

December 13, 2021

VIA ELECTRONIC FILING

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

RE: *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*

Attention: RIN 1210-AC03

Dear Acting Assistant Secretary Khawar,

National Grid respectfully submits this letter in support of the Department’s proposed rule, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* (“the Proposed Rule”), 86 Fed. Reg. 57272 (Oct 14, 2021).

National Grid is one of the world’s largest investor-owned utilities with operations in the United Kingdom and here in the United States. We serve 7 million customers in Massachusetts, New York and Rhode Island and employ 17,000 Americans. In the United States, National Grid sponsors multiple retirement benefit plans with assets of approximately \$20 billion. As a business we are committed to being a leader in the clean energy transition. We have experienced first-hand the impacts of climate change with the emergence of more powerful storms in our region, which have in some cases had devastating impacts to our customers and communities and required our dedicated storm response. We believe committing to challenging climate goals as a business benefits all stakeholders including investors.

In 2020, National Grid issued its first [Responsible Business Report](#), which reaffirms our commitment to be net-zero by 2050. As a large business, in a pivotal role in the energy system, we know we have a responsibility to encourage and persuade others to adopt challenging goals, as it is only by acting in a coordinated way – across businesses, policy-makers, academia and others – that we can deliver the changes necessary to drive down emissions. While we support the United Nations Sustainable Development Goals, we can make a particularly strong contribution by helping to achieve gender equality in our workforce; ensuring access to affordable, reliable, sustainable and modern energy for all; promoting sustained, inclusive and sustainable economic growth for all; building resilient infrastructure; and taking urgent action to combat climate change and its impacts. Ultimately, one of our aims is for our responsible business actions and impact to differentiate us from our peer group—to demonstrate our values to the communities we serve, make us an employer of choice and a strong proposition for ESG-minded investors.

We applaud the Department for its thorough and carefully considered proposal. We believe the Proposed Rule aligns with longstanding Department guidance and the protective nature of the Employee Retirement Income Security Act of 1974 (ERISA). The proposal would amend the Department’s investment duties regulation, which was most recently revised in 2020 by the previous

administration through a pair of rulemakings.¹ The 2020 revisions had amended the investment duties regulation to incorporate in regulatory guidance for the first time standards related to environmental, social, and governance (“ESG”) considerations in plan investments and investment courses of action, as well as plan fiduciaries’ obligations to vote proxies and exercise other shareholder rights in connection with plan investments. While the final regulations issued in 2020² did respond to some stakeholder comments,³ the 2020 revisions created unnecessary uncertainty for fiduciaries with respect to the appropriate consideration of ESG factors and whether and how to vote proxies.

Settled guidance that focuses on following a sound process is necessary

National Grid supports the importance of plan fiduciaries acting in accordance with ERISA’s duties of prudence and loyalty when making investment-related decisions. We take those duties very seriously when acting as fiduciaries and making decisions regarding plan assets. We also share the Department’s long-held view that a fiduciary may not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to collateral objectives—this is a core view that has remained constant throughout multiple changes in administration.

ERISA takes a non-prescriptive approach with the duties it imposes on plan fiduciaries, giving fiduciaries the leeway they need to determine how best to fulfill those duties in a wide variety of situations. Key to making those determinations is the fiduciary’s use of a sound process. We appreciate the Department’s efforts to take a less prescriptive approach with the proposal as compared to the current regulation, including by eliminating certain explicit requirements that the Department explains in the preamble as already being inherently accounted for by the general obligations that ERISA imposes on fiduciaries. Because meeting ERISA’s fiduciary duties requires flexibility on the part of fiduciaries, it is vital that the Department’s regulations or other guidance do not interfere with a fiduciary’s ability to exercise the requisite level of flexibility.

For example, the current regulation includes several provisions that inappropriately single out ESG factors and subjects them to increased scrutiny and added restrictions. Specifically, these include:

- the prohibition on an investment fund, product, or model portfolio from being added or retained as, or as a component of, a QDIA if its investment objectives or goals, or its principal investment strategies, “include, consider, or indicate the use of one or more non-pecuniary factors”;⁴
- a separate provision clarifying the general application of the duties of prudence and loyalty with respect to the selection or retention of DIAs;⁵ and

¹ 29 C.F.R. § 2550.404a-1. In this letter, we use the term “current regulation” to refer to the Department’s investment duties regulation as it exists today, which includes the amendments that were made to the regulation in 2020. References to the “2020 revisions” (or similar such terms) refer specifically to the amendments made by the previous administration’s Financial Factors in Selecting Plan Investments final rulemaking and/or the Fiduciary Duties Regarding Proxy Voting and Shareholder Rights final rulemaking, as applicable.

² 85 Fed. Reg. 72,846 (Nov. 13, 2020); 85 Fed. Reg. 81,658 (Dec. 16, 2020).

³ 85 Fed. Reg. 39,116 (June 30, 2020); 85 Fed. Reg. 55,221 (Sept. 4, 2020).

⁴ 29 C.F.R. § 2550.404a-1(d)(2)(ii).

⁵ 29 C.F.R. § 2550.404a-1(d).

- a special documentation requirement that applies if a fiduciary uses non-pecuniary factors as a tie breaker.⁶

The proposed regulation would eliminate each of the above items. For the reasons described by the Department, we strongly support the removal of provisions in the current regulation that unnecessarily single out ESG factors. Removing these provisions would help return the focus of the investment duties regulation to the use of a prudent process and restore the flexibility fiduciaries need to apply such process in different contexts. It would also counteract the chilling effect that these provisions have had on fiduciaries' consideration of ESG factors. More specifically, we endorse the Department's rescission of the prohibition on certain investment alternatives being used as a QDIA. A fiduciary's responsibilities of prudence and loyalty are no different for a QDIA than for other plan investments, and if a participant does not wish to invest in the QDIA, they can select another investment vehicle. Any other approach would, as the Department observes in the preamble, "only serve to harm participants by depriving them of otherwise financially prudent options as QDIAs."

In addition to providing flexibility, it is important to have settled guidance for fiduciaries making investment decisions. Despite the consistency in the Department's core view as noted above, different administrations have expressed different notions over the years about what exactly that core view means with respect to a fiduciary's consideration of ESG factors and proxy voting. Those differing viewpoints were first expressed through a series of sub-regulatory guidance, and most recently through the 2020 revisions that resulted in the current regulation.

Beyond the text of the regulation itself, we also encourage the Department to consider whether the rule's preamble and regulatory impact analysis ("RIA") could be used against the proposal and to support a future administration's potential desire to revisit the investment duties regulation (assuming the proposal is finalized). For example, the RIA's discussion of certain studies that have found ESG investing results in lower returns than conventional investing could invite future scrutiny of the rule.⁷ Although the RIA mentions that such studies "may not be completely representative of ERISA investment outcomes," it neglects to more thoroughly address the extent to which those studies are irrelevant to ERISA plans and an analysis of the proposed regulation.⁸

The Proposed Rule rightfully restores fiduciary authority to consider all relevant factors

Since 1978, Department regulations have required fiduciaries to consider all relevant factors when choosing among available investment options. The *Financial Factors* rule replaced this well-understood legal standard with a new and ill-defined "pecuniary" test, causing considerable confusion. The Proposed Rule appropriately eliminates this new term, restoring the traditional all-relevant-factors test.

We are particularly supportive of paragraph (b)(4) which, as the preamble states, "clarifies and confirms that a fiduciary may consider *any* factor material to the risk-return analysis, including climate change and other ESG factors." This reaffirms that "under ERISA, if a fiduciary prudently concludes that climate change or another ESG factor is material to an investment or investment course of action under consideration, the fiduciary can and should consider it and act accordingly, as would be the case with respect to any material risk-return factor." In our view, the Proposed Rule is consistent with, and

⁶ 29 C.F.R. § 2550.404a-1(c)(2)(i)-(iii).

⁷ 86 Fed. Reg. at 57,290.

⁸ *Id.* at 57,291.

encapsulates, the spirit and text of ERISA, as stated in the paragraph (c)(1), “A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.”

Climate change is a relevant factor that fiduciaries must be free to consider

Fiduciaries must be empowered to evaluate *all* factors that impact risk and return, including climate change, which affects nearly [all sectors](#) of the economy. Climate related disasters are increasingly frequent, with a record 22 events causing over \$1 billion damage each in the US during 2020 alone, for a total cost of [\\$100 billion](#). A 2019 analysis of 215 of the world’s [largest companies](#) identified just under \$1 trillion of potential risk to them from climate change – and noted that half of these losses are expected to materialize in the next five years. National Grid and our customers are experiencing climate change firsthand. This year alone we have responded to some of the most impactful storms we have seen in almost 20 years. Hurricane Isaias and the October Micro-Burst/Tornado/Derecho took their place on the US National Grid Top Ten storm list as some of the most severe weather events to affect our customers. In 2020/21, we experienced around double the number of storm events compared to the prior year, resulting in \$201 million of storm costs. In 2019/20 we experienced \$98 million of deferrable storm costs. In [our annual report](#) we note that while the climate change related risk is classed as a strategic and regulatory risk, it is also an operational risk, in particular as regards weather-related events in the northeastern US (where storm planning and preparation are key to what we do), and the investigation of the impact of rising temperatures and widening temperature ranges on the performance and operation of our networks.

As an empirical matter, climate risks are not yet fully reflected in asset prices, which means that prudent fiduciaries are warranted in probing further. Climate-related financial risks are especially relevant to retirement investors, who invest over decades, and are generally universal owners with exposure to many at-risk sectors. As society increasingly recognizes the importance of responding to the climate crisis, new regulation and changes in consumer demand will create significant [market and investment opportunities](#) that fiduciaries may wish to [consider](#).

Sophisticated institutional [investors](#) recognize these risks and opportunities, and are addressing climate risk as a bedrock principle of capital preservation and growth. A growing number of individual investors also [want](#) access to ESG funds. Climate concerns and other ESG risks will be a significant driver of investment risk and return for the foreseeable future. As with any factor, performance of ESG funds will vary, but an analysis of 11,000 mutual funds over 14 years showed that [ESG funds had lower downside risk and equivalent returns](#) to the broader market. In spite of this overwhelming evidence, organizations that offer retirement plans or “plan sponsors” have largely remained on the sidelines, with [fewer than 3%](#) offering ESG funds in their investment menu. The Proposed Rule removes the impediments to ESG considerations, returning to fiduciaries their broad mandate to consider all relevant factors.

The Proposed Rule clarifies that ERISA plans may continue to make prudent investments that provide collateral benefits for workers, communities, and the environment

The *Financial Factors* rule provided that non-financial factors that offer collateral benefits to beneficiaries could be used to decide between funds only where the funds are economically “indistinguishable” (a provision known as the “tie-breaker rule.”) Under the current regulation, a fiduciary that cannot distinguish investment alternatives on the basis of pecuniary factors may use non-

pecuniary factors as the deciding factor.⁹ The proposal would replace that tie-breaker test with a standard under which, if a fiduciary prudently concludes after conducting a risk-return analysis that competing investments or investment courses of action “equally serve the financial interests of the plan over the appropriate time horizon,” then the fiduciary is not prohibited from making the selection based on collateral benefits other than investment returns.¹⁰

We support this proposed change as an improvement over the current regulation’s tie-breaker test. However, we would emphasize that, when a fiduciary is evaluating investment opportunities, there are often many investments that would be prudent to select. As long as the selection of any particular investment is consistent with a prudent process, then any number of investments may be chosen. Furthermore, while the Proposed Rule’s “equally serve the financial interests of the plan” language is an improvement on the term “indistinguishable,” we suggest that the language is still too narrow. The issue is not how closely two or more investments resemble one another, but whether they are each the product of a prudent selection process. Fiduciaries should receive equal deference if their investment choice is the product of such a process. We believe it is more appropriate for the collateral benefit provision in the final rule to focus on whether investments are equally prudent (i.e., the output of a prudent fiduciary process,) rather than on an analysis of the equivalence of their financial characteristics.

The Proposed Rule allows fiduciaries to consider all available information in seeking to best serve the interests of the plan’s participants and beneficiaries. It eliminates confusing language and restores the authority to exercise shareholder rights in the beneficiaries’ best interests. It represents a return to ERISA standards that have served American workers well in the nearly 50 years since ERISA became law. National Grid appreciates the Department’s hard work in drafting this timely and thoughtful Proposed Rule. Thank you for the opportunity to provide our view and suggestions. If you would find it helpful to discuss any of these matters with us, please contact me at Madeline.Gothie@nationalgrid.com.

Sincerely,

/s/ Madeline Gothie

Director, Pensions
National Grid

⁹ 29 C.F.R. § 2550.404a-1(c)(2).

¹⁰ Proposed § 2550.404a-1(c)(3).