



December 13, 2021

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Submitted Electronically

**RE: RIN 1210-AC03 – “Prudence and Loyalty in Selecting Plan Investments and
Exercising Shareholder Rights” Proposed Regulation**

Dear Acting Assistant Secretary Khawar:

The ERISA Industry Committee (ERIC) appreciates the opportunity to comment on the proposed rule titled “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights” issued by the United States Department of Labor (Department) and published in the Federal Register on October 14, 2021 (the Proposed Rule).¹

We are hopeful that the Department will codify timeless principles providing the clarity and consistency that plan fiduciaries need to effectively administer benefit plans. To improve this Proposed Rule, the Department should eliminate the undue emphasis on certain risk-return factors in the operative text of the Proposed Rule while providing a more extensive list of examples of risk-return factors in the preamble purely for illustrative purposes. Additionally, the proposed tiebreaker rule is unnecessary and should be eliminated. Alternatively, if the proposed tiebreaker rule is kept, the proposed disclosure requirements should be eliminated, and a host of practical questions must be answered. By making these changes, the Department could finally bring stability to this area and reduce the likelihood of future policy shifts.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, and compensation public policy issues at the federal, state, and local levels. With member companies that are leaders in every sector of the economy, ERIC is a key advocate for legislative and regulatory policies that improve the ability of employers to provide effective and cost-efficient retirement and health care programs.

ERIC has a strong interest in the Proposed Rule because our member companies sponsor and maintain retirement plans for millions of their workers and retirees. In accordance with their fiduciary obligations, ERIC member companies supervise billions of dollars in retirement assets with the goal of providing the best financial investments and outcomes for their participants.

¹ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57,272 (proposed Oct. 14, 2021).

Consequently, ERIC advocates for clear, workable, consistent, and enduring rules that reflect the long-established principles of fiduciary standards for selecting retirement plan investments.

ERIC appreciated that the Department last year attempted to clarify, by regulation, the standards of conduct that govern these obligations. The litany of subregulatory guidance issued over the past decades, despite consistency on fundamental rules, had raised questions from plan fiduciaries about their obligations under the *Employee Retirement Income Security Act* (ERISA) with respect to considering environmental, social, and governance (ESG) factors in making plan investment decisions. Further, this serial reissuance of subregulatory guidance created uncertainty because plan fiduciaries could not be sure how long subregulatory guidance would be in effect or what new guidance would say. While ERIC appreciates that the Proposed Rule is intended to bring clarity, that the Proposed Rule would amend regulations that had only been finalized in November and December 2020 further illustrates the regulatory instability facing fiduciaries and the need for clear, consistent, and timeless rules.

Comments

ERIC Supports the Long-Established Principles of Fiduciary Standards for Selecting Investments.

ERIC welcomes those aspects of the Proposed Rule that are rooted in and reinforce long-established principles of fiduciary standards for selecting investments. The Department “has a longstanding position that ERISA fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals.”² There has been a long history of subregulatory guidance attempting to explain the fiduciary standards for investment selection.³ The relevant subregulatory guidance pre-dating 2020 made clear that a fiduciary violates ERISA if the fiduciary accepts “reduced expected returns or greater risks to secure social, environmental, or policy goals.”⁴

Nevertheless, the Department’s guidance has also recognized that ESG factors may be relevant to fiduciary’s evaluation of an investment or an investment course of action. This includes Field Assistance Bulletin (FAB) 2018-01, in which the Department stated that there could be instances when ESG issues present material business risk or opportunities that a fiduciary should consider.⁵ Of course, FAB 2018-01 also contained a warning that the weight given to those factors should be appropriate to the relative risk and return involved compared to other relevant factors. In other words, the subregulatory guidance before 2020 was clear that ESG factors could be relevant in the economic calculus that plan fiduciaries must undertake.

² *Id.* at 57,273.

³ *Id.* at 57,273-75 (reciting the history).

⁴ *Id.*

⁵ FAB 2018-01 (Apr. 23, 2018) at 2.

While the tone and details of the guidance have evolved over the years, the Department has consistently emphasized that plan fiduciaries are to focus on the plan’s financial returns and risk to participants and beneficiaries. Consequently, ERIC was supportive of the Department’s effort in 2020 to end the regulatory instability of varying pronouncements on this topic and provide certainty for plan fiduciaries.

At that time, the Department offered a proposed rule to reiterate “that plan fiduciaries when making decisions on investments and investment courses of action must be focused solely on the plan’s financial risks and returns, and the interests of plan participants and beneficiaries in their plan benefits must be paramount.”⁶ Furthermore, the Department clarified that “[t]he fundamental principle is that an ERISA fiduciary’s evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the plan’s funding policy and investment policy objectives.”⁷ These formulations are consistent with the language in the preamble to the final rule as well.⁸

Unfortunately, in attempting to provide plan fiduciaries specific guidance beyond the standards elucidated in ERISA, some plan fiduciaries believe that the regulations issued by the Department in 2020 (including the commentary contained in the preamble to the regulations) created additional confusion. ERIC chronicled several concerns with the 2020 proposed regulations in its comment letter,⁹ some of which the Department addressed. Some commentators have also published criticisms of the rule as finalized.¹⁰ Underlying some of these criticisms is the premise that the Department muddied the traditional fiduciary duties and created a higher standard for certain investments.

Nevertheless, we believe that the fundamental principles underlying the 2020 Final Rule and the Proposed Rule are consistent. Under the 2020 Final Rule, “[a] fiduciary’s evaluation of an investment or investment course of action must be based only on pecuniary factors” unless two investments are not able to be distinguished on that basis. “Pecuniary factor” is defined as “a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.” Under the Department’s new Proposed Rule, “[a] fiduciary’s evaluation of an investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are material to investment value, using appropriate investment horizons consistent with the plan’s investment objectives and taking into account the funding policy of the plan.” We support both formulations of fiduciary duty, as we view them as

⁶ Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39,113, 39,114 (proposed June 30, 2020).

⁷ *Id.* at 39,116.

⁸ See Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846, 72,848 (Nov. 13, 2020) (“2020 Final Rule”).

⁹ Letter from The ERISA Industry Committee to Jeanne Klinefelter Wilson, Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor, <https://www.regulations.gov/comment/EBSA-2020-0004-0654> (July 30, 2020) (“ERIC Comment Letter”).

¹⁰ See Proposed Rule, *supra* note 1, at 57,275 and 57,285 for a discussion of the concerns.

fundamentally consistent with each other and consistent with long-established principles of fiduciary standards for selecting investments.

To Avoid Misleading Fiduciaries, the Operative Text of the Final Regulation Should Not Highlight Specific Examples of Risk-Return Factors.

ERIC appreciates that the Department has attempted to bring greater clarity to plan fiduciaries that are uncertain about which factors can appropriately be taken into account in a risk-and-return analysis. In its preamble, the Department goes to great lengths to explain the potential economic effects of climate change and other factors, and their potential to affect the risks and returns of investments.¹¹ The requirement of a prudent fiduciary to consider these potential effects on a given investment option is captured in the general fiduciary duties found in ERISA and the Department’s regulations.¹² However, the Department missteps by proposing to add a host of specific factors to the operative text of the regulation and suggesting that evaluation of those factors is not only permitted, but “may often” be required.

Many factors affect risk and return, and it would be impossible for the Department to codify every single potentially relevant factor. ERIC is very concerned that by going to such length, especially in the operative text, to emphasize climate change and certain other social and governance factors, the Department is inadvertently setting up a new “over and above” standard beyond the generally applicable duty of prudence. Due to this emphasis, some plan fiduciaries may believe that they are required to consider these factors in a way that could override normal and proportionate consideration of these factors, contrary to ERISA’s general fiduciary duties. Moreover, the formulations of these factors in the text are, in some cases, ill-defined and open-ended. If they are retained, much more definition is required to provide meaningful guidance to fiduciaries.

The Department clearly anticipated the concern that the proposal would substantively change the duties owed, explaining that the list of examples in the operative text of the Proposed Rule “would not introduce any new conditions under the prudence safe harbor [and] its sole purpose is to provide clarification through examples.”¹³ The reality is that if the operative text of the final regulation goes to such lengths to highlight particular examples, the compliance-minded fiduciary will certainly give heightened attention to these factors, perhaps beyond that otherwise permitted by the general duty of prudence. Further, fiduciaries may interpret inclusion in the operative text as a signal that enforcement activities will emphasize these factors to the exclusion of others, or that fiduciaries may be perceived as presumptively violating their fiduciary duties

¹¹ E.g., Proposed Rule, *supra* note 1, at 57,276-77, 57,287-92.

¹² The Department elaborates that “material climate change and other ESG factors are no different than other traditional material risk-return factors. . . . Thus, under ERISA, if a fiduciary prudently concludes that a climate change or other 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.” Proposed Rule, *supra* note 1, at 57,277. This is not inconsistent with the Department’s previous view that “particular environmental or social factors may present material and current business risks or opportunities for specific companies (and may be reflected in potential market risk and return).” 2020 Final Rule, *supra* note 8, at 72,860.

¹³ Proposed Rule, *supra* note 1, at 57,277.

unless all of these factors are expressly considered, even if not otherwise material to the investment decision. Additionally, including these examples (which are not needed to state the general rule) could invite the Department in the future to reopen this regulation, causing additional confusion and change.

The fix for this is simple: ERIC supports the Department's latest formulation of the classic principle: "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, is material to the risk-return analysis." The rest of proposed Section 2550.404a-1(b)(4) should be deleted as unnecessary, confusing, and potentially dangerous in that it could mislead otherwise prudent fiduciaries into inappropriately weighing the factors listed in the examples. Additionally, a cross-reference to paragraph (b)(4) should be deleted from proposed Section 2550.404a-1(c)(2). If the Department declines to adopt this suggestion, the paragraph must include stronger statements that these are examples for illustrative purposes only, that these factors may not be relevant in any particular case, and that there are many other factors that are relevant to the evaluation of the projected return of the portfolio relative to the funding objectives of the plan. Similarly, proposed Section 2550.404a-1(b)(2)(ii)(C) should be amended to read "(C) The projected return of the portfolio relative to the funding objectives of the plan." If the Department declines to adopt this suggestion, the word "often" should be deleted from (C), and a statement should be inserted at the end of (C) to indicate that the listed factors may not in all circumstances be relevant to the projected return of the portfolio relative to the funding objectives of the plan.

The Preamble to the Final Regulation Should Include Other Examples of Risk-Return Factors.

ERIC understands and appreciates that the Department is undertaking this regulation to provide fiduciaries with additional information about the factors that it believes are appropriate to consider in evaluating an investment or an investment course of action. As discussed above, ERIC is concerned about emphasizing these factors in the operative text of the regulation and therefore encourages the Department to remove these examples. However, if examples are highlighted, it would be helpful for the Department to list in the preamble as many examples as possible of factors that a prudent fiduciary might consider.

For example, in addition to traditional risk-and-return metrics, the list of potentially relevant factors should be significantly expanded to include items such as:

- The potential costs of current and future regulation
- The potential costs of current and future taxation
- The potential susceptibility to frivolous litigation
- The costs of mandates relating to wages and benefits imposed by states, localities, and foreign jurisdictions
- The costs of mandates relating to operating conditions imposed by states, localities, and foreign jurisdictions

Furthermore, the Department should also include unambiguous language stating that not every factor will be relevant to every investment or investment course of action, reassuring fiduciaries that only those factors that are material to the risk-return analysis must be considered, and reiterating that the weight accorded in such circumstances to a relevant factor must be in accordance with the general duty of prudence.

The “Collateral Benefits” Tiebreaker Should Be Removed; If Kept, More Guidance Is Necessary and the Disclosure Requirement Should Be Eliminated.

As ERIC stated in its comment letter on the 2020 proposal, we believe there is no such thing as a true “tie” between different investments. Nevertheless, the 2020 Final Rule allowed for the possibility that a prudent fiduciary might use non-pecuniary factors to break a tie if the fiduciary cannot distinguish between investments on the basis of pecuniary factors. In this Proposed Rule, the Department proposes to allow the use of “collateral benefits other than investment returns” in a situation where there are competing investments that “equally serve the financial interests of the plan over the appropriate time horizon.”

In the preamble, the Department attempts to distinguish the “indistinguishable” standard and the “equally serve the financial interests of the plan” standard. The Department argues that “two investments may differ on a wide range of attributes, yet, when considered in their totality, they can serve the financial interests of the plan equally well. These investments are not indistinguishable, but they are equally appropriate additions to the plan’s portfolio.”¹⁴ However, it is unclear how investments that equally serve the plan on a risk-and-return basis are functionally not indistinguishable in a practical sense for plan investment purposes. In any case, to the extent the Department believes these ties between prudent competing investments or competing investment courses of action can and do exist, the Department should clarify that all such competing investments or competing investment courses of action may be appropriate based on a fiduciary’s prudent risk-and-return evaluation. And, as we noted last year, a prudent fiduciary could consider diversifying (i.e., utilizing both options) assuming they are “tied,” taking into account fees.¹⁵

Beyond the theoretical uncertainty that two investments can literally serve a plan equally well, there are practical concerns with the proposal’s emphasis on breaking ties. For example, the Proposed Rule “does not place any parameters on the collateral benefits that may be considered by a fiduciary to break the tie,”¹⁶ which means that plan fiduciaries are left guessing which factors might be appropriate for consideration, with the possibility that the Department’s views could shift over the years. The Department gave a hint about its preliminary thinking when it asked whether the regulation 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, above and beyond their financial interests as plan participants.”

¹⁴ Proposed Rule, *supra* note 1, at 57,278.

¹⁵ ERIC Comment Letter, *supra* note 9, at 5.

¹⁶ Proposed Rule, *supra* note 1, at 57,279.

In ERIC's view, placing fiduciaries in the position of making decisions that have financial ramifications for the plan based on a survey or estimation of participant preferences unrelated to plan returns is in tension with ERISA's command that a fiduciary operate "for the exclusive purpose" of providing benefits and defraying reasonable expenses.

However, if the Department is determined to include this tiebreaker construct, the additional disclosure of the collateral-benefit basis used by the fiduciary, as proposed, is unnecessary and of little value for plan participants. Because the chosen option would have been judged prudent on the basis of risk and return by the fiduciary, the disclosure could needlessly raise doubt about the investment or the investment course of action. In fact, plan participants may wonder, upon seeing the disclosure, whether the investment or the investment course of action was truly appropriate on the basis of risk and return.

The Department's permission to use collateral factors is an invitation for litigation by those who could argue that the fiduciaries did not appropriately weigh collateral benefits. The costs of this litigation will be borne by plan participants. We also note that, rather than merely codifying well-established principles of fiduciary duty, this part of the proposal could also be especially subject to change based on policy preferences over time. Introducing this instability is unnecessary in this instance, as ties are unlikely or impossible. In any event, any such tied investment would have already been judged prudent on its risk-return merits.

Further, if the Department is determined to include this tiebreaker concept, it must provide more guidance for fiduciaries. The proposal raises several fundamental questions, such as:

- What is the definition of "collateral benefit"?
- What is the universe of "collateral benefits" that might be considered?
- What methodology should fiduciaries use to determine the appropriate collateral benefits or factors to consider?
- What methodology should fiduciaries use to choose between competing collateral benefits?
- What if a fiduciary believes that the fiduciary's good-faith weighting of collateral benefits is inconsistent with the non-financial preferences of plan participants?
- When an option chosen on the basis of a collateral benefit is provided as an investment option in a 401(k) plan, does the fiduciary have an obligation to monitor the investment's continuing emphasis on that collateral factor?
- If disclosure is required in the final regulation, how should a fiduciary disclose such collateral benefit?

Conclusion

For the above reasons, ERIC appreciates the Department's attempt to further clarify the fiduciary obligations attendant to choosing an investment or an investment course of action, a critical issue for ERIC's large plan sponsor members. To avoid confusion and an invitation for future changes to the regulation, ERIC recommends eliminating the undue emphasis on certain

risk-return factors in the operative text of the regulation and providing a more comprehensive discussion of risk-return factors in the preamble. Additionally, the proposed tiebreaker rule should also be eliminated; at minimum, more guidance is needed, and the unnecessary disclosure requirement should be struck. Each of these changes would serve the Department's goals of reducing confusion and creating regulatory stability.

Thank you for your consideration of our recommendations. We look forward to the opportunity to discuss them in greater detail or to answer any questions.

Sincerely,



Senior Vice President,
Retirement and Compensation Policy