prejudicial as well and thus arbitrary and capricious. The Rules' favoritism for ESG investing is all the more arbitrary because the Department ignores obvious regulatory options that would avoid this result.

Second, building on a mistaken provision of the current regulation, the NPRM proposes to set loose employers and other fiduciaries in many instances to make investment choices for reasons other than participant and beneficiary welfare. This tie-breaker provision, even in the current regulation, violates both ERISA's command of exclusive focus on participants and beneficiaries and its clear direction that benefits from the possession or operation of pension plans may in no circumstances inure to employers. The NPRM would make things even worse by stripping away the restrictions under which the 2020 Rules placed this provision—a change that, because use of the tie-breaker rule definitionally does not serve the financial interests of retirees, is guaranteed not to further ERISA's purposes.

Third, the NPRM for the first time would allow fiduciaries to default workers who do not actively manage their accounts into investment strategies that focus on ESG goals which those workers may well oppose. Due to the heightened vulnerability of America's least experienced investors and the large consequences of an error in setting the default option, the issue of default investing warrants the most strict adherence to ERISA's command of single-minded focus on participant and beneficiary welfare. The NPRM admits that default investors require special protection but then simply declines to give it, failing to grapple with or even acknowledge the harms that will ensue.

Fourth, the NPRM threatens to muddy the waters for voting proxies by removing the detailed standard that fiduciaries must follow in monitoring the proxy voting of investment managers and proxy advisory

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<sup>7</sup> *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988).



firms. The NPRM even impedes the ability of participants and beneficiaries to monitor their fiduciaries by removing the demand that fiduciaries keep records of the proxy votes they cast, in contravention of Congress's decision in ERISA to give workers all the tools they need to hold fiduciaries accountable.

Fifth, in a buried request for comment, the NPRM suggests deeming ESG factors *presumptively* material. But the Department has advanced not a single coherent reason for such a revolutionary change, and in any event its suggestion is far too vague to finalize.

Sixth and finally, contemporaneous official releases from the Department and the White House confirm that officials have made up their mind on this rulemaking. Their firm decision to rescind the 2020 Rules precludes their full and fair consideration of comments and would make the finalization of the NPRM a violation of the prejudgment doctrine.

These many defects in law and analysis mean that the Department cannot lawfully finalize the NPRM (except for a targeted rule to eliminate the tie-breaker provision of the current regulation in obedience to Congress's clear direction). The Department cannot cure the analytic defects in the preamble to a final rule because doing so would require it to cut from whole cloth a new rationale for disposing of the principal issue in this rulemaking—whether the NPRM, if finalized, would promote retiree welfare—and the public has a statutory right to offer comments on that rationale first. The only way to cure these defects would be to issue a new notice for comment setting forth the missing analyses.

#### ARGUMENT

##### I. **The NPRM's Pursuit of Phantom Benefits for ESG Investing at the Price of Retiree Welfare Violates ERISA and Is Arbitrary and Capricious.**

###### A. **The NPRM Irrationally Disregards Retiree Welfare.**

Little more than a year ago the Department found that, as a factual matter, there are “shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace.”<sup>8</sup> These shortcomings arose because “the growing emphasis on ESG investing may prompt ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses.”<sup>9</sup> The Department found

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<sup>8</sup> 85 Fed. Reg. at 72850.

<sup>9</sup> *Id.* at 72848.



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that this conclusion, which has been confirmed by “numerous observers,”<sup>10</sup> is justified by, for instance, the disclosure materials of certain ESG funds, which “acknowledg[e] ... that the fund may perform differently, forgo investment opportunities, or accept different investment risks, in order to pursue the ESG objectives,”<sup>11</sup> as well as by commenters who themselves “indicated their intention to make, or current practice in making, plan investment decisions based on non-pecuniary factors, rather than based on investment risk and return.”<sup>12</sup> The 2020 Rules responded to this factual finding.<sup>13</sup>

This finding stands today. The NPRM does not disavow it, question the data on which it was founded, propose to reconsider it, or even seek comment expressly on it. The NPRM does not and could not dispute that such a finding means that “the interests of participants in employee benefit plans and their beneficiaries”<sup>14</sup> are imperiled. Nor does the NPRM argue that the 2020 Rules failed to address this peril. As far as the NPRM is concerned, the Department’s earlier conclusion that retirees are endangered and that the 2020 Rules will protect them stands unquestioned.

The NPRM proposes to dispense with that protection due to a different consideration altogether: the concern that the 2020 Rules have “created a perception that fiduciaries are at risk if they include any ESG factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights.”<sup>15</sup> The NPRM’s regulatory amendments “are intended to address” this concern.<sup>16</sup>

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<sup>10</sup> *Id.* at 72847.

<sup>11</sup> *Id.* at 72848.

<sup>12</sup> *Id.* at 72850.

<sup>13</sup> *Id.* at 72847-48; 85 Fed. Reg. at 81660, 81662.

<sup>14</sup> 29 U.S.C. 1001(b).

<sup>15</sup> 86 Fed. Reg. at 57275-76.

<sup>16</sup> *Id.* at 57276.



The Department nowhere finds that the existence of this concern calls into question its earlier finding that retirees' financial security is imperiled absent the 2020 Rules. Nor does it propose that removing the fears of fiduciaries justifies endangering the financial security of those whom the fiduciaries serve. Indeed, the Department does not explain at all how the NPRM's goal of allaying fiduciaries' fears relates to the 2020 Rules' goal of protecting retirement security from deviation from the duty of loyalty. That is because it never explores, in so much as a sentence, the adverse consequences to participants and beneficiaries from revoking the 2020 Rules.

The Department's myopic focus on one concern to the irrational exclusion of another is among the purest forms of arbitrary decision-making. One of the APA's most basic demands is that an agency must "consider[] ... the relevant factors" at issue in a rulemaking; "an agency rule would be arbitrary and capricious if the agency ... entirely fail[s] to consider an important aspect of the problem."<sup>17</sup> Here, the Department pursues one objective (clarifying that fiduciaries may make ESG investments) with total disregard of another (protecting participants and beneficiaries from ESG investing run amok). In its failure to grapple with one of the principal concerns at issue in the rulemaking, the NPRM bears an uncanny resemblance to the Department of Transportation's rulemaking struck down in *State Farm*. The resemblance is all the greater for the fact that here, as in *State Farm*, the disregarded factor is "within the ambit of the existing" regulation<sup>18</sup>—indeed, is the *raison d'être* for the rules that the NPRM seeks to rescind. When an agency proposes to revoke regulations, the APA requires more than silence about the objective that brought those regulations into existence in the first place.

The Department's failure is especially egregious because the goal it slights is the goal Congress regarded as paramount. A reader of the NPRM would reasonably assume that one of ERISA's main objects is to promote the discretion of fiduciaries to choose among investment strategies. But that is not so.<sup>19</sup> The point of ERISA is to protect retirees, and fiduciary discretion is valuable only insofar as it promotes financial security for participants and beneficiaries. But while the NPRM has very much to say about how the 2020 Rules "chilled" the pursuit of ESG investments by fiduciaries,<sup>20</sup> it fails to connect that asserted chill to fiscal impact on participants and beneficiaries.

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<sup>17</sup> *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>18</sup> *See id.* at 37, 48, 51.

<sup>19</sup> *See* 29 U.S.C. 1001-1001b (listing Congress's purposes in enacting ERISA).

<sup>20</sup> *See, e.g.*, 86 Fed. Reg. at 57275, 57279, 57281-82, 57284-5, 57288, 57294-95.



The Department seems instead to assume, without analysis, that maximizing the discretion of fiduciaries is a perfect proxy for maximizing financial benefits for participants and beneficiaries.<sup>21</sup> Congress, however, did not make that assumption, instead recognizing that retirees will receive better returns through constraint in cases of possibly divided loyalty.<sup>22</sup> That insight drove the 2020 Rules. The NPRM is arbitrary and capricious in its unconsidered assumption that maximizing fiduciary discretion would promote financial benefits for retirees.

Further, even if the NPRM is correct that enhancing fiduciary discretion here would promote such financial benefits, it irrationally fails to consider whether those benefits are greater than the losses the NPRM would also cause. The NPRM does not question that the 2020 Rules achieved real benefits for retirees (or would have if they had not been subject to a non-enforcement policy); those benefits will necessarily be lost if the 2020 Rules are revoked.<sup>23</sup> But the NPRM never attempts to understand the magnitude of that loss or to compare it to the benefits that the NPRM asserts it will create. While the NPRM's economic analysis considers a number of other costs, it never assesses or mentions the costs to participants and beneficiaries of the deviations from the duty of loyalty that the Department earlier found would occur absent the 2020 Rules.<sup>24</sup>

That failure is particularly egregious in light of the well-documented danger of violations of the duty of loyalty. Just in Fiscal Year 2020, the Department found 793 violations in the retirement plan context of ERISA's command that fiduciaries exclusively pursue the interests of participants and beneficiaries,

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<sup>21</sup> See, e.g., *id.* at 57296 (asserting that the NPRM, if finalized, would promote consideration of material ESG factors and that such consideration would “redound ... to employee benefit plans covered by ERISA and their participants and beneficiaries”).

<sup>22</sup> See, e.g., 29 U.S.C. 1106(a) (barring fiduciaries even from transactions justified by risk-adjusted returns when such transactions involve self-dealing).

<sup>23</sup> The NPRM admits as much when it notes that it will not “increase fiduciaries’ burden of care.” 86 Fed. Reg. at 57293. If under the NPRM fiduciaries’ duty of care would remain just what it was before the 2020 Rules, then the NPRM cannot remedy the abuses that the 2020 Rules found to pose a danger to retirees.

<sup>24</sup> See *id.* at 57293-95.



making it the second-largest category of violations.<sup>25</sup> By contrast, the NPRM cannot cite a single instance of a breach by reason of a fiduciary failing to consider the financial potential of ESG factors. Indeed, it does not even point to an instance of fiduciary imprudence based on a categorical avoidance of *any* class of factors as a whole. The NPRM thus proposes to fix a problem that does not exist by exacerbating a problem that does, but fails to weigh the benefits and burdens of doing so.

The NPRM's failure to consider whether the benefits it seeks for retirees outweigh the costs they will bear is arbitrary and capricious. "[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions."<sup>26</sup> While the APA does not require a detailed cost-benefit analysis to accompany every rule, the Supreme Court has made clear that declining even to compare costs to benefits is irrational, for it leaves open the possibility that the regulation will do "significantly more harm than good."<sup>27</sup> The NPRM is a case in point: it fails to demonstrate, or even to consider, whether any good it does will make up for its harm. As a bare preliminary, the NPRM should have considered whether fiduciaries are more at risk from violations of the duty of loyalty than from failure to realize the potential of ESG factors in some investment decisions, but it does not engage even that basic question.

These failures of reasoning would render a rule finalizing the NPRM arbitrary and capricious. Nor will the Department be able to repair these defects by offering new analysis in the preamble to the final rule. That is because under the APA "a notice of proposed rulemaking must provide sufficient ... rationale for the rule to permit interested parties to comment meaningfully."<sup>28</sup> Here, the Department has failed to offer any rationale at all with respect to the principal issue in this rulemaking: whether the NPRM, if finalized, would promote retiree welfare. Because we do not know the agency's views on this

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<sup>25</sup> Government Accountability Office, *Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans* 48 (May 2021), <https://www.gao.gov/assets/gao-21-376.pdf>. While the generic "fiduciary imprudence" category looms slightly larger, at 869 violations, there is no reason to think that any of these cases involve slighting of ESG factors, or even the general problem of a fiduciary disregarding an entire class of factors as irrelevant.

<sup>26</sup> *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

<sup>27</sup> *Id.*

<sup>28</sup> *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation mark omitted).



overriding point, we cannot address them. Because we and other commenters have not yet had a “first opportunity ... to offer comments that could persuade the agency to modify” its thinking on this decisive point,<sup>29</sup> the purposes of notice and comment have not been served, and the Department lacks logical outgrowth to finalize any rule relying on an updated analysis.<sup>30</sup>

### **B. DOL’s Asserted Goal of Curing Fiduciaries’ Fears Is Spurious.**

The NPRM asserts again and again that its proposal is justified by the 2020 Rules’ creation of “a perception that fiduciaries are at risk if they include any ESG factors in the financial evaluation of plan investments.”<sup>31</sup> It is replete with statements that anonymous “stakeholders” believe that the 2020 Rules somehow disfavor taking account of material ESG factors.<sup>32</sup> The NPRM largely aims to remedy this misperception<sup>33</sup> and nowhere claims the Department would pursue this rulemaking but for the confusion assertedly caused by the 2020 Rules.

Even if this concern were compelling, for the reasons given above DOL may not pursue it without regard to the 2020 Rules’ objective of preventing departures from the duty of loyalty. But the concern is a canard. For the 2020 Rules are pellucidly clear that ESG factors, just like any other factors, may and must be taken into account insofar (and only insofar) as they affect the financial security of retirees.

The term “ESG,” or an equivalent term, does not appear in the regulatory text issued in 2020. Rather, that regulation’s requirements of single-minded loyalty, exclusive focus on pecuniary factors, comparison among possible investments, and documentation of the use of the tie-breaker provision

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<sup>29</sup> *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (emphasis omitted).

<sup>30</sup> This is also true for the many other instances in which the NPRM fails to engage with the principal considerations at issue in its proposals.

<sup>31</sup> 86 Fed. Reg. at 57275-76.

<sup>32</sup> *E.g., id.* at 57275.

<sup>33</sup> *See id.* at 57275-76 (assigning as the only purpose for the rulemaking the need to dispel fiduciaries’ confusion arising from the 2020 Rules).



apply to all investment decisions, regardless of whether ESG factors are in play.<sup>34</sup> Nor do these requirements have the practical effect of prohibiting evaluation of ESG factors that are material to risks and returns. Quite to the contrary: if ESG factors materially affect the risk-adjusted returns of an investment, investment strategy, or proxy vote, the current regulation *demand*s that the fiduciary take them into account just as he or she would any other factors.<sup>35</sup>

Nor is it possible to interpret any term of the regulatory text to single out ESG investing for disfavor. The NPRM points to no textual term that even ambiguously applies just to ESG factors. And if any confirmation were needed, the preambles to both 2020 Rules provide it by making clear that the Rules apply to ESG factors on precisely the same terms as other factors. Consider the following statements:

- “[T]his [Proxy Voting] rule and the financial factors rule sought to make clear that, from a fiduciary perspective, 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.”<sup>36</sup>
- “The final rule recognizes 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....”<sup>37</sup>
- “[W]hen ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company’s business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories .... these issues are themselves appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors

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<sup>34</sup> See 29 C.F.R. 2550.404a-1.

<sup>35</sup> *Id.* 2550.404a-1(c)(1).

<sup>36</sup> 85 Fed. Reg. at 81662 n.30.

<sup>37</sup> 85 Fed. Reg. at 72848.

....”<sup>38</sup>

- “The ERISA fiduciary duty of prudence requires portfolio-level attention to risk and return objectives reasonably suited to the purpose of the account, diversification, cost-sensitivity, documentation, and ongoing monitoring. The proposal was not intended to suggest that these principles apply other than neutrally to all investment decisions....”<sup>39</sup>
- “[T]he final rule does not single out ESG investing or any other particular investment theory for particularized treatment.”<sup>40</sup>

Perhaps most compellingly, the preamble to the Financial Factors Rule explains that the Department eliminated all reference to the term “ESG” precisely to avoid any “misconstru[ction]” that the regulatory “general prudence criteria” apply “in some unique (or at least more rigorous) fashion to ESG and other similarly oriented investment strategies.”<sup>41</sup> Far from discriminating against ESG factors, the Department in 2020 went out of its way to ensure that they are treated, and are seen to be treated, just the same as factors of every other sort.

Confronted with these plain truths, the NPRM sensibly does not argue that the 2020 regulation treats ESG factors differently than factors of any other sort *as a legal matter*. Instead, it claims that certain statements in the preambles to the 2020 Rules “express skepticism” about ESG investing.<sup>42</sup> It is surely true that skepticism by a regulator, even if not translated into legal requirements, can chill behavior in the regulated industry. But as the quotations we have given above indicate, the preambles are also clear that DOL in 2020 viewed ESG investing on the same footing as non-ESG investing: permissible when undertaken with an “eye single” toward the financial benefit of participants and beneficiaries and impermissible when undertaken for other reasons.

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<sup>38</sup> *Id.* at 72857.

<sup>39</sup> *Id.* at 72858.

<sup>40</sup> *Id.* at 72862.

<sup>41</sup> *Id.* at 72858 (internal quotation marks omitted).

<sup>42</sup> 86 Fed. Reg. at 57275.



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The NPRM cites only three passages to show that DOL previously conveyed a message of such animus against ESG investing that an entire rulemaking is needed to repair the damage. First, one passage stated that “ESG investing raises heightened concerns under ERISA.”<sup>43</sup> The preamble quickly explained what those “heightened concerns” are: “the growing emphasis on ESG investing may prompt ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses.”<sup>44</sup> The concern, then, is not with the use of ESG factors, but with their abuse to justify departures from the duty of loyalty. As we discuss above, the 2020 Rules’ solution was not to single out ESG investments for disfavor, but to require that *all* investments be made with an eye only toward the pecuniary success and security of participants and beneficiaries.<sup>45</sup>

Another passage warned “fiduciaries against too hastily concluding that ESG-themed funds may be selected based on pecuniary factors.”<sup>46</sup> But as the rest of the paragraph made clear, this warning was not designed to prejudice fiduciaries against ESG investing, but to explain that a number of ESG-themed funds are heavily weighted toward technology, which has outperformed other investment classes during the pandemic; this excellent recent performance may be attributable to these funds’ weighting toward technology rather than to the inherent profitability of ESG investing, and the uncertainty on this point is important for fiduciaries to navigate.<sup>47</sup> The Department was merely providing information for fiduciaries to use in “prudently balanc[ing]” the risk and return of ESG-themed investments.<sup>48</sup> Indeed, the fact that the Department provided such information itself presumes that ESG-themed investments are fair game and that fiduciaries therefore need information to use “when comparing [them to] alternatives,” just as fiduciaries would do for any other investment under the Financial Factors Rule.<sup>49</sup>

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<sup>43</sup> 85 Fed. Reg. at 72848.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 72859.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



Finally, the NPRM points to a short sentence in the regulatory impact analysis of the Proxy Voting Rule explaining the “Department believes it is likely that many of” the more than one thousand environmental- and social-focused shareholder proposals under discussion in that paragraph “have little bearing on share value or other relation to plan financial interests.”<sup>50</sup> To believe that the investment industry would infer from this passing statement characterizing a concrete set of proposals a general animus toward the consideration of ESG factors wherever they may be found is, to put it charitably, fanciful.

These statements taken alone could not warrant the conclusion that the 2020 Rules adopted or hinted at a policy of disfavoring ESG investing. But they are not alone. They must be viewed beside regulatory text that treats ESG and non-ESG investing even-handedly and preambles that confirm this even-handed approach. In light of this, any reasonable observer would understand that the 2020 Rules did not disfavor ESG investing.

That is also the view evident in the behavior of the regulated industry, including in the time between the 2020 Rules’ issuance and the new Administration’s decision not to enforce the Rules. For instance, BlackRock, Inc. related that “[a]s of November 2020, 100% of active portfolios and advisory strategies are environmental, social, and governance (“ESG”) integrated[,] meaning that portfolio managers are accountable for managing exposure to material ESG risks....”<sup>51</sup> The Financial Factors Rule, *issued the same month*, did not deter the world’s largest asset manager from considering ESG factors across all active portfolios and strategies (necessarily including those managed for ERISA plans). Another of the world’s largest managers, J.P. Morgan Chase, explained in a 2020 year-end report that it “recognize[s] the potential for ESG-related risks, which we work to identify and manage just as we manage risk in all areas of our business,”<sup>52</sup> again necessarily including its ERISA plan portfolios and strategies.

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<sup>50</sup> 85 Fed. Reg. at 81681.

<sup>51</sup> BlackRock, *2020 TCFD Report 4*, <https://www.blackrock.com/corporate/literature/continuous-disclosure-and-important-information/tcfid-report-2020-blkinc.pdf>.

<sup>52</sup> JP Morgan, *Environmental, Social & Governance Report 4*, <https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/documents/jpmc-esg-report-2020.pdf>.



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In any event, even if fiduciaries may plausibly assert that these isolated statements caused them to fear that the Department in 2020 disfavored ESG investing, to assert that such prejudice lingers *today* and thus justifies the current rulemaking beggars belief. The sitting President of the United States has issued multiple executive orders favoring ESG investing, including one that favorably mentions “environmental, social, and governance factors” by name,<sup>53</sup> directs the Department to “identify agency actions” to secure pension plans against climate risk, and specifically calls for reconsideration of the 2020 Rules that fiduciaries claim continue to cause them such anxiety.<sup>54</sup> And other agencies such as the Securities and Exchange Commission have also taken action to favor the consideration of ESG factors.<sup>55</sup> These actions would not be enough to remove a legal impediment to ESG investing, but a legal impediment is not at issue here. They are far more than enough to persuade any remotely reasonable observer that the Department, and the federal government generally, does not harbor animus against ESG investing.

A regulation aiming at a particular problem is, of course, “highly capricious if that problem does not exist.”<sup>56</sup> The NPRM is a solution in search of a problem and for that reason cannot be finalized.

### **C. The NPRM Unlawfully Pressures Fiduciaries to Prefer ESG Investing.**

There is unlawful prejudice in favor of some investment strategies at play in this rulemaking—but that prejudice exists in the NPRM, not in the 2020 Rules. Unlike the 2020 Rules, the NPRM expressly, repeatedly, and favorably mentions ESG investing in its regulatory text, stating that prudence “may often” require consideration of ESG factors and listing such factors—and only such factors—as examples of prudent considerations.<sup>57</sup> It devotes some ten percent of its preamble to touting the

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<sup>53</sup> E.O. 14030 s. 4(c).

<sup>54</sup> *Id.* s. 4(a) and (b).

<sup>55</sup> *See, e.g.*, Securities and Exchange Commission, “SEC Response to Climate and ESG Risks and Opportunities,” <https://www.sec.gov/sec-response-climate-and-esg-risks-and-opportunities> (detailing the SEC’s several initiatives to promote the availability and accuracy of ESG disclosures).

<sup>56</sup> *Alltel Corp.*, 838 F.2d at 561.

<sup>57</sup> 86 Fed. Reg. at 57302.



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benefits of ESG investing.<sup>58</sup> It fills its preamble with statements suggesting that considering ESG factors is often required.<sup>59</sup> And it even seeks comment on “whether fiduciaries should consider climate change as *presumptively material* in their assessment of investment risks and returns.”<sup>60</sup> It is difficult to imagine a proposal more thoroughly prejudiced in favor of ESG investing or one that will have more far-reaching effects on fiduciary behavior.<sup>61</sup> Fiduciaries will get the message and will, to the extent they do not already, give pride of place to ESG factors. The Department is in no position to dispute this, for if the three isolated sentences from 2020 that the NPRM identifies are enough to “chill” ESG investing notwithstanding the mountain of evidence that such investing was permissible in 2020 and is today a favored policy of the United States government, what shall we say of the chill of non-ESG investing created by the NPRM? If the NPRM’s “chill” theory is compelling, then the NPRM’s own chilling effect must prevent its finalization; if that theory is not compelling, then there is no reason to rescind the 2020 Rules.

Further, on the NPRM’s own theory, the NPRM must be taken to radically understate both its own departure from the Department’s pre-2020 practice and its own consequences. The NPRM claims that it largely adheres to DOL’s pre-2020 positions on the use of material ESG factors,<sup>62</sup> and for this reason

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<sup>58</sup> See *id.* at 57288-92.

<sup>59</sup> See, e.g., *id.* at 57276 (“Climate change is particularly pertinent to the projected returns of pension plan portfolios that, because of the nature of their obligations to their participants and beneficiaries, typically have long-term investment horizons.”); *id.* at 57277 (“a growing body of evidence suggests a generally positive relationship between the financial performance of investments that address or account for climate change”).

<sup>60</sup> *Id.* at 57290 (emphasis added).

<sup>61</sup> The NPRM appears to recognize that its forcefulness will result in greater use of ESG factors, for it recognizes the likelihood “that more plans will start to consider ESG factors ... as a result of the new rule,” representing an increase over the “11 percent ... of plans that were using ESG factors under the prior non-regulatory guidance.” *Id.* at 57286. Because the baseline for this statement is plans using ESG factors before the 2020 Rules’ alleged discouragement of them, this increase cannot be attributed to removing a thumb on the scale against ESG; it can come only from putting a thumb on the scale in their favor.

<sup>62</sup> See, e.g., *id.* at 57276.



predicts that it would have only modest economic effects vis-à-vis a pre-2020 baseline.<sup>63</sup> But the Department's interpretive bulletins and other memoranda, while they differed among each other on some matters and may have caused confusion by their varying formulations, agreed in this: ESG investing was not entitled to a privileged place above non-ESG investing.<sup>64</sup> Pressuring fiduciaries to prefer ESG investing would therefore mark a radical departure from DOL's past positions with massive economic effects that the NPRM does not try to fathom.

Similarly, the NPRM fails to understand or acknowledge the reliance interests it undermines. The NPRM expressly discusses reliance interests only in a single paragraph, in which it claims that the regulation "does not undermine serious reliance interests *on the part of fiduciaries,*" but it does not consider whether it might undermine reliance interests of the participants and beneficiaries that ERISA aims to protect.<sup>65</sup> Millions of American workers have invested in pension plans in reliance on Congress's promise that employers and other fiduciaries must manage those investments only with a view toward their retirement security. If finalized, the NPRM would fundamentally upend that expectation.

Additionally, the NPRM fails to acknowledge the cost of channeling pension investments toward strategies that, as recently found by another federal agency, can present serious risks of misrepresentations. In April, the Securities and Exchange Commission's Division of Examinations issued a Risk Alert to apprise investors of "deficiencies and internal control weaknesses from examinations of investment advisors and funds regarding ESG investing."<sup>66</sup> The Division recounted "instances of potentially misleading statements regarding ESG investing processes," "policies and procedures that did not appear to be reasonably designed to prevent violations of law," and "documentation of ESG-related investment decisions that was weak or unclear," among other

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<sup>63</sup> See, e.g., *id.* at 57301.

<sup>64</sup> See, e.g., *Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments*, 80 Fed. Reg. 65135, 65136 (2015); *Interpretive Bulletin Relating to Investing in Economically Targeted Investments*, 73 Fed. Reg. 61734, 61735 (2008).

<sup>65</sup> 86 Fed. Reg. at 57283 (emphasis added).

<sup>66</sup> *The Division of Examinations' Review of ESG Investing 2*, <https://www.sec.gov/files/esg-risk-alert.pdf> (Apr. 9, 2021).



defects.<sup>67</sup> The NPRM does not acknowledge these grave problems affecting ESG investing, attempt to ensure that pension investment returns are not adversely impacted by them, estimate the cost likely to arise from them, or compare that cost to the benefits that the NPRM would assertedly achieve.

The Department's failure to acknowledge the change of policy it makes or the profound effects it will have is yet another reason that finalization of the NPRM would be arbitrary and capricious.

#### **D. DOL Fails to Consider Obvious Alternatives to the NPRM's Approach.**

If the Department's concern that the 2020 Rules signaled prejudice against ESG investing were well-taken, the remedy would be obvious: DOL should issue a policy statement or interpretive memorandum making clear that it is not biased toward either ESG or non-ESG investing and strategies; that both ESG and non-ESG factors may be used to pursue financial benefits for participants and beneficiaries; and that neither may be used to pursue other goals. That remedy is all the more obvious because DOL in the past has issued just such memoranda addressing the permissibility of ESG investing.<sup>68</sup>

The NPRM gives no reason why issuance of a policy statement or interpretive memorandum to dispel fears of bias does not accomplish its goal here. Indeed, it never considers the question. In its discussion of alternative approaches, the NPRM rejects reversion to the investment duties regulation of 1979 on the basis that doing so would fail to give fiduciaries adequate guidance, because "the Department's prior non-regulatory guidance on ESG investing and proxy voting was removed from the Code of Federal Regulations by" the 2020 Rules.<sup>69</sup> But, stunningly, it never considers *whether simply to reissue that guidance or issue new guidance dispelling any notion of bias*. This failure to consider an approach that the Department itself has employed on multiple occasions in the past violates, yet again, the hornbook requirement to consider all relevant factors in rulemaking.<sup>70</sup>

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<sup>67</sup> *Id.* at 4.

<sup>68</sup> 86 Fed. Reg. at 57273-74.

<sup>69</sup> *Id.* at 57296.

<sup>70</sup> *State Farm*, 463 U.S. at 43.



DOL's failure to consider issuing a policy statement or interpretive memorandum is particularly problematic because doing so would avoid both the expense of rulemaking and, more importantly, the costs of familiarization with the new rule. Those costs, as even DOL admits, will be considerable,<sup>71</sup> and would have been revealed as far greater had not DOL irrationally included the costs only to plans and fiduciaries of familiarization with the rule but not other costs such as those to plan participants and beneficiaries who wish to understand their fiduciaries' obligations. Such costs would be *de minimis* to review a short interpretive bulletin merely stating that DOL is not biased against ESG or non-ESG investing. Most importantly, such a statement or memorandum would avoid what, under the NPRM's own logic and standards, must be considered the heavy-handed chilling of non-ESG investments by the NPRM itself.

## II. The NPRM's Tie-Breaker Provision Is Unlawful.

### A. The Tie-Breaker Doctrine Violates ERISA.

The NPRM is right to propose to rescind one provision of the Financial Factors Rule: the Department should eliminate 29 C.F.R. 2550.404a-1(c)(2), which permits a fiduciary to "use non-pecuniary factors as the deciding factor in the investment decision" when the fiduciary "is unable to distinguish [among investment alternatives] on the basis of pecuniary factors alone."<sup>72</sup> This provision codifies the "tie-breaker" or "all things being equal" principle. But this doctrine has, to our knowledge, never been upheld by a court, and its appearance in DOL interpretive memoranda was never appropriately explained by recourse to ERISA's text and purpose. Because ERISA does not permit the tie-breaker doctrine, the Department should rescind the provision of the Financial Factors Rule incorporating it and should omit to finalize the similar provision in its current NPRM.

ERISA is in places a complex and difficult statute, but it is straightforward on the question here. It states that "the assets of a plan ... shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan,"<sup>73</sup> and that a fiduciary therefore must "discharge his duties ... solely in the interest of the

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<sup>71</sup> See 86 Fed. Reg. at 57293.

<sup>72</sup> The Department should also excise from the preceding regulatory subsection the phrase "except as provided in paragraph (c)(2) of this section."

<sup>73</sup> 29 U.S.C. 1103(c)(1).



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participants and beneficiaries ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries” and defraying reasonable plan expenses.<sup>74</sup> As the Supreme Court has held, the word “benefits” in the foregoing sentence “must be understood to refer to the sort of *financial* benefits ... that trustees who manage investments typically seek to secure for the trust’s beneficiaries.”<sup>75</sup> The terms “solely” and “exclusive” are common and their meaning is clear: to act “solely” in the interest of one person means that another person’s interests do not enter into the calculus, and to act for an “exclusive” purpose means that no other purposes play any role in the decision. That common-sense interpretation is confirmed by the common law tradition from which Congress drew this sole interest standard, as explained at length in a law review article that the NPRM itself cites favorably.<sup>76</sup>

The application of these provisions to the tie-breaker doctrine is easy to see. ERISA requires that a fiduciary act only for the interests of participants and beneficiaries, but the tie-breaker doctrine allows pursuit of collateral benefits that are irrelevant to or even opposed by them.<sup>77</sup> ERISA requires that, aside from defraying expenses, a fiduciary may pursue only the achievement of financial benefits for participants and beneficiaries, but the tie-breaker doctrine allows aiming at other goals that, again, may be irrelevant or antithetical to their well-being. A fiduciary who pursues financial benefits for

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<sup>74</sup> *Id.* 1104(a)(1).

<sup>75</sup> *Fifth Third Bancorp*, 134 S. Ct. at 2468.

<sup>76</sup> Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 *Stan. L. Rev.* 381, 408-10 (2000).

<sup>77</sup> See 29 C.F.R. 2550.404a-1(c)(2) (failing to limit the “non-pecuniary factors” that the fiduciary may pursue to those that participants and beneficiaries favor); see also 86 Fed. Reg. at 57279 (“[t]he proposal does not place parameters on the collateral benefits that may be considered by a fiduciary to break the tie”). We note that the preamble to the Financial Factors Rule explained that fiduciaries may pursue collateral benefits only insofar as consistent with “ERISA’s general loyalty obligation” and therefore “must act in a manner that is consistent with the interests of participants and beneficiaries in their retirement income or financial benefits.” 85 Fed. Reg. at 72862. The current regulation, however, fails to reflect that stricture in its text. In any event, even construing the current regulation to be consistent with the fiduciary’s duty to pursue “solely” the interests of participants and beneficiaries, it nevertheless contradicts ERISA’s demand that fiduciaries’ “exclusive purpose” be the attainment of financial benefits (as well as defraying expenses) and therefore warrants rescission.



participants and fiduciaries first of all and collateral benefits only secondarily nevertheless pursues a purpose other than (even if not inconsistent with) the achievement of financial benefits for participants and fiduciaries. The tie-breaker doctrine therefore violates the plain text of ERISA.

The tie-breaker rule transforms ERISA's clear instruction to *aim exclusively* at financial benefits for participants and beneficiaries into a direction to *prioritize* such benefits. Congress knows how to instruct the prioritization of some interests over others and has done so in statutes such as the bankruptcy code,<sup>78</sup> but it chose another approach here. Furthermore, the tie-breaker rule makes a nullity of Congress's choice to import the sole interest standard from the common law. The Department ought to give effect to Congress's choices.

Our conclusion is reinforced by ERISA's demand that "the assets of a plan shall never inure to the benefit of any employer."<sup>79</sup> Surely the ability to promote favored political, social, or other policy goals is a "benefit." Yet the tie-breaker doctrine allows employers (and other fiduciaries) to channel pension funds to promote causes of their choice. Indeed, the NPRM appears to recognize that the tie-breaker doctrine offers employers the benefit of promoting their social goals when it gives as an example of a "tie-breaking characteristic" that a particular investment alternative "better aligns with the corporate ethos of the plan sponsor."<sup>80</sup> That the tie-breaker doctrine permits the inurement of a benefit to a participant's employer is another reason that that doctrine violates ERISA.

True, DOL guidance has approved the use of the tie-breaker doctrine in some circumstances, but this guidance never seriously grappled with ERISA's text. The 2015 guidance on the subject stated merely that "ERISA does not direct an investment choice in circumstances where investment alternatives are equivalent."<sup>81</sup> The 2008 guidance similarly explained that "ERISA does not itself specifically provide a basis for making the investment choice" as between two equivalent investments and therefore permits

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<sup>78</sup> See, e.g., 11 U.S.C. 507(a).

<sup>79</sup> 29 U.S.C. 1103(c)(1).

<sup>80</sup> 86 Fed. Reg. at 57280.

<sup>81</sup> *Interpretive Bulletin Relating to the Fiduciary Standard under ERISA in Considering Economically Targeted Investments*, 80 Fed. Reg. at 65136.



the consideration of collateral benefits.<sup>82</sup> But the fact that ERISA does not provide an instruction about how to choose between two equivalent investments does not mean that fiduciaries may ignore the instruction ERISA *does* give: fiduciaries may not act in the interest of anyone but participants and beneficiaries or pursue any purpose but securing financial benefits and meeting reasonable plan expenses for them.

Obedying Congress's clear instruction would not leave fiduciaries, like Buridan's ass,<sup>83</sup> unable to select among equivalent investment options. Rather, it would require fiduciaries to make the hard but vital choice between an investment that is good and one that is best—a choice that Congress meant to require but that the tie-breaker doctrine allows fiduciaries to shirk. And even in the small number of cases in which there truly is no pecuniary basis to prefer one option to another, fiduciaries would simply do what we all do when an objective can best be achieved in more than one way. We select among identically effective commuting routes not by distinguishing them according to some factor (e.g., distance from the prime meridian) that is irrelevant to our goal in choosing, but by selecting without a reason. Such unreasoned choice is itself reasonable when any distinction would be irrelevant to the purpose of choosing, and especially when the act of distinguishing would imperil the achievement of that purpose (e.g., deliberating for so long that we arrive late at work).

That is the situation here. Under ERISA, a fiduciary has, aside from covering the plan's expenses, one goal and one goal only: achieving a secure retirement for participants and beneficiaries. Collateral benefits, falling as they do outside the fiduciary's remit, are irrelevant to the fiduciary's purposes. And deliberating about them can be harmful. As the Department found about this time last year and as common sense bears out, the possibility of pursuing collateral benefits gives fiduciaries an incentive to conclude that an investment that furthers such benefits is equivalent to an investment that does not,

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<sup>82</sup> *Interpretive Bulletin Relating to Investing in Economically Targeted Investments*, 73 Fed. Reg. at 61735.

<sup>83</sup> The 2008 interpretive bulletin curiously seems to have thought that a fiduciary placed between two indistinguishable investment options and unable to resort to collateral benefits would suffer the fate of that hapless beast of burden. *See* 73 Fed. Reg. at 61735 (explaining that ERISA does not provide a means to select among such investments and yet requires the fiduciary to choose among them, implying that collateral benefits are necessary to fulfill the latter duty).



even when a candid review would find the latter investment superior.<sup>84</sup> The NPRM does not propose to rebut or even question that finding.

The existence of that incentive means that prophylaxis is needed to prevent deviations from the duty of loyalty. This prophylaxis should be as strong and sweeping as necessary, as fiduciaries have no legitimate countervailing interest in pursuing collateral benefits.<sup>85</sup> The only measure that would entirely protect participants and beneficiaries from this risk is a complete ban on considering collateral benefits. That presumably is why Congress enacted such a ban in the first place.

The case for rescinding the tie-breaker provision is even stronger for the fact that the provision allows fiduciaries to leverage funds contributed by employers to fund their employees' retirement, and even contributed by employees themselves, to support causes with which those employees vehemently disagree. Under the tie-breaker provision, funds of a worker in Appalachia may be used to pursue the "collateral benefit" of putting the industry on which his or her community depends out of business. Funds of a pro-life employee may be used to favor companies with pro-choice personnel policies, or vice versa. Funds of a worker who believes critical race theory is false and degrading may be used to favor companies that administer vigorous CRT trainings to employees, or vice versa. As the Department has recognized before, Congress did not enact ERISA to allow fiduciaries to exploit employee funds in support of social and political causes that the employees oppose.<sup>86</sup> The Department should give effect to that recognition by rescinding 29 C.F.R. 2550.404a-1(c)(2) and should not finalize the tie-breaker provision of the current NPRM.

If the Department elects to retain some version of the tie-breaker provision, it should "require that any collateral benefit relied upon as a tie-breaker be based upon an assessment of the shared interests or views of the participants."<sup>87</sup> Further, it should require that information about such shared interests

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<sup>84</sup> 85 Fed. Reg. at 72862 (the Financial Factors Rule's documentation requirement for invocation of collateral benefits "is intended to provide a safeguard against the possibility that fiduciaries interested in making policy-based investments would improperly find economic equivalence and make decisions based upon non-pecuniary benefits without proper analysis and evaluation").

<sup>85</sup> See *infra* at pp. 26-27.

<sup>86</sup> See *Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines*, 81 Fed. Reg. 95879, 95881 (2016).

<sup>87</sup> 86 Fed. Reg. at 57279.



must be obtained from each affected employee along with his or her consent to pursue collateral benefits with funds in his or her account and a delineation of which specific causes each employee wishes to support. The NPRM asserts that such proactive solicitation of preferences is “beyond the scope of this rulemaking,”<sup>88</sup> but the Department does not get to set the bounds of the proceeding arbitrarily so as to exclude ideas it does not like.

### **B. The NPRM’s Tie-Breaker Provision Makes a Bad Doctrine Worse.**

If the Department concludes that ERISA permits the tie-breaker doctrine, then it should also conclude that the protective documentation requirements included in 29 C.F.R. 2550.404a-1(c)(2) are justified and decline to rescind or amend them. These requirements, while not as effective as a complete ban on pursuit of collateral benefits, do advance ERISA’s purposes by ensuring that fiduciaries make findings about the equivalence of investments and that participants and beneficiaries may look to these contemporaneous findings in any subsequent disputes about the propriety of particular investments based on collateral benefits.

The NPRM proposes to rescind the documentation requirement because it may “have a chilling effect on the” pursuit of collateral benefits, ESG and otherwise.<sup>89</sup> But, in the first place, any such “chill” is irrelevant because a fiduciary’s discretion to choose among investments is not an end in itself, but a means to securing retirement benefits. Definitionally, a collateral benefit does not bear on securing retirement benefits; if a particular consideration does bear on that end, it is a pecuniary factor instead. That is why the change proposed by the NPRM is *guaranteed* not to promote a secure retirement for participants and beneficiaries. Exchanging a provision that serves ERISA’s purposes for one that does not is arbitrary and capricious as well as a violation of ERISA.<sup>90</sup> That is doubly true if rescinding the

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<sup>88</sup> *Id.* at 57296.

<sup>89</sup> *Id.* at 57279.

<sup>90</sup> The NPRM also asserts that the documentation requirements for use of the tie-breaker rule may “chill investments based on climate change or other ESG factors, even when those factors are directly relevant to the financial merits of the investment decision.” *Id.* at 57279. This assertion simply rehashes the argument about chill rebutted *supra* at pp. 11-17, with the following additional defect: it fails to explain how a requirement to document the facts that the NPRM itself admits are necessary to trigger the tie-breaker rule with respect to all collateral benefits, ESG or otherwise, could discourage the use of ESG factors outside the context of collateral benefits.



documentation provision would actually undermine retirement security, and that is precisely what will happen under the Department's own prior and unquestioned findings.

Moreover, the NPRM does not dispute that under ERISA a fiduciary, before using the tie-breaker rule, must find that there are equivalent investments among which to choose and that the use of collateral benefits to break the tie will not impede retirement benefits. The NPRM's objection is only to *documenting* the finding that fiduciaries must in any event make. The only real downside to such documentation is that the records it creates may be used in litigation later. Those records should not be a source of concern to fiduciaries who correctly make the requisite finding; indeed, contemporaneous documentation of their reasoning can only help them in any subsequent disputes. The chill about which the NPRM worries, then, is the concern only of fiduciaries who are not or may not be meeting their statutory obligations. That concern is not a cognizable interest under ERISA. Further, one of ERISA's central purposes is giving participants and beneficiaries the information they need to hold fiduciaries accountable for their retirement security.<sup>91</sup> Limiting the creation of that information to protect fiduciaries who are less than confident of their compliance with the law is not a permissible approach.

Even if the NPRM's asserted concern with the chilling effect of the recordkeeping requirement were legitimate, the Department should retain the requirement. As noted, the Department recently found that the possibility of pursuing collateral benefits offers incentives to fiduciaries to deviate from the best interests of participants and beneficiaries. These incentives differ from those that fiduciaries otherwise face, for when the collateral benefit doctrine is activated, fiduciaries are free to pursue their own policy preferences and interests in a way otherwise unknown to the law of fiduciary duty. The NPRM itself recognizes that special regulatory protections are warranted for special risks.<sup>92</sup> Thus, the complaint of the "stakeholders" that the 2020 Rules single out the pursuit of collateral benefits for unique documentation requirements amounts simply to a protest that unlike things are being treated as unlike.

The NPRM briefly asserts that 29 C.F.R. 2550.404a-1(c)(2) creates a "one-size-fits-all documentation requirement" that undermines the duty of prudence, which "may require something more, less, or

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<sup>91</sup> See 29 U.S.C. 1001(b).

<sup>92</sup> 86 Fed. Reg. at 57280.



different” than the documentation that that provision demands.<sup>93</sup> But it is difficult to imagine how prudence could demand something less or other than 29 C.F.R. 2550.404a-1(c)(2) demands now: a record establishing that there are indeed equivalent investments among which to choose and that the pursuit of collateral benefits will not impede the achievement of retirement security. And if prudence demands more in some or all cases, the Department should finalize a more robust documentation requirement rather than, as the NPRM proposes, removing that requirement altogether.

Elimination of the recordkeeping requirement is particularly perverse because the NPRM relies on ERISA’s general duty of prudence to do the requirement’s work. The Department asserts that “ERISA[’s] general prudence obligation is sufficiently protective in this context.”<sup>94</sup> But that obligation can be effective only if participants and beneficiaries are able to hold fiduciaries to it. How they are to do so if fiduciaries may decline to provide even the elementary documentation required by the current regulation is a mystery.

Indeed, the Department’s sister agency the SEC recently urged, in light of its review of troubling ESG practices at some investment advisors, that “firms should ... consider taking steps to document and maintain records relating to important stages of the ESG investing process.”<sup>95</sup> Surely the Department would not dispute that using the tie-breaker rule, with its acknowledged potential for abuse, constitutes such an “important stage” of the process. Yet the NPRM proposes to go in exactly the opposite direction from the SEC without explaining why or even acknowledging the SEC’s contrary advice. This self-contradicting approach violates the most basic norms of reasoned rulemaking.

Removing the documentation provision will signal to fiduciaries that the Department strongly favors use of the tie-breaker doctrine to advance policy preferences. Even during periods in which DOL permitted invocation of the doctrine without special documentation, it cautioned that fiduciaries may not “expend trust assets to promote myriad public policy preferences.”<sup>96</sup> The NPRM does not reiterate

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<sup>93</sup> *Id.* at 57279.

<sup>94</sup> *Id.*

<sup>95</sup> Risk Alert, *supra* n.65, at 7.

<sup>96</sup> See *Interpretive Bulletin Relating to the Exercise of Shareholder Rights*, 81 Fed. Reg. at 95881.



that cautionary note,<sup>97</sup> and fiduciaries will get the message. Millions of workers have invested in pension plans in reliance on the assurance that their funds at least would not be used for wholesale advancement of causes they strongly oppose. The NPRM's ringing endorsement of the tie-breaker doctrine will upend those reliance interests and undermine willingness to participate in pension plans. The NPRM fails to acknowledge those interests or explain why it chooses to sacrifice them.

### **III. Allowing Participants and Beneficiaries To Be Defaulted into Funding Policies They Oppose Contravenes ERISA and Sound Judgment.**

The foregoing argument applies with redoubled force against the NPRM's proposal to remove limits on the use of qualified default investment alternatives (QDIAs). QDIAs, which channel pension funds into investments in the absence of affirmative selection by participants, are often "the predominant investment for plan participants."<sup>98</sup> As the Financial Factors Rule found and as the NPRM admits, QDIAs raise special concerns "because plan participants have not affirmatively directed the investment of their assets into the QDIA, but are nevertheless dependent on the investments for long-term financial security."<sup>99</sup> The unique importance of QDIAs for a large proportion of America's least experienced investors, combined with the fact that QDIAs operate in the absence of affirmative selection, warrants the most protective approach. Here, above all, ERISA's injunction to concentrate solely on financial benefits for participants and beneficiaries must be given powerful effect.

In the NPRM, the Department reiterates its conclusion from the Financial Factors Rule that "QDIAs warrant special treatment," but then astonishingly refuses to give it.<sup>100</sup> Instead, the NPRM leaves QDIAs merely "subject to the same rules ... as all other investments."<sup>101</sup> Under the proposal, fiduciaries would be permitted to use the tie-breaker rule to select QDIAs on the basis of collateral benefits without even creating the documentation required by the current regulation, and QDIAs

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<sup>97</sup> The NPRM cites its prior warning, but only in its historical overview of the Department's past positions. See 86 Fed. Reg. at 57275.

<sup>98</sup> *Id.* at 57280.

<sup>99</sup> *Id.*; see also 85 Fed. Reg. at 72865-66.

<sup>100</sup> 86 Fed. Reg. at 57280.

<sup>101</sup> *Id.*



themselves would be permitted to channel the funds that have been defaulted into them toward achieving collateral benefits.<sup>102</sup> The NPRM makes this proposal notwithstanding its acknowledgment that “a particular plan participant or a population of plan participants [may] not share the same preference for a given collateral purpose as the plan fiduciary.”<sup>103</sup>

To leave QDIAs on the same footing as all other investments, the Department must show that some compelling goal cognizable under ERISA outweighs the powerful interest of inexperienced investors in protection from use of their funds for purposes unrelated to their own retirement and with which they may vehemently disagree. The NPRM’s principal justification, however, is merely that the ubiquitous unnamed “stakeholders” worry “that funds could be excluded from treatment as QDIAs solely because they expressly considered climate change or other ESG factors.”<sup>104</sup> But the QDIA provision in the current regulation does not say a word about ESG factors,<sup>105</sup> and as we documented above, the 2020 Rules repeated again and again that ESG considerations that affect risks and returns may be used to select investments and investment strategies. Even if, *contra factum*, the Financial Factors Rule hinted that the government harbored some secret animus against ESG investing, the belief that any such animus lingers today is incredible and in any event could be dispelled by a simple policy memorandum.

The NPRM worries that the current ban on QDIAs that use the tie-breaker rule “will only serve to harm participants by depriving them of otherwise financially prudent options as QDIAs.”<sup>106</sup> But the tie-breaker rule comes into play only when multiple investments or strategies are equally prudent; a QDIA that achieves “best in class”<sup>107</sup> risk-adjusted returns by considering ESG or other factors does not thereby use the tie-breaker rule at all. Nor need we worry about situations in which multiple QDIAs, some of which pursue collateral benefits, are equally “financially prudent options,” for in that case the financial interests of participants and beneficiaries would be served by selecting one of the prudent

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<sup>102</sup> *Id.* at 57279-80.

<sup>103</sup> *Id.* at 57280.

<sup>104</sup> *Id.* at 57279.

<sup>105</sup> 29 C.F.R. 2550.404a-1(d)(2)(ii).

<sup>106</sup> 86 Fed. Reg. at 57280.

<sup>107</sup> *Id.*



QDIAs that does not pursue collateral benefits. The NPRM offers no evidence of potential QDIAs that stand head and shoulders above all their peers based just on their use of pecuniary factors and that *also* happen to pursue collateral benefits under the tie-breaker rule. Enabling use of such hypothetical QDIAs cannot justify dispensing with protections needed by America’s least experienced investors, and in any event their use could be enabled by a much more targeted amendment.<sup>108</sup>

Thus, neither of the rationales offered by the NPRM for dispensing with the current QDIA provision holds up. Even if they did, the Department must do more than simply assert a legitimate interest; it must also show that that interest outweighs the retiree protection that the Department proposes to give up. But the NPRM does not even ask that question, let alone answer it in the Department’s favor. That is textbook arbitrariness.

As a substitute for the protections it eliminates, the NPRM offers only the requirement that disclosure materials must display “the collateral-benefit characteristic of the fund, product, or model portfolio”—the same disclosure that must accompany the use of the tie-breaker rule in the context of any designated investment alternative.<sup>109</sup> That is cold comfort, or rather no comfort, for investors who “do not actively direct their investments” and have “less investment experience and sophistication than more active investors” and who are therefore less likely to read and understand the disclosures.<sup>110</sup>

To our knowledge, the NPRM is the first document the Department has issued that would give fiduciaries an unrestricted right to select QDIAs on the basis of collateral benefits. As the Department has explained before, “[n]othing in the QDIA regulation suggests that fiduciaries should choose QDIAs based on collateral public policy goals,” and doing so “without regard to possibly different or competing views of plan participants and beneficiaries would raise questions about the fiduciary’s

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<sup>108</sup> For instance, the Department might amend the current regulation by adding at the end of 29 C.F.R. 2550.404a-1(d)(2)(ii) the following: “except for any investment fund, product, or model portfolio that the fiduciary finds in writing is likely to achieve better risk-adjusted returns than any suitable fund, product, or model whose investment objectives or goals or principal investment strategies do not include, consider, or indicate the use of one or more non-pecuniary factors.”

<sup>109</sup> 86 Fed. Reg. at 57279.

<sup>110</sup> 85 Fed. Reg. at 72866.



compliance with ERISA’s duty of loyalty.”<sup>111</sup> American workers have come to rely on this promise that, even if they are inexperienced investors and thus reluctant to take the reins of their own retirement accounts, their fiduciaries will not channel their funds toward causes they oppose. The NPRM would throw over that promise and upend these settled expectations.

#### **IV. The NPRM’s Changes to the Proxy Requirements Would Needlessly Confuse Fiduciaries and Diminish Accountability to Participants and Beneficiaries.**

One of the principal justifications for the Proxy Voting Rule was to clarify fiduciary obligations with respect to proxy voting.<sup>112</sup> The Department found a “lack of precision and consistency in the marketplace with respect to ERISA fiduciary obligations with respect to exercise of shareholder rights”<sup>113</sup>—a finding the NPRM does not dispute. The Proxy Voting Rule adopted several provisions to address this “lack of clarity.”<sup>114</sup> Foremost among them was a list of six specific requirements spelling out the demands of the duties of prudence and loyalty in the context of shareholder rights.<sup>115</sup> The NPRM retains this list (with one exception) and agrees with the Proxy Voting Rule that the list “confirm[s] and restate[s] what the prudence and loyalty obligations of ERISA ... require in these areas.”<sup>116</sup>

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<sup>111</sup> Field Assistance Bulletin No. 2018-01, <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01>. The 2018 Field Assistance Bulletin raised, without deciding, the question of whether collateral benefits may serve as a basis for selecting a QDIA “for a particular plan population,” i.e., a plan population that the fiduciary has reason to believe shares common commitments and wishes to pursue those commitments together using retirement funds. Such a possibility is a far cry from what the NPRM proposes to authorize.

<sup>112</sup> 85 Fed. Reg. at 81678.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See 29 C.F.R. 2550.404a-1(e)(2)(ii).

<sup>116</sup> 86 Fed. Reg. at 57282.



The Proxy Voting Rule also clarified that, when a fiduciary engages an investment manager or proxy advisory firm to exercise shareholder rights on behalf of the fiduciary’s participants and beneficiaries, the fiduciary must monitor the manager or advisor’s activities. The Department has recognized such a requirement under ERISA since at least 1994.<sup>117</sup> The Proxy Voting Rule’s most important contribution on this front was to explain that the fiduciary’s monitoring duty encompassed ensuring that the manager or firm complied with the requirements of prudence and loyalty that apply to the fiduciary itself (and that the Rule summarized in the list of six requirements).<sup>118</sup> The Proxy Voting Rule made clear that it is not enough for a fiduciary, for instance, to exact a generalized commitment from a manager or proxy firm to act prudently and loyally; the fiduciary must ensure that the manager or firm abides by the same code of conduct applicable to the fiduciary itself, so that participants do not lose any protections by reason of the transfer of proxy voting rights from the fiduciary. This aspect of the monitoring duty is a necessary implication of the statutory duties of prudence and loyalty, but last year the Department believed that the “lack of clarity”<sup>119</sup> in the market with respect to proxy duties made its articulation imperative.

The NPRM does not disagree that the monitoring duty demands that a fiduciary ensure investment managers and proxy advisories adhere to the same standard of prudence and loyalty as the fiduciary itself. But strangely it does change the regulatory text on just this point. It replaces 29 C.F.R. 2550.404a-1(e)(2)(iii) with a generalized directive that fiduciaries must “[e]xercise prudence and diligence in the selection and monitoring of persons, if any, selected to exercise shareholder rights.”<sup>120</sup> The NPRM hastens to point out that “[t]he revised text does not represent a change in the Department’s view or requirements under the current regulation.”<sup>121</sup> Rather, the point of the change is to avoid suggesting that monitoring is subject to “some special obligations above and beyond the statutory obligations of prudence and loyalty.”<sup>122</sup>

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<sup>117</sup> See *Interpretive Bulletin Relating to the Exercise of Shareholder Rights*, 81 Fed. Reg. at 95881.

<sup>118</sup> See 29 C.F.R. 2550.404a-1(e)(2)(iii).

<sup>119</sup> 85 Fed. Reg. at 81678.

<sup>120</sup> 86 Fed. Reg. at 57303.

<sup>121</sup> *Id.* at 57281.

<sup>122</sup> *Id.*



It is difficult to make sense of this concern. The NPRM cannot mean that the Proxy Voting Rule misinforms fiduciaries about their proxy-voting duties, for as just noted the NPRM agrees with (and therefore does not propose to change) the substance of those duties.<sup>123</sup> The concern seems rather to be that, by listing “specific monitoring obligations,” the Proxy Voting Rule implied that these obligations were “above and beyond the statutory obligations,”<sup>124</sup> thus perhaps underselling the demands of the prudence and loyalty duties in other contexts where these specific obligations are not spelled out. But this is a strange objection, not least because the NPRM itself continues to list those same “specific standards for fiduciaries to meet”<sup>125</sup> in their own voting. We cannot imagine how the same list of specific obligations can be helpful when describing the obligations of fiduciaries in voting proxies but harmful when describing the obligations of fiduciaries to monitor the voting of proxies by others.

In any event, here too the NPRM simply chases one goal without accounting for the loss of another. By removing the Proxy Voting Rule’s 29 C.F.R. 2550.404a-1(e)(2)(iii), the NPRM sacrifices the clarity that that provision imparts. Indeed, fiduciaries may well draw the conclusion that the Department now believes the Proxy Voting Rule erred by maintaining that the monitoring duty requires that fiduciaries hold managers and firms to the same standard as themselves. The NPRM never explains or even considers whether that loss is worth whatever gain it may be pursuing here.

The same problem crops up again in the NPRM’s proposal to eliminate the requirement that fiduciaries “[m]aintain records of proxy voting activities and other exercises of shareholder rights.”<sup>126</sup> To justify this proposal, the NPRM turns to its favorite standby concern: requiring that fiduciaries keep records of their proxy votes might “chill” their exercise of proxy rights.<sup>127</sup> But the NPRM does not acknowledge the downside to its proposal: if fiduciaries do not so much as retain records of their proxy votes, how are participants and beneficiaries to hold them accountable for adherence to their duties of prudence and loyalty? Moreover, as we explained above, the desire to avoid documenting the exercise of

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 29 C.F.R. 2550.404a-1(e)(2)(ii)(E).

<sup>127</sup> 86 Fed. Reg. at 57281-82.



fiduciary duties is simply not a legitimate interest under a statute with a core purpose of giving participants and beneficiaries the information they need to hold fiduciaries accountable.<sup>128</sup>

**V. Climate Change Cannot Be Deemed “Presumptively Material,” and the NPRM Fails to Provide Sufficient Detail to Comment on This Revolutionary Idea.**

The NPRM buries in its cost-benefit analysis a request for comment on a notion that, if adopted, would fundamentally transform investing under ERISA: whether “fiduciaries should consider climate change as presumptively material in their assessment of investment risks and returns.”<sup>129</sup> This radical suggestion must be firmly rejected.

In the first place, it is astounding that an NPRM predicated on the “chill” allegedly caused by disfavoring a particular investment approach should, in its turn, consider disfavoring the opposite approach. A presumption of materiality for climate-related factors would unquestionably chill investments and investment strategies that do not consider those factors. The chilling effect of attaching actual legal penalties to the failure to disprove the materiality of climate-related factors would be much greater than the one allegedly caused by a few sentences in the preambles of the 2020 Rules hinting at possible bias. This reason alone is more than enough to reject the NPRM’s suggestion.

There are many more reasons. Chief among them is the fact that the Department offers no basis (and we are aware of none) to believe that climate-related factors are material to a majority, or even a sizable minority, of investment decisions under ERISA. The Department predicates its request for comment on a “substantial body of evidence” reviewed in the NPRM,<sup>130</sup> but this evidence, on the Department’s own characterization, shows merely that climate-related factors are causing “significant economic impacts ... across various sectors of the economy.”<sup>131</sup> But that a factor may cause large aggregate impacts across the economy does not mean that those impacts are material to most

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<sup>128</sup> See 29 U.S.C. 1001(b).

<sup>129</sup> 86 Fed. Reg. at 57290.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 57289.



investment decisions. Presidential elections, U.S. foreign policy, and even Halloween<sup>132</sup> have large impacts on the economy, but they are not presumptively material for all investment decisions; rather, ERISA demands that fiduciaries consider them when, and only when, they may affect the risk-adjusted returns of a particular investment or strategy.

Climate change warrants no different treatment, for there is no reason to think that it materially affects the risks and returns of all or even most investments. The climate affects different enterprises differently. The NPRM itself admits that transition risk varies by sector and asset class,<sup>133</sup> and a report cited favorably in the NPRM states that “physical climate risks vary greatly by region.”<sup>134</sup> Moreover, the materiality of climate-related factors must turn on facts about each investment itself; projected long-term risk from severe weather, for instance, may not be material to short-term investment decisions. These and many other individuating factors mean that there is simply no basis to assert that, for most investments in most enterprises, climate-driven risks or opportunities are material. And a presumption of materiality for factors that are not material in the majority of cases would be irrational.

Further, the NPRM makes no effort to show that climate factors are *more* likely to be material than other factors that cause a large aggregate economic impact. For instance, as of the date of this comment, tensions between the U.S. and both China and Russia are escalating. Serious conflict with either of those powers would cause a profound impact on the economy that, for the duration of the conflict, would dwarf any climate-related effects. Yet the NPRM does not propose that pending foreign wars or even great-power conflicts should be presumptively material. As another example, just a few days ago it appeared that Congress might not enact appropriations to keep the federal government in operation, suspending federal salaries with accompanying deep economic ripples, yet the comment does not propose to treat appropriations, or for that matter any legislation, as presumptively material. The same is true for other events that would have an outsized economic impact: e.g., riots of the sort that rocked the nation in the summer of 2020; disruptive technological innovations; the outcome of elections; consumer confidence; regulatory changes; or future public health crises. Indeed, the NPRM

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<sup>132</sup> See “Planned annual Halloween expenditure in the United States in 2021, by item” (Nov. 8, 2021), <https://www.statista.com/statistics/275736/annual-halloween-expenditure-in-the-us-by-item/>.

<sup>133</sup> 86 Fed. Reg. at 57290 (noting that transition risk affects “carbon-dependent businesses”).

<sup>134</sup> BlackRock Investment Institute, “Getting Physical: Assessing Climate Risks” (2019), [bii-physical-climate-risks-april-2019.pdf](#); see 86 Fed. Reg. at 57290 (favorably citing report).



does not even propose to treat the continuing COVID-19 pandemic as presumptively material, notwithstanding its known massive impact on every economy in the world. To deem climate-related factors alone presumptively material, the Department would need to show that climate-related effects are more likely to be material than the effects of all the events we have named and many more, but the NPRM does not make, or even attempt to make, that showing. If (as will be the case) the Department cannot make such a showing, then if the Department finalizes a rule deeming climate factors presumptively material, it must also in that rule deem presumptively material all the factors listed in this paragraph and any others that present at least as great a likelihood of being material to an ERISA-covered investment or investment strategy as are climate-related factors.

Incredibly, the Department suggests that climate factors may be presumptively material without any mention of an *ongoing regulatory proceeding on the same question*. Several months ago the Securities and Exchange Commission issued a detailed request for comment on amendments to the securities disclosure requirements for climate-related issues.<sup>135</sup> Materiality is the touchstone for such disclosures, which is why the SEC's request uses the term several times,<sup>136</sup> any amendments to the disclosure framework would almost certainly require the SEC to opine on an array of questions about the materiality of climate-related factors. The SEC has received thousands of comments in response to its request.<sup>137</sup> Yet the NPRM does not discuss, or even display awareness of, the request or the comments. Deeming climate factors presumptively material without considering the information gathered in the SEC proceeding and readily available to the Department would be arbitrary and capricious. So would creating a materiality framework that irrationally diverges from the one that may be offered soon by the SEC, which after all has considerably more expertise on the issue than the Department. The Department must hold this proceeding until it has assessed the information submitted to the SEC and has coordinated its approach on the materiality question with the SEC's own approach.

In any event, the Department cannot finalize a presumption of materiality for climate-related factors because the NPRM fails to give sufficient details for the public to comment adequately on the notion.

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<sup>135</sup> Acting Comm'r Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures" (Mar. 15, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

<sup>136</sup> *Id.*

<sup>137</sup> SEC, Comments on Climate Change Disclosures, <https://www.sec.gov/comments/climate-disclosure/cll12.htm>.



To finalize such a presumption, the Department would need to spell out many critical details, such as how to define “climate change,” the class of investment decisions to which the presumption would apply, and, most importantly, how the presumption could be rebutted. The two short sentences in which the presumption is suggested, sandwiched amid the discussion of benefits in the regulatory impact analysis, address none of these details. Questions about them go to the heart of the presumption; we, and doubtless many others, would have much to say about the Department’s proposed answers. But we cannot “divine the [agency’s] unspoken thoughts,” and because we cannot, we and others have not yet had our “first opportunity ... to offer comments that could persuade the agency to modify” whatever details it has in mind for the presumption.<sup>138</sup> To secure logical outgrowth for any particular version of the presumption, the Department must first propose some particular version; after all, “[s]omething is not a logical outgrowth of nothing.”<sup>139</sup> Absent a specific proposal on which we can comment, the purposes of notice and comment have not been served,<sup>140</sup> and the Department lacks logical outgrowth to finalize any version of the presumption.

#### **VI. The Department Has Prejudged the Outcome of This Rulemaking.**

The same day the NPRM was issued, the White House released a report entitled *A Roadmap to Build a Climate-Resilient Economy*.<sup>141</sup> The report explained that the “current U.S. regulatory framework makes it difficult for pension plan managers to adequately consider climate-related financial risk,” and that the Department is therefore “leading efforts to remove regulatory barriers,” efforts which “will better

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<sup>138</sup> *Arizona Pub. Serv. Co.*, 211 F.3d at 1299 (emphasis omitted).

<sup>139</sup> *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

<sup>140</sup> *See Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (1994) (noting that “general notice that a new standard will be adopted affords the parties scant opportunity for comment” and holding that the agency failed to establish logical outgrowth because it did not specify adequately the details of the standard it proposed).

<sup>141</sup> Available at <https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf>.



protect the life savings of America’s workers and their families from the impacts of climate change.”<sup>142</sup> The NPRM, the report explained, is “part of these efforts.”<sup>143</sup>

The report’s statements are consistent with those of the Department when it began the rulemaking. In March of this year, in a statement announcing its intent to revisit the 2020 Rules and to decline to enforce them in the interim, the then-Principal Deputy Assistant Secretary (and now Acting Assistant Secretary) for the Employee Benefits Security Administration stated in an official press release that “[t]hese rules have created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights.”<sup>144</sup> Accordingly, he explained that the Department intends “to determine how to craft rules that better recognize the important role that environmental, social and governance integration can play.”<sup>145</sup>

These documents leave no doubt about the settled position of the Department, and indeed of the entire Administration, on the core questions which this rulemaking presents. They have decided that the 2020 Rules impede consideration of ESG factors, that such impedance is unjustified, and that the rules therefore must be rescinded. We argue to the contrary in this comment, and the APA and the Due Process Clause of the United States Constitution both demand that the Department consider these views. But in light of the statements we have cited, to doubt that the Department has made up its mind to rescind the 2020 Rules notwithstanding the data and arguments offered in comments would require wilfull blindness.

To be sure, agency leadership’s “mere discussion of policy or advocacy on a legal question” does not raise prejudgment concerns.<sup>146</sup> But departmental and White House officials went much further here. They did not just endorse the view that pension plans ought to consider material ESG factors; they also

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<sup>142</sup> *Id.* at 24.

<sup>143</sup> *Id.* at 25.

<sup>144</sup> News Release, *supra* n.6.

<sup>145</sup> *Id.*

<sup>146</sup> *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991) (quoting *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.3d 1151, 1188 (D.C. Cir. 1979)).



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announced, in official publications, a decision to remove any regulatory barriers to such consideration; declared that the 2020 Rules discourage consideration of ESG factors (and therefore fall within the category of barriers they have decided to remove); and stated that the NPRM's purpose is to carry forward the removal of such unwarranted regulatory impediments. Those erroneous decisions are enough to dispose of this rulemaking; there is practically nothing left for the Department to decide.

Moreover, these decisions bear every mark of finality: they were announced in official government publications and contain no hint that they are tentative or subject to revision. They bespeak, in other words, an "unalterably closed mind"<sup>147</sup> on a set of questions decisive for this proceeding. For these reasons, finalizing the NPRM would render a rule that is unlawful on the basis of prejudgment.<sup>148</sup>

### CONCLUSION

As should now be evident, the NPRM suffers from many defects that go to the heart of the proposal. Many are errors of law, and the Department will therefore not be able to repair them while retaining the NPRM in anything like its present form.

Even if the Department disagrees about these questions of law, there are inarguable failures of rationality under the APA that require repair. The nature of these flaws means that the Department will not be able to fix them in any finalization of the current NPRM. That is because, for one thing, many of the defects consist in failure to acknowledge the important aspects of the problems this rulemaking presents. To issue a lawful final rule, the Department must acknowledge these aspects and also offer reasons to choose to proceed anyway. The public has not yet had an opportunity to comment on those reasons, and such an opportunity must be afforded before the rule may be finalized.<sup>149</sup> The only way to cure these defects would be to issue a new notice for comment setting forth the missing analyses.

Likewise, except with respect to our proposed rescission of the tie-breaker provision in the current regulation, the NPRM would encounter fatal prejudgment concerns if the Department proceeds

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<sup>147</sup> *Id.*

<sup>148</sup> No prejudgment issues, however, would be raised by finalizing this comment's proposal to remove the tie-breaker provision from the current regulation. That is because the White House and Departmental statements do not indicate any intent to eliminate that provision.

<sup>149</sup> *See supra* at p. 10-11.



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directly to finalization. The only cure for this defect is additional process that demonstrates the Department's openness to the views of commenters. Such a process should consist of a withdrawal of the NPRM for reconsideration. Such a reconsideration should offer the public opportunities to provide views, especially the plan participants and beneficiaries whom ERISA is meant to serve and not just fiduciaries.

For the foregoing reasons, the Department should finalize a targeted rule that eliminates the tie-breaker provision of the Financial Factors Rule, 29 C.F.R. 2550-404a-1(c)(2), and should otherwise announce a decision not to finalize the NPRM. If the Department declines such a decision and instead chooses to proceed with a broader rulemaking, it must withdraw the NPRM and, after a suitable process to cure the taint of prejudice, issue a new NPRM that addresses the numerous defects in law and analysis in the current NPRM.

Sincerely,

*Will Hild*

William Hild  
Executive Director, Consumers' Research

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