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

December 13, 2021

Dear Sir or Madam,

**Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)**

The Alternative Investment Management Association (AIMA)<sup>1</sup> appreciates the opportunity to comment on the U.S. Department of Labor's (Department) proposed rule to amend the Employee Retirement Income Security Act of 1974 ("ERISA") to clarify the application of ERISA's fiduciary duties of prudence and loyalty in selecting investments and investment courses of action, including selecting qualified default investment alternatives ("QDIAs"), exercising shareholder rights and the use of written proxy voting policies and guidelines (the "Proposal").<sup>2</sup> AIMA's members include many U.S. and non-U.S. institutional investment managers, some of which are ERISA plan fiduciaries and thus impacted by the Proposal. Accordingly, AIMA is well positioned to opine on the Proposal's impact on these investment managers.

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<sup>1</sup> AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 170 members that manage \$400 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, [www.aima.org](http://www.aima.org).

<sup>2</sup> Proposed rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, [86 Fed. Reg. 57272](https://www.federalregister.gov/documents/2021/10/14/proposed-rule-prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights) (Oct. 14, 2021).



AIMA broadly supports the Proposal and the Department's stated intent to "address uncertainties regarding aspects of the current regulation<sup>3</sup> and its preamble discussion relating to the consideration of ESG issues . . . ."<sup>4</sup> AIMA therefore encourages the Department to adopt several provisions that would rescind or eliminate certain parts of the current regulation, but we also request that the Department revise other elements of the Proposal to further the clarity it seeks to provide.

We note that because the Proposal would make some significant changes to the current regulation, we hope the Department will consider finalizing revisions to the current regulation and ERISA framework that will endure and provide regulatory certainty to the market, fiduciaries, plan participants and beneficiaries.

1. AIMA supports rescinding the current rule's requirement that a fiduciary's evaluation of an investment or investment course of action must be based on pecuniary factors; however, we request that the Department clarify that consideration of ESG factors should be discretionary, not mandatory.

The current regulation generally requires plan fiduciaries to select investments and investment courses of action based solely on the consideration of "pecuniary factors."<sup>5</sup> Although the definition of pecuniary factors may seem straightforward, the preamble to the current regulation articulates a concern and skepticism about whether ESG factors may be deemed pecuniary while also generally discouraging the consideration of ESG factors in selecting an investment or investment course of action.<sup>6</sup>

During its review of the current regulation, the Department received feedback that, rather than provide clarity, some aspects of the current regulation, including the restriction regarding consideration of only pecuniary factors, may have created further uncertainty surrounding whether an ERISA fiduciary may consider ESG and other factors in making investment decisions.<sup>7</sup> The Department further explains that the current regulation has led to confusion about whether climate change and other ESG factors may be treated as pecuniary factors under the current regulation and has had a chilling effect on the appropriate integration of climate change and other ESG factors in investment decisions.<sup>8</sup>

AIMA agrees with the Department's findings and conclusions regarding the limitations, uncertainty and confusion caused by the current regulation's restriction related to the consideration of only pecuniary factors. We therefore support the Department's removal of the concept of pecuniary factors and clarification that a "prudent fiduciary may consider any factor in the evaluation of an

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<sup>3</sup> 85 Fed. Reg. 72846 (Nov. 13, 2020).

<sup>4</sup> *Id.* at 57276.

<sup>5</sup> 85 Fed. Reg. at 72859. As described in the Proposal, the current regulation defines a pecuniary factor as one "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."

<sup>6</sup> *Id.* at 72857.

<sup>7</sup> 86 Fed. Reg. at 57275.

<sup>8</sup> *Id.*



investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis . . . .”<sup>9</sup>

We appreciate the Department’s intent to clarify the scope of factors that a prudent fiduciary may consider in exercising its ERISA duties. There are several instances in the Proposal’s preamble, however, that could be interpreted to *require* a prudent fiduciary to consider ESG factors in selecting an investment or an investment course of action.<sup>10</sup> The Department also requests comments on whether fiduciaries “should consider climate change as presumptively material in their assessment of investment risks and returns.”<sup>11</sup>

We believe that prudent fiduciaries may consider ESG factors *if* they are determined to be material to an investment or an investment course. Therefore, AIMA encourages the Department to clearly articulate in a final rule that a prudent fiduciary’s consideration of ESG factors should be discretionary, not mandatory. Mandatory consideration of ESG factors could only further the confusion the Department seeks to remedy in the Proposal and, ultimately, lead to fiduciaries considering investments or investment courses of action that are inconsistent or not solely in the interest of the plan’s participants and beneficiaries.

2. Prior to issuing a final rule, the Department should revise or eliminate the list of factors that a fiduciary may consider in evaluating an investment or investment course of action.

The Proposal seeks to clarify and eliminate doubt caused by the current regulation and therefore provides examples of factors, including climate change and other ESG factors, that a fiduciary may consider in the evaluation of an investment or investment course of action, if material.<sup>12</sup> The Department lists three broad categories/factors – climate change-related factors, governance factors and workforce practices – and several subcategories/factors that may be considered.<sup>13</sup>

AIMA appreciates the Department’s intent to provide a list of factors that a fiduciary may consider in the evaluation of an investment or investment course of action. The enumerated factors, however, may inadvertently be interpreted as an exclusive, exhaustive list. This perception may lead fiduciaries to avoid certain investments that do not directly require consideration of one of the specific factors despite the fact that the investment is consistent with the interests of the plan’s participants and beneficiaries.

We suggest the Department eliminate the list of factors that may be considered and either: (i) state that material ESG factors broadly may be considered in selecting an investment or an investment course of action; or (ii) provide examples of a fiduciary considering a material ESG factor in selecting an investment or an investment course of action. This revision will help eliminate the potential confusion and limitations that may result should the list be included in a final rule.

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<sup>9</sup> *Id.* at 57302.

<sup>10</sup> *Id.* at 57276-77.

<sup>11</sup> *Id.* at 57290.

<sup>12</sup> *Id.* at 57277.

<sup>13</sup> *Id.*

3. We support the elimination of both the “tie-breaker” standard and the requirement for a fiduciary to document its analysis in these scenarios.

The Department proposes to eliminate the current regulation’s tie-breaker standard and replace it with a new standard that is intended to be broader and applies when choosing between choices or investment courses of action that may equally serve the plan’s financial interests.<sup>14</sup> Specifically, the current tie-breaker concept would be replaced with a new standard: a fiduciary can select an investment or investment course of action based on collateral benefits, other than investment returns, if the fiduciary concludes that competing investment choices or an investment course of action equally serves the financial interest of the plan.<sup>15</sup> Moreover, the Proposal would not place parameters on the collateral benefits that may be considered by a fiduciary to break the tie.<sup>16</sup>

The Proposal would also directly rescind the current regulation’s requirement for a fiduciary to document its analysis in those cases where the fiduciary has concluded that pecuniary factors alone were insufficient to be the deciding factor.<sup>17</sup> The Department cites concerns that the current regulation’s documentation requirement effectively singles out ESG investments for special scrutiny and may also have a chilling effect on the use of the tie-breaker provision, including when ESG is not under consideration.<sup>18</sup>

AIMA supports the Department’s intent to replace the current regulation’s tie-breaker standard with a new, clearer concept. We agree that the current regulation could be interpreted too narrowly, while singling out and creating burdens for investments that may provide collateral benefits.<sup>19</sup> We also agree with the Department’s proposal to eliminate the special documentation requirement under the current regulation. The Proposal correctly acknowledges that the special documentation requirement is unnecessary because fiduciaries are subject to a general prudence obligation, and it is a common practice to document and maintain records about their investment selections pursuant to that obligation.<sup>20</sup> Furthermore, the elimination of the documentation requirement will provide additional costs savings, thus ultimately benefitting the plan’s participants and beneficiaries.

4. AIMA supports the ability of fiduciaries of participant-directed defined contribution plans to offer investment alternatives, including QDIAs, using ESG factors.

The current regulation expressly provides that in no circumstances may any investment fund, product or model portfolio be added as, or component of, a QDIA if its investment objectives, goals or principal investment strategy include, consider or indicate the use of non-pecuniary factors.<sup>21</sup> Stakeholders have alleged that this prohibition harms, instead of protects, plan participants by depriving them of

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<sup>14</sup> *Id.* at 57278.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 57279.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 57278.

<sup>20</sup> *Id.*

<sup>21</sup> 85 Fed. Reg. at 72865.

otherwise financially prudent options as QDIAs.<sup>22</sup> Other stakeholders have expressed concerns that funds could be excluded from treatment as QDIAs solely because they consider ESG-related factors, even though the funds were prudent based solely on a consideration of their financial attributes.<sup>23</sup>

AIMA supports the Department's intent to eliminate the current regulation's prohibition on certain investment alternatives from being used as a QDIA.<sup>24</sup> The Proposal notes that QDIAs are often the predominant investment for plan participants;<sup>25</sup> however, the current regulation could deter plan fiduciaries from "choosing QDIAs that include climate change and other ESG factors in their investments."<sup>26</sup> The Department also correctly notes that the rescission of this provision does not leave participants and beneficiaries in plans with QDIAs without protections.<sup>27</sup>

5. AIMA supports the four proposed changes to the current regulation's proxy voting and exercise of shareholder rights provisions.

The Proposal would make several noteworthy changes to the current regulation with respect to proxy voting and the exercise of shareholder rights.<sup>28</sup> First, it would eliminate the statement from the current regulation that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right."<sup>29</sup> The Department justifies the removal of this statement on the grounds that it could be misread as suggesting that plan fiduciaries should be indifferent to the exercise of their rights as shareholders.<sup>30</sup>

Second, the Proposal would eliminate the provision from the current regulation that sets out specific monitoring obligations where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager or where a proxy voting firm performs advisory services as to voting proxies.<sup>31</sup> The Department explains that the specific provision in the current regulation may be read as requiring some special obligations above and beyond the statutory obligations of prudence and loyalty.<sup>32</sup>

Third, the Department is proposing to revise the provision in the current regulation that addresses proxy voting policies by removing the two "safe harbor" examples for proxy voting policies that would be permissible under the provisions of the current regulation.<sup>33</sup> The Proposal recognizes that, because the two examples in current regulation are characterized as safe harbors, they may become

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<sup>22</sup> 86 Fed. Reg. at 57280.

<sup>23</sup> *Id.* at 57279.

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

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

<sup>26</sup> *Id.* at 57284.

<sup>27</sup> *Id.* at 57280.

<sup>28</sup> *Id.* at 57281.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



widely adopted by plan fiduciaries.<sup>34</sup> Accordingly, the Department is skeptical whether the safe harbors are necessary or helpful.<sup>35</sup>

Finally, the Proposal would eliminate the current regulation's requirement that, when deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must maintain records on proxy voting activities and other exercises of shareholder rights.<sup>36</sup> The Department explains that, in context, this requirement appears to treat proxy voting and other exercises of shareholder rights different from other fiduciary activities.<sup>37</sup> Moreover, it may create a misperception that proxy voting and other exercises of shareholder rights are disfavored or carry greater fiduciary obligations, and thus greater potential liability.<sup>38</sup>

AIMA supports the Department's conclusions and proposed changes to the current regulation regarding proxy voting and the exercise of shareholder rights. The current regulation's requirements have created additional and unnecessary costs<sup>39</sup> and compliance burdens, and the Proposal accurately notes the extensive cost savings that would result from the proposed changes.<sup>40</sup> We agree that fiduciaries should take their rights as shareholders seriously, and the proposed changes would help clarify and enhance the ability of fiduciaries to do so.

We would be happy to elaborate further on any of the points raised in this letter. For further information please contact Daniel Austin, AIMA's Director of U.S. Policy and Regulation, by [email](#) or phone at 601-842-4545.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "J. Król".

Jiří Król  
Deputy CEO, Global Head of Government Affairs

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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

<sup>39</sup> Most of which are overhead costs that are not necessarily passed on to the plans themselves.

<sup>40</sup> 86 Fed. Reg. 57292.