



December 13, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5655
Washington, DC 20210
Attention: RIN 1210-AC03

Submitted online via <http://www.regulations.gov>

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

BlackRock, Inc. (together with its affiliates, “BlackRock”)¹ respectfully submits its comments to the Department of Labor (“DOL”) in response to the DOL’s proposed rule regarding the consideration of prudence and loyalty in selecting plan investments and exercising shareholder rights (the “Proposal”). BlackRock strongly supports the DOL’s goal of empowering plan fiduciaries to safeguard participants’ savings by making it clear that fiduciaries may consider climate and other environmental, social, and governance (“ESG”) factors.² Our investment conviction is that incorporating sustainability-related factors – which are often characterized and grouped into ESG categories – into investment decisions can provide better risk-adjusted returns to investors over the long-term. This conviction is founded on research by BlackRock, the industry, and academic research, in addition to our deep experience with both investment and risk management across asset classes. We believe the ability to consider climate and other ESG factors is imperative for ERISA plans and their participants (in the case of defined contribution plans), who are saving and investing for the long-term.

We commend the DOL’s efforts to improve the 2020 final rules titled “Financial Factors in Selecting Plan Investments”³ and “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights”⁴ (together, the “2020 Rules”). The Proposal reflects a thoughtful analysis of the challenges presented by the 2020 Rules, incorporates feedback from a wide range of stakeholders, and takes significant positive steps toward the DOL’s goal of empowering plan fiduciaries.

¹ BlackRock manages assets on behalf of individual and institutional clients across equity, fixed income, real assets, and other strategies. The assets we manage represent investors’ futures and the investment outcomes they seek, and it is our responsibility to help them better prepare themselves and their families to achieve their financial goals. Two thirds of the assets we manage are retirement-related assets. BlackRock manages assets for public and private pensions, including defined benefit and defined contribution plans of varying sizes.

² DOL Fact Sheet, Oct. 13, 2021.

³ 85 FR 72846 (Nov. 13, 2020).

⁴ 85 FR 81658 (Dec. 16, 2020).

BlackRock further appreciates the DOL's efforts to counteract the negative perception of the use of ESG factors in investment decisions caused by the 2020 Rules. We acknowledge the challenge of constructing a regulation that balances those efforts with maintaining the DOL's long-standing principles-based interpretation of fiduciary investment duties.

While the Proposal is a significant improvement over the 2020 Rules, there are certain provisions that may create confusion and/or uncertainty for plan fiduciaries. In this letter, we (1) provide insights regarding the evidence of the financial relevance of ESG factors in various investment contexts and (2) offer specific recommendations to clarify and improve the Proposal.

Section I: Financial Relevance of ESG Factors

The DOL notes that “the body of research evaluating ESG investing as a whole shows ESG investing has financial benefits, although the literature overall has varied findings.”⁵ We believe additional information and insights could better contextualize the DOL's findings. Below we address the comprehensiveness of research on ESG fund performance as well as the evolution of ESG investing.

The comprehensiveness of research on ESG fund performance

As noted in our [2020 response to the DOL](#), there is a growing body of practitioner and academic evidence supporting the view that incorporating sustainability-related factors into investment decisions can improve risk-adjusted returns in portfolios over time. However, to accurately assess the performance of ESG funds versus their non-ESG peers, it is essential that researchers select an applicable universe of ESG funds, benchmark(s) (e.g., whether index or peers), and time period(s) for relative comparison. Otherwise, results can be easily skewed based on how the universe, benchmark, and time periods are determined.

For example, in the Winegarden report cited by the DOL,⁶ the author compared ESG funds against the S&P 500. However, the ESG funds evaluated in the report were not all broadly diversified US equity funds. Many funds selected invested in equities of global clean technology-related companies, including large exposures to international and emerging market companies and/or were concentrated in one or two industries. Because of this dataset mismatch, Winegarden's comparison of the selected ESG funds against the S&P 500 does not isolate how incorporation of ESG data affects performance.

In contrast, while not academic papers, the periodic [Sustainable Funds: US Landscape Reports from Morningstar](#)⁷ offer comprehensive information on ESG fund performance. These reports identify the broad universe of mutual funds that incorporate meaningful ESG language in their prospectuses and compare the performance, over 1-, 3-, and 5-year

⁵ Proposal at 57290.

⁶ Proposal at 57290-91 citing Wayne Winegarden, Environmental, Social, and Governance (ESG) Investing: An Evaluation of the Evidence. Pacific Research Institute (2019).

⁷ Available at <https://www.morningstar.com/lp/sustainable-funds-landscape-report>

periods, of those funds relative to peers in their respective Morningstar category which includes similarly benchmarked funds that do not incorporate meaningful ESG language into their prospectuses. Morningstar's report covering year-end 2020 found that 69% of ESG funds performed in the top-half of their Morningstar category over the 1-year period, 75% over the 3-year period, and 69% over the 5-year period.⁸ We encourage the DOL to revisit and enhance the regulatory impact analysis given the body of research demonstrating that considering risk and return factors for ESG can have material, positive financial impact.

Evolution of ESG Investing

ESG investing has evolved rapidly over the past ten years, shifting from a focus on values-based investing to a focus on long-term value creation. "Responsible investing" began decades ago with values-based investors seeking strategies that reflected their moral and ethical views. These first-generation strategies were typically negative exclusion strategies or "screens", and performance considerations were often secondary to excluding specific investments or types of investments. This could provide useful context when interpreting some of the research cited by the DOL.⁹

As ESG data has become more accessible over the past ten years, we have a better understanding of financially relevant ESG information, and ESG funds that incorporate financially relevant ESG data, including beyond exclusionary strategies, have become more common. Today at BlackRock, we have access to over 2000 categories of ESG metrics from multiple vendors in our proprietary portfolio and risk management system. Because of the rapid increase in ESG-related disclosures by companies and third party ESG data providers, as well as advancements in technologies, the use of ESG data to seek enhanced investment returns and/or mitigate investment risks has become more sophisticated.

As outlined in our 2020 paper, [Sustainable Investing: resilience amid uncertainty¹⁰](#), traditional financial accounting standards such as GAAP or IFRS do not provide investors with a complete picture of what is material – that is, the full set of risks and opportunities faced by companies. Additional information such as, for example, the regulatory context in which a company operates can equip investors to evaluate risks more comprehensively, in particular over the long-term and in market stress periods when uncertainty about future outcomes may be heightened.

That same [research](#) shows that a select group of flagship ESG indices have, as a group, outperformed over multiple periods of market turbulence relative to their non-sustainable peers and have also provided equal to or better than overall risk-adjusted performance on a multi-year basis. Similarly, during the market volatility in Q1 2020, funds across active

⁸ Id.

⁹ See e.g., Proposal at 57291 citing Pieter Jan Trinks and Bert Scholtens, The Opportunity Cost of Negative Screening in Socially Responsible Investing, 140 Journal of Business Ethics 2 (2017).

¹⁰ Available at <https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf>.

and index investment strategies that scored higher on sustainability metrics from Morningstar generally outperformed like peers with lower sustainability metric scores.¹¹

Section II: Recommendations to Clarify and Improve the Proposal

We believe that plans and plan participants, who are generally long-term investors, are best served when plan fiduciaries can rely on clear and durable guidance that limits confusion and is free of bias. Therefore, BlackRock respectfully requests that the DOL consider the following suggestions to better align the Proposal with (1) the DOL's goal of empowering plan fiduciaries to safeguard participants' savings by clarifying that they can consider ESG factors, and (2) the DOL's position that proxy voting is the responsibility of plan fiduciaries, and fiduciaries can differ in their determinations regarding the exercise of shareholder rights.

Modify paragraph (b)(2)(ii)(C)

BlackRock agrees with the DOL that, depending on the facts and circumstances, a prudent risk/return analysis could require an evaluation of the economic effects of climate change or other ESG factors.¹² However, we are concerned that the words "may often require" may introduce uncertainty that could be confusing to plan fiduciaries and could lead them to interpret paragraph (b)(2)(ii)(C) either more broadly or less broadly than the DOL intended. There are common situations, such as when the objective of the applicable portion of the portfolio is to track the performance of an index, that a prudent analysis of the projected return relative to the portfolio's funding objective is unlikely to require an evaluation of the economic effects of ESG factors. By modifying the language as suggested below, the DOL would counteract any negative perception of the use of ESG factors in investment decisions created by the 2020 Rules while maintaining a principles-based approach to interpreting a fiduciary's duty of prudence.

Suggested Revision: Modify paragraph (b)(2)(ii)(c) as follows: "*(C) The projected return of the portfolio relative to the funding objectives of the plan, which ~~may often require~~ **permits** an evaluation of the economic effects of climate change and other environmental, social, or governance factors on a particular investment or investment course of action.*"

Clarify certain aspects of paragraph (b)(4)

BlackRock agrees with the DOL that "material climate change and other ESG factors are no different than other 'traditional' material risk-return factors."¹³ We are also supportive of the DOL's efforts to remove prejudice to the contrary by adding paragraph (b)(4) to the Proposal. One way to potentially improve the section could be to replace "material" with "relevant" in order to keep terminology consistent with the language used in paragraph

¹¹ [Sustainable Funds Weather the First Quarter Better Than Conventional Funds | Morningstar](#)

¹² Proposal at 57276.

¹³ Proposal at 57277.

(b)(1)(i). The DOL appears to use the terms “material” and “relevant” somewhat interchangeably in the preamble to the Proposal,¹⁴ and prior non-regulatory guidance uses the terminology “relevant economic factors”.¹⁵ Moreover, it would be useful to avoid confusion with the test for the “materiality” of disclosures under the federal securities laws if that is not what the DOL intended.¹⁶ To further enhance the clarity of the paragraph, we recommend the DOL expressly state in the regulation that a prudent fiduciary determines whether or not a particular factor is relevant.

Suggested Revision: Modify paragraph (b) (4) as follows: “A prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, **it prudently determines is relevant** ~~is material~~ to the risk-return analysis, which might include, for example...”

Clarify disclosure requirement in paragraph (c)(3)

BlackRock agrees with the DOL that the “tie-breaker” standard articulated in the Proposal is broader than the standard in the 2020 Rules and better aligns with Interpretive Bulletin 94-1. We also understand the importance of giving plan participants information to make an informed investment decision. However, we are concerned that the proposed disclosure requirement is unclear and could, unintentionally and inappropriately, broadly relegate ESG characteristics to collateral benefit factors.

As noted in the preamble, examples of tie-breaking characteristics may include alignment with the corporate ethos of the plan sponsor or the esprit de corps of the workforce.¹⁷ We believe that the DOL intended the applicable fund characteristic to be disclosed but would not expect the plan fiduciary to specify the collateral benefit itself. In other words, the collateral benefit to the plan may be different from the characteristic of the fund that is expected to provide the collateral benefit. For example, if the plan fiduciary of the 401(k) plan for a sustainable clothing manufacturer selected a mutual fund with an investment objective to seek to maximize total return while seeking to maintain certain ESG characteristics versus a benchmark, then presumably the disclosure requirement would be satisfied with a prominent display of the fund’s investment objective, rather than a statement regarding the fund objective’s alignment with the plan sponsor’s corporate ethos. As a result, we find the preamble’s reference to alignment with corporate ethos as a “tie-breaking **characteristic**” potentially confusing.¹⁸

¹⁴ See e.g., 57277 - 57279

¹⁵ See IB 2015-01.

¹⁶ See Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988) (“[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.”); TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 449 (1977) (“[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote... Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”).

¹⁷ Proposal at 57280.

¹⁸ Id. (emphasis added).

There are a number of reasons why the required disclosure should be limited to disclosure of the fund characteristic without mandating additional explanation of the collateral benefit to the plan. The feature or characteristic of an investment alternative that provides the collateral benefit to the plan is not always inherently non-financial. But by characterizing that feature as a collateral benefit characteristic without sufficient distinction between the characteristic and the collateral benefit it provides to the plan, the DOL may cause an unintentional implication that a fund characteristic providing a collateral benefit to a particular plan fiduciary is inherently non-financial or non-economic. A statement of that nature could provide an unprecedented window into the fiduciary's decision-making process, which could be understood by plan participants as a recommendation of the investment alternative providing the collateral benefit. Furthermore, this would almost certainly require modification of existing disclosures or the creation of new disclosures.

For these reasons, we encourage the DOL to consider the suggested revisions below, which could provide helpful clarity.

Suggested Revision: Modify the penultimate sentence in paragraph (c)(3) as follows: “...However, if the plan fiduciary makes such a selection in the case of a designated investment alternative for an individual account plan, the plan fiduciary must ensure that the ~~collateral benefit~~ characteristic of the fund, product, or model portfolio ***that could reasonably be expected to provide such collateral benefits*** is prominently displayed in the disclosure materials provided to participants and beneficiaries.”

The DOL indicated that it assumes that existing participant disclosures generally could be sufficient to satisfy the new disclosure requirement. To provide additional certainty and potentially reduce administrative burdens, the DOL could clarify that the disclosure requirement would be satisfied if the applicable fund, product, or model portfolio characteristic is readily apparent from the name, investment objective, goal, or strategy of the investment alternative.

In keeping with the DOL's position that proxy voting is the responsibility of plan fiduciaries, and fiduciaries can differ in their determinations regarding the exercise of shareholder rights, we recommend two modifications to paragraph (d)(4).

Modify paragraph (d)(4)(i)(B)

Historically, most ERISA plans have not conducted in-house proxy voting or engagements because they have not had the expertise or the appetite to engage directly with portfolio companies in which they invest. Rather, they have deferred to their investment managers to manage proxy voting decisions. This fiduciary relationship has worked (and continues to work) effectively and to the benefit of ERISA plan participants, as asset managers' ability to scale the voting function streamlines the vote submission process, reduces the potential for analytical and operational error, and allows plans to benefit from their asset

managers' expertise in making proxy voting decisions that are informed by engagements with issuers.

However, with the more widespread understanding that incorporating sustainability-related factors into investment decisions is likely to provide better risk-adjusted returns to investors over the long-term, increasing numbers of ERISA plan fiduciaries may choose to retain the ability to instruct the plan's trustee or investment manager to implement a proxy voting policy chosen by the plan fiduciary.

Accordingly, we recommend that the DOL consider modifying paragraph (d)(4)(i)(B) to acknowledge that a plan's named fiduciary that has retained the right to vote proxies may choose to vote those proxies or otherwise exercise shareholder rights appurtenant to their plan assets by directing an investment manager.

Suggested Revision: Modify paragraph (d)(4)(i)(B) to read: "*Where the authority to manage plan assets has been delegated to an investment manager pursuant to ERISA section 403(a)(2), the investment manager has exclusive authority to vote proxies or exercise other shareholder rights appurtenant to such plan assets in accordance with this section, except to the extent the plan, trust document, or investment management agreement expressly provides that the responsible named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee **or investment manager** regarding the exercise or management of some or all of such shareholder rights.*"

Modify paragraph (d)(4)(ii)

Regarding the obligations of an investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan, we believe paragraph (d)(4)(ii) can be improved to better align with existing industry practices consistent with an investment manager's fiduciary duty to all investors in a pooled investment vehicle. We encourage the DOL to modify paragraph (d)(4)(ii) to address the possibility that the responsible named fiduciary may choose to retain the authority to vote proxies or to direct an investment manager regarding the voting of proxies appurtenant to those plan assets that are invested in a pooled investment vehicle.

Suggested Revision: Modify paragraph (d)(4)(ii) to read as follows: "*In the case of proxy voting, to the extent permitted by applicable law, the investment manager may, or may allow a plan fiduciary to, vote (or abstain from voting) the relevant proxies to reflect a policy chosen by the plan fiduciary, in proportion to such plan's economic interest in the pooled investment vehicle, provided that the investment manager shall confirm that such policy is consistent with applicable law that pertains to the pooled vehicle, including Title I of ERISA and this section. Such investment manager may, however, develop a proxy voting policy consistent with Title I of ERISA and this section, and require all participating plans to accept the investment manager's proxy voting policy, before they are allowed to invest.*"¹⁹

¹⁹ For ease of reference the following is a comparison of our suggested language with the original. "~~An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may~~

We thank the DOL for providing the opportunity to comment in response to the DOL's proposed rule regarding prudence and loyalty in selecting plan investments and exercising shareholder rights. Please contact the undersigned if you have any questions or comments regarding BlackRock's views.

Sincerely,

Paul Bodnar
Head of Sustainable Investing

Nicole Rosser
Director, Legal & Compliance

~~be subject to an investment policy statement that conflicts with the policy of another plan. Compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)). In the case of proxy voting, to the extent permitted by applicable law, the investment manager must~~ **may, or may allow a plan fiduciary to, vote (or abstain from voting) the relevant proxies to reflect such policies a policy chosen by the plan fiduciary, in proportion to each such plan's economic interest in the pooled investment vehicle, provided that the investment manager shall confirm that such policy is consistent with applicable law that pertains to the pooled investment vehicle, including Title I of ERISA and this section.** Such an investment manager may, however, develop a proxy voting policy consistent with Title I of ERISA and this section, and require **all** participating plans to accept the investment manager's ~~investment policy statement, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy statement and proxy voting policy are consistent with Title I of ERISA and this section before deciding to retain the investment manager"~~