



December 13, 2021

Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: Comments Concerning the Proposed Rule "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights"

RIN 1210-AC03

Dear Secretary Khawar:

I am writing on behalf of Massachusetts Financial Services Company ("MFS" or "We")¹ in response to the invitation by the U.S. Department of Labor (the "Department") to provide comments on the Department's recently proposed amendments to Section 2550.404a-1 (the "Proposed Amendments") under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").²

MFS has a long history of providing investment management services to clients and accounts that are subject to ERISA, including serving as an adviser for pooled vehicles that are included on defined contribution plan rosters and managing assets of defined benefit plans through separate account structures (collectively, "ERISA assets"). As an active investment manager, MFS believes that the integration of all factors that are financially material to the risk-return analysis of an investment should be considered in the investment process and when exercising shareholder rights. This analysis includes the consideration of environmental, social, and governance ("ESG") factors when these factors have a material impact on an investment's value. We believe this approach to investment management is particularly important when managing retirement assets,

¹ MFS Investment Management traces its history back to 1924 and the creation of the country's first open-end mutual fund, Massachusetts Investors Trust. Today MFS is a global investment manager managing approximately \$668 billion in assets as of November 30, 2021, through a variety of pooled investment vehicles and separate accounts.

² *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, RIN 1210-AC03, 86 FR 57272 (October 14, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf> (the "Release").

which tend to have a longer-term investment horizon and, therefore, may be more susceptible to risks associated with climate change and other ESG factors. We additionally regularly engage participants in employer-sponsored retirement plans to gauge market trends and preferences. These interactions indicate that such participants generally view the inclusion of ESG factors in the investment process positively and (1) are interested in employers adding plan options that incorporate ESG factors, and (2) would likely increase their contribution rate to a retirement plan if they had access to options that incorporate ESG factors.³ For these reasons, we think that the Proposed Amendments overall represent an important step towards clarifying for fiduciaries that all material factors, including ESG factors, may be appropriate considerations when managing ERISA assets.

I. MFS supports the Department's initiative to clarify that all material factors may be appropriate considerations when managing ERISA assets.

We are supportive of the Department's initiative to add clarity around the consideration of all material factors, including ESG factors, when managing ERISA assets and the Department's proposed revision of certain elements of the prior administration's November 2020 rule, "Financial Factors in Selecting Plan Investments" (the "**Current Rule**"). We share the Department's concern that the tone of the Current Rule, and in particular the Current Rule's proposing release, characterizes ESG factors as having questionable economic value.⁴ We believe the Current Rule is misguided and we agree with the Department that the Current Rule may disadvantage ERISA investors by deterring fiduciaries from "taking steps that other marketplace investors would take in enhancing investment value and performance, or improving investment portfolio resilience against the potential financial risks and impacts often associated with climate change and other ESG factors."⁵ We think the Release includes important, financially-grounded discussion to recalibrate this tone and unambiguously establish that ESG factors may have a material impact on an investment's value and, therefore, may be an appropriate consideration when managing ERISA assets.⁶ We additionally support the Department's shift away from the Current Rule's overly complex and legalistic terminology by removing all references to the term "pecuniary" and the associated analysis.

We do, however, respectfully submit the below comments for the Department's consideration. We think these targeted changes to the Proposed Amendments will help

³ MFS sponsors an annual Global Retirement Survey (the "**Survey**"), which, in 2021, indicated that (i) 73% of the Survey's respondents are interested in seeing more ESG investments options offered in their defined contribution plan, and (ii) 72% of the Survey's respondents indicated they would likely contribute at a higher rate to their defined contribution plan if it included options that consider ESG issues. Dynata, an independent third-party research provider, conducted the Survey among defined contribution plan participants in the US on behalf of MFS. MFS was not identified as the sponsor of the Survey. To qualify, plan participants had to be ages 18+, working at least part-time, and actively contributing to an employer-sponsored retirement plan. 1,020 US defined contribution plan participants answered the Survey, which was fielded between March 31 – April 13, 2021.

⁴ See Release, 86 FR 57275.

⁵ *Id.*

⁶ See Release, 86 FR 57276 (discussing the potential economic consequences resulting from the effects of climate change).

add further clarity for fiduciaries and reinforce ERISA's principles-based approach. We additionally encourage the Department to consider the comments articulated in the comment letters submitted by the Defined Contribution Institutional Investment Association ("DCIIA"), the Investment Company Institute ("ICI"), and the Investment Adviser Association ("IAA"), which we largely agree with.

II. The Department should remove examples of ESG factors from the newly proposed paragraph 404a-1(b)(4).

In the Release, the Department indicates that new paragraph 404a-1(b)(4) is intended to clarify that fiduciaries may consider any factor that is material to a risk-return analysis when managing ERISA assets, including climate risk and other ESG factors.⁷ The Department further states that to eliminate any doubt or prejudice caused by the Current Rule, the Department is proposing to codify, as part of 404a-1(b)(4), a list of illustrative examples of factors that may have a material impact on an investment's value.⁸ The Department's proposal includes an extensive list of examples that solely relate to ESG factors, including: (i) climate change-related factors, such as physical, transitional, and regulatory risk; (ii) governance factors, such as board composition and executive compensation practices; and (iii) workforce practices, such as diversity and labor relations.⁹ The Department has solicited industry feedback concerning whether this list of examples should be reduced or expanded. While we do not disagree that the above factors may, and often are, material to an investment's value and may reflect appropriate considerations when managing ERISA assets, we urge the Department to revise 404a-1(b)(4) to remove all examples for the following reasons:

- Codifying only examples of ESG-related factors and no other factors may unintentionally elevate the emphasis placed on ESG factors by fiduciaries in managing ERISA assets. The Department clearly intends 404a-1(b)(4), and the Proposed Amendments overall, to have a broad application and extend beyond merely the consideration of ESG factors.¹⁰ We think, however, spotlighting only ESG factors above other potentially material factors¹¹ could be interpreted in practice as the Department signaling to fiduciaries to consider, at minimum, this discrete list of issues. This could result in a "tick-box" exercise for fiduciaries and potentially narrow the practical application of the Proposed Amendments. Additionally, adding examples of non-ESG factors or additional ESG factors would not address this concern, as codifying any examples in rulemaking could have the unintended consequence of

⁷ See Release, 86 FR 57277 ("This paragraph [b](4)] clarifies and confirms that a fiduciary may consider any factor material to the risk-return analysis, including climate change and other ESG factors. The intent of this new paragraph is to establish that material climate change and other ESG factors are no different than other "traditional" material risk-return factors, and to remove any prejudice to the contrary.").

⁸ See Release, 86 FR 57277.

⁹ 404a-1(b)(4)(i)-(iii).

¹⁰ See Release, 86 FR 57277.

¹¹ Examples of such factors may include an issuer's reputation and brand, customer preferences and demographics, cybersecurity and data protection, or general regulatory environment.

assigning undue prominence to those specific factors.

- We are concerned that the specific examples selected by the Department may lay the groundwork for justifying future revisions to this Rule. We believe one of the principal concerns among fiduciaries managing ERISA assets is the back-and-forth nature of rulemaking and guidance surrounding the consideration of ESG factors. This lack of certainty has created confusion in the marketplace regarding the appropriate role of ESG factors, potentially deterring the consideration of such factors altogether. Additionally, there is a financial cost and toll on other resources incurred by fiduciaries in tracking and implementing fluctuations in regulatory standards. As such, the Department should use this opportunity to introduce amendments that add clarity in this area, but are constructed to be "evergreen" in their application. The ESG-related examples cited by the Department, particularly around climate change, diversity, and labor relations, certainly reflect potentially material issues impacting an investment's value, but also reflect areas of historical political and social flashpoints. The proposed approach could motivate future administrations to amend this rule further to add counterbalancing examples or otherwise update this list and, therefore, continue the perpetual back-and-forth in this area.
- The list of examples is not necessary to reinforcing the ERISA bedrock principle that a fiduciary should only consider factors that materially impact risk/return analysis. We believe the Department's amendment to 404a-b(2)(ii)(C) to add an explicit reference to ESG factors and the addition of paragraph 404a-(b)(4), without the examples, are sufficient alone to communicate the Department's intent to clarify that all material factors, including ESG factors, may be appropriate considerations for a fiduciary when managing ERISA assets. The Department alludes to this point in the Release, noting that "[p]aragraph (b)(4) of the proposal would not introduce any new conditions under the prudence safe harbor in paragraph (b); its sole purpose is to provide clarification through examples."¹² Given this fact, we believe the preamble in any rulemaking is a more appropriate place for this type of "color" around the application and intent of a rule. The Department has already done this in the Release's preamble by reciting these examples verbatim and providing other illustrative analysis around how specific ESG factors can have a material economic impact on an issuer.¹³ We encourage the Department to carry forward this type of discussion in the preamble when preparing the adopting release for the Proposed Amendments.

¹² See Release, 86 FR 57277.

¹³ See Release, 86 FR 57277-57278.

III. The Department should clarify the proposed language under 404a-1(b)(2)(ii)(C) describing factors that a fiduciary should analyze when determining an "appropriate consideration".

As discussed above, we support the Department's initiative to clarify that all material factors, including ESG factors, may be appropriate considerations when managing ERISA assets. In making this clarification, the Department has proposed to rewrite 404a-1(b)(2)(ii)(C) to provide that "appropriate consideration" may include, among other things, the following:

"The projected return of the portfolio relative to the funding objective of the plan, which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action." (emphasis added)¹⁴

We are concerned that the phrasing "*may often require*" is ripe for misinterpretation by fiduciaries and insinuates a mandatory consideration of climate change and other ESG factors. We do not believe that this is the intent of the Department and, as such, we urge the Department to substitute "*may often require*" with "*may involve*" as this would clearly establish a fiduciary's discretion in considering these factors.

* * *

We appreciate the opportunity to provide comments on the Proposed Amendments. If you have any questions, please contact me at [REDACTED] or Brad Wilson at [REDACTED]
[REDACTED].

Sincerely,

Heidi W. Hardin

¹⁴ 404a-1(b)(2)(ii)(C).