



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,

*[This comment is a complement to the comment signed by Americans for Financial Reform Education Fund (AFREF), the Sierra Club, the Sierra Club Foundation, and 10 other organizations also submitted on December 13, 2021. This comment expands upon the views of AFREF and should be read as an additional submission.]*

AFREF writes to offer our strong support of the Department's proposed rule, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* ("the Proposal"), 86 Fed. Reg. 57272 (October 14, 2021). Under the Employee Retirement Income Security Act of 1974, as amended (ERISA) fiduciaries should be able to prudently choose investments that provide long-term benefits, yield increased contributions to retirement plans, enhance—rather than undermine—workers' share of earnings, and promote a healthy and livable planet, fair working conditions, and a racially just and democratic society while honoring their fiduciary duty.

In addition to supporting the Proposal, we call for the Department in future rulemakings, guidances and other agency actions to set a minimum standard for fiduciaries' consideration of systemic risks to retirement savings, and to require that participant-directed plans offer a sustainable investing option addressing systemic risks among a prudently constructed lineup of funds offered to participants. As discussed below, ERISA fiduciaries have an obligation to address credible systemic threats to the long-term performance of private retirement plans.

## I. Restoring fiduciaries' discretion is critical in light of the impact of climate change and other ESG factors on investment returns

We strongly support restoring fiduciaries' discretion to consider climate change and other environmental, social and governance (ESG) factors in their investments, engagement and voting. The Proposal would remove costly barriers and arbitrary prohibitions on ESG investments and clarify how ERISA fiduciaries can and should consider economically relevant ESG factors in their investment practices.

There is a substantial and growing body of evidence<sup>1</sup> that climate change, racial and economic inequality, and other ESG factors affect investment returns and corporate financial performance across many sectors, and will be particularly important to consider for typical retirement savers with long investment horizons and broad ownership of the market. Investors are pouring money into sustainable investments<sup>2</sup> and being rewarded with higher returns, but so far ERISA savers have largely missed out on these substantial economic benefits. This must change. Sustainable investment products and ESG integration are value-added components of modern investing and must be readily available to all ERISA fiduciaries and participants, and encouraged by the Department.

The economic risks posed by climate change and the necessary transition to a more resilient, clean energy economy are substantial. Regarding acute physical risk, climate-related disasters have become increasingly frequent and severe, with a record 22 events,<sup>3</sup> each of which has resulted in over \$1 billion in damage, in the US during 2020 alone, for a total cost of \$100 billion. The correlation of acute and chronic physical risks and losses caused by climate change, combined with transition risks caused by decarbonization are already impacting, or will impact, nearly all sectors of the economy. Credible economy-wide climate stress tests have revealed that climate change could shave off up to 18 percent of global GDP by mid-century,<sup>4</sup> with variable geographic and sectoral vulnerabilities that represent further threats to financial stability.<sup>5</sup>

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<sup>1</sup> A recent review of over 1000 studies published in the last five years found that a higher ESG rating for an individual company was associated with higher corporate financial performance (e.g., return on equity or assets, or stock performance) in 58 percent of the studies, and a higher ESG rating for a portfolio of stocks was associated with better investment returns in 59 percent of the studies. For low carbon ratings in particular, the climate-friendly companies and portfolios performed better 57 percent and 65 percent of the time, respectively. Source:

<https://www.stern.nyu.edu/sites/default/files/assets/documents/ESG%20Paper%20Aug%202021.pdf>. See also E.g., "ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies," <https://www.tandfonline.com/doi/full/10.1080/20430795.2015.1118917>

<sup>2</sup> See E.g., "A Broken Record: Flows for U.S. Sustainable Funds Again Reach New Heights," <https://www.morningstar.com/articles/1019195/a-broken-record-flows-for-us-sustainable-funds-again-reach-new-heights>

<sup>3</sup> "Billion-Dollar Weather and Climate Disasters," NOAA. <https://www.ncdc.noaa.gov/billions/>

<sup>4</sup> "World economy set to lose up to 18% GDP from climate change if no action taken, reveals Swiss Re Institute's stress-test analysis," Swiss Re Group, 2021. <https://www.swissre.com/media/news-releases/nr-20210422-economics-of-climate-change-risks.html>

<sup>5</sup> "The Implications of Climate Change for Financial Stability," Financial Stability Board, 2020. <https://www.fsb.org/wp-content/uploads/P231120.pdf>

That climate change represents a significant threat to financial performance and investment returns, and a systemic threat to the capital markets and the financial system as a whole, is no longer up for debate. A 2021 report from the White House National Economic Council states that “Climate change poses serious and systemic risks to the U.S. economy and financial system” and that “current U.S. regulatory framework makes it difficult for pension plan managers to adequately consider climate-related financial risk when they invest workers’ pensions.”<sup>6</sup> Last month, the Financial Stability Oversight Council released a bipartisan report that added “Climate change is an emerging threat to the financial stability of the United States.”<sup>7</sup> The Commodity Futures Trading Commission (CFTC) Market Risk Advisory Committee (MRAC) found in 2020 that:

**“Climate change is expected to affect multiple sectors, geographics, and assets in the United States, sometimes simultaneously and within a relatively short time frame” and that regulators “should clarify that climate-related factors—as well as ESG factors that impact risk-return more broadly—may be considered to the same extent as ‘traditional’ financial factors, without creating additional burdens.”<sup>8</sup>**

*The Proposal rightly states that ESG factors are often economically relevant and in many cases should be considered by a prudent fiduciary.*

In the Proposal, the Department recognizes the need “to craft rules that better recognize the role that ESG integration can play in evaluation and management of plan investments.”<sup>9</sup> The Trump-era rules singled out ESG factors for heightened scrutiny and special documentation requirements, warning that fiduciaries should avoid “too hastily” concluding that ESG factors are economically relevant.<sup>10</sup> The Proposal rightly recognizes that the Trump-era rules “may deter fiduciaries from taking steps that other marketplace investors would take in enhancing investment value and performance, or improving investment portfolio resilience.”<sup>11</sup>

We support the Department’s overarching conclusion about its proposed rule: “The proposal makes clear that climate change and other ESG factors are often material and that in many instances fiduciaries should consider climate change and other ESG factors in the assessment of investment risks and returns.”<sup>12</sup>

Likewise, we endorse the Department’s rescission of the prohibition on certain ESG-related investment alternatives from being used as a default investment (the Qualified Default Investment Alternative, or QDIA). As the Department states, this only served “to harm participants by depriving them of otherwise financially prudent options as QDIAs.”

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<sup>6</sup> “A Roadmap To Build A Climate-Resilient Economy,” The White House, 2021.

<https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf>

<sup>7</sup> “Report on Climate-Related Financial Risk,” Financial Stability Oversight Council, 2021.

<https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>

<sup>8</sup> “Managing Climate Risk in the U.S. Financial System,” CFTC MRAC Subcommittee on Climate-Related Market Risk, 2020. <https://www.cftc.gov/PressRoom/PressReleases/8234-20>

<sup>9</sup> RIN 1210-AC03, Proposed Rule Preamble

<sup>10</sup> 85 FR 72848, 72859 (Nov. 13, 2020)

<sup>11</sup> RIN 1210-AC03, Proposed Rule Preamble

<sup>12</sup> *Ibid.*

*The Proposal's list of potentially relevant ESG factors is incomplete. The final rule should encourage fiduciaries to consider a broader range of additional ESG factors.*

The Proposal deviates from the typical “ESG” classification when it introduces a list of factors that “might” be economically relevant to the risk-return analysis and therefore should be considered. This deviation from the typical ESG classification might confuse fiduciaries who are interested in incorporating ESG factors into their investment practices, and could bias consideration towards those particular factors that made the list while discouraging consideration of other ESG factors that are economically relevant or may become so.

Notably, the shift from a tranche of “environmental” factors to “climate change” factors could bias against the consideration of important issues like environmental justice; respect for Indigenous rights; responsible stewardship of water and other natural resources; ecological and regional economic impacts of corporate activities in the global forest, food and land sector; and chemicals, plastics, and air toxics pollution, for example. The Proposal mentions environmental regulations in the “Governance” tranche (“avoidance of criminal liability and compliance with labor, employment, environmental, tax, and other applicable laws and regulations”)—which can be substantial<sup>13</sup>—but this excludes the economic relevance of environmental issues that may not result in criminal liability or regulatory enforcement. Environmental justice factors are increasingly a market and credit risk;<sup>14</sup> consider the significant Indigenous-led opposition to pipeline projects like the Dakota Access Pipeline and Enbridge’s Line 3 that raised the cost of capital for these projects.

The Proposal also omits mention of economically relevant factors related to corporate impact on racial and economic inequality, as well as political activity, which are also increasingly market and credit risks.<sup>15</sup> The final rule should include a broad range of these factors as examples and

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<sup>13</sup> See E.g., [https://archive.epa.gov/epapages/newsroom\\_archive/newsreleases/2520f12f7372fe1d85257694005ab7a7.html](https://archive.epa.gov/epapages/newsroom_archive/newsreleases/2520f12f7372fe1d85257694005ab7a7.html); [www.cbsnews.com/news/duke-energy-fined-102-million-in-coal-ash-spill/](http://www.cbsnews.com/news/duke-energy-fined-102-million-in-coal-ash-spill/)

<sup>14</sup> See E.g., <https://abcnews.go.com/US/previously-proposed-route-dakota-access-pipeline-rejected/story?id=43274356>; [www.bloomberg.com/news/articles/2021-07-01/how-climate-activists-pressure-banks-to-defund-the-oil-industry?sref=CZcaXeEr](http://www.bloomberg.com/news/articles/2021-07-01/how-climate-activists-pressure-banks-to-defund-the-oil-industry?sref=CZcaXeEr); <https://thehill.com/policy/energy-environment/510748-court-cancels-shutdown-of-dakota-access-pipeline>; <https://mspmag.com/arts-and-culture/how-the-line-3-fight-will-continue/>; [www.ran.org/wp-content/uploads/2020/12/RAN-Briefing\\_Line3\\_KXL.pdf](http://www.ran.org/wp-content/uploads/2020/12/RAN-Briefing_Line3_KXL.pdf); [www.bloomberg.com/news/articles/2020-07-28/nordic-fund-divests-45-million-from-jbs-on-amazon-concerns](http://www.bloomberg.com/news/articles/2020-07-28/nordic-fund-divests-45-million-from-jbs-on-amazon-concerns); [www.morningstar.com/articles/1065414/cop26-deforestation-pledge-will-empower-companies-investors-to-attack-supply-chain-emissions](http://www.morningstar.com/articles/1065414/cop26-deforestation-pledge-will-empower-companies-investors-to-attack-supply-chain-emissions)

<sup>15</sup> See E.g., <https://fortune.com/2021/07/21/uber-lyft-drivers-stage-nationwide-strike-right-to-unionize-better-pay/>; [www.nbcnews.com/business/business-news/fired-interrogated-disciplined-amazon-warehouse-organizers-allege-year-retaliation-n1262367](http://www.nbcnews.com/business/business-news/fired-interrogated-disciplined-amazon-warehouse-organizers-allege-year-retaliation-n1262367); [www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html](http://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html); <https://endpolicessurveillance.com/documents/2021-05-03-Motion-for-Leave-to-File-Brief-as-Amici-Curiae-with-Ex.-A-Amicus-Brief-attached.pdf>;

also make explicitly clear that fiduciaries have full discretion to assess and consider additional ESG factors as needed.

*The Proposal rightly removes the documentation requirements for the tie-breaker test, which singled out and created burdens for investments providing collateral benefits.*

For investments that are eligible for the tie-breaker test, fiduciaries should be able select those that are expected to yield greater collateral benefits without burdensome documentation requirements. There are growing pools of market-rate investments specifically designed to create good jobs and/or support public goals such as place-based economic development or decarbonization. There is no reason to impose an additional burden on ETIs simply because they provide additional social, economic, or environmental benefits, especially given the broad discretion that fiduciaries already enjoy and the wide range of investment strategies employed.

*The final rule should underscore that fiduciaries can and should take into account collateral economic benefits and harms to the economic fortunes of their participants.*

Plan performance depends as much or more on employer contributions as it does on market performance. Evaluating increased (or decreased) job creation and contributions to plan assets should be allowed as a part of plan underwriting strategies. Importantly, it should also be made clear that workers' retirement savings should not be deployed in ways that are likely to undermine their jobs or economic security.

*The Proposal rightly restores the presumption that proxies will be voted unless the fiduciary determines that the cost of voting outweighs the benefits.*

We strongly support the Proposal's restatement of the Department's long standing view that "proxies should be voted as part of the process of managing the plan's investment in company stock unless a responsible plan fiduciary determines voting proxies may not be in the plan's best interest (e.g., if there are significant costs or efforts associated with voting)" and that "The solution to proxy-voting costs is not total abstention, but is, instead, for the fiduciary to be prudent in incurring expenses to make proxy decisions and, wherever possible, to rely on efficient structures (e.g., proxy voting guidelines, proxy advisers/managers that act on behalf of large aggregates of investors, etc.)."<sup>16</sup>

We also support the Proposal's removal of the problematic safe harbors<sup>17</sup> for potential proxy voting policies, and the related documentary and investigative burdens of the Trump-era rules, that the Proposal states "may potentially chill plan fiduciaries from exercising their rights, or result in excessive expenditures as fiduciaries over-document their efforts."<sup>18</sup>

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<sup>16</sup> RIN 1210-AC03, Proposed Rule Preamble

<sup>17</sup> Safe harbors in (e)(3)(i)

<sup>18</sup> RIN 1210-AC03, Proposed Rule Preamble

## **II. The Department should set a minimum standard for consideration of systemic risks to retirement savings.**

Although restoring fiduciaries' flexibility to consider ESG factors is an important step, it is not enough to ensure that fiduciaries undertake their ERISA responsibilities with respect to systemic risks to retirement savings. Climate change,<sup>19</sup> racial and economic inequality<sup>20</sup> and threats to democracy<sup>21</sup> are critically important systemic risks that are sometimes ignored in the pursuit of short-term returns. In future rulemakings the Department should set a minimum standard for management of these and any other systemic risks that pose a significant risk to the economy, the financial system and the long-term economic security of plan participants.

One of the key measures of whether a fiduciary is carrying out its ERISA duties of prudence and loyalty to participants and beneficiaries is whether it is properly diversifying its investments.<sup>22</sup> Whenever a plan fiduciary ignores credible long-term systemic risks, it is at odds with this core ERISA requirement. By adhering to minimum standards for considering systemic risks in investments, engagement and voting, fiduciaries can directly bolster long-term retirement income in ways that also confer socioeconomic benefits that further improve retirees' economic well being.

The Department has long made it clear that in enforcing ERISA, it will not judge fiduciaries on the results they achieve but rather by their processes. We support this approach. But the conditions for decision making, and the best practices of fiduciaries in responding to those conditions, have evolved considerably since ERISA's enactment. What might have been a reasonable process in 1974 is no longer today. The global economic meltdown in 2008 provided important lessons about the enormous, unnecessary harm suffered by retirees and workers when asset managers and other financial gatekeepers ignore systemic risks to their retirement savings.

For systemic ESG issues that threaten retirees' financial health over the long term, the Department should engage in a rulemaking to set minimum standards. In addition, the Department can accomplish a great deal by simply providing informal guidance on the process of integrating ESG factors into investment practices. For example, the Department could develop educational materials and convene workshops providing instructions and

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<sup>19</sup> See E.g., <https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf> ("Climate change poses serious and systemic risks to the U.S. economy and financial system.")

<sup>20</sup> See E.g., <https://www.pionline.com/sponsored-content/facing-hard-truths-material-risk-rising-inequality>; <https://www.chicagobooth.edu/review/racial-inequality-business-risk>;

<sup>21</sup> See E.g., [https://www.v-dem.net/media/filer\\_public/d3/f1/d3f1799a-5d50-4653-8440-1e9547144c0f/wp\\_111\\_final.pdf](https://www.v-dem.net/media/filer_public/d3/f1/d3f1799a-5d50-4653-8440-1e9547144c0f/wp_111_final.pdf)

<sup>22</sup> See §1104(a)(1)(C): "A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries... by diversifying the investments of the plan so as to minimize the risk of large losses..."

encouragement on development of Sustainable Investment Policies.<sup>23</sup> It could highlight the benefits of investing in and providing options for funds managed by individuals of diverse racial, ethnic and economic and diverse gender orientation. Finally, it could provide a standardized format for fiduciaries to disclose to the Department, plan participants and beneficiaries how they integrate ESG factors into their investment practices.

### **III. Participant-directed plans should be required to include at least one ESG option that addresses climate and other ESG systemic risks among a prudently constructed lineup of funds offered to participants.**

Recent years have seen an incredible rise in investor demand for ESG products<sup>24</sup> and a recent survey found the majority of investors' want to be Paris-aligned.<sup>25</sup> Yet fewer than 3 percent of defined contribution plans offer a climate-friendly investment option.<sup>26</sup> The vast majority of the 140 million Americans who rely on ERISA plans to save for retirement do not even have the option of investing with companies best oriented toward a climate-safe future.

To correct this, the Department must require that participant-directed plans offer at least one option that addresses climate and other systemic ESG risks as part of a prudently constructed lineup of funds, an essential step in ensuring that fiduciaries satisfy their duty of loyalty to plan participants and beneficiaries. Further, the Department should ensure that plans provide options of funds managed by individuals of diverse racial, ethnic and economic background and diverse gender orientation.

There are a number of market rate ESG funds that have performed as well or better than their non-ESG counterparts over the past decade, and there is no credible reason that a fiduciary would be unable to find such a fund addressing systemic ESG risks to offer to their participants that meets ERISA criteria.<sup>27</sup> Climate science tells us systemic climate risk will continue to grow over the long investment horizons of many retirement savers, at least through 2050, and thus

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<sup>23</sup> See E.g., [www.unpri.org/an-introduction-to-responsible-investment/an-introduction-to-responsible-investment-policy-structure-and-process/4917.article](https://www.unpri.org/an-introduction-to-responsible-investment/an-introduction-to-responsible-investment-policy-structure-and-process/4917.article)

<sup>24</sup> See E.g., [www.investopedia.com/demand-for-esg-investments-soars-emerging-from-covid-19-pandemic-5193532](https://www.investopedia.com/demand-for-esg-investments-soars-emerging-from-covid-19-pandemic-5193532)

<sup>25</sup> See E.g., [www.barrons.com/articles/future-returns-wealthy-see-a-role-in-investing-to-tackle-climate-change-01632255522](https://www.barrons.com/articles/future-returns-wealthy-see-a-role-in-investing-to-tackle-climate-change-01632255522)

<sup>26</sup> <https://www.napa-net.org/news-info/daily-news/could-esg-options-boost-401k-participation>

<sup>27</sup> The SEC will likely soon provide more clarity regarding definitions, disclosures, and criteria for different types of sustainable funds, and the Department should incorporate their work into future actions. Recent examinations of major asset managers' ESG funds have revealed that a portion of some of the largest asset managers' funds include investments in companies that have had serious negative impacts related to racial, economic, and environmental injustices. In order to adequately address the systemic risks and economic harms of investments in extractive industries, the Department should follow developments and provide guidance to fiduciaries on best practices for examining these issues. See E.g., [www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/?sref=f7rH2jW](https://www.bloomberg.com/graphics/2021-what-is-esg-investing-msci-ratings-focus-on-corporate-bottom-line/?sref=f7rH2jW) S ("A Bloomberg Intelligence analysis earlier this year showed that BlackRock's ESG Aware holds a portfolio that closely tracks both the S&P 500 and BlackRock's own top-selling S&P 500 fund, with two notable exceptions: The ESG fund has a "sustainable" label thanks to MSCI, and it's more heavily weighted in 12 fossil fuel stocks than the actual S&P 500.")

fiduciaries should be required to offer an investment option that credibly addresses climate risk, which is clearly in the financial interests and desires of their participants. Organizations like Fossil Free Funds provide information and investing tools for fiduciaries and participants to search for the most climate-friendly investment options.<sup>28</sup>

An ESG option requirement for participant-directed plans would not significantly raise compliance costs. Money managers already offer such lineups that include ESG options, and existing ERISA plans could comply simply by adding an option addressing systemic ESG risks to their current lineup, with no need to move money between funds. Until such options are universally available in participant-directed plans, workers and retirees will remain deprived of investment strategies that meet their needs.

We thank the Department for this important proposal and we look forward to further agency actions that will encourage and standardize sustainable investing processes within ERISA plans, to the benefit of workers and retirees. For more information please contact Alex Martin ([alex@ourfinancialsecurity.org](mailto:alex@ourfinancialsecurity.org)).

Respectfully submitted,

Americans for Financial Reform Education Fund

Cc: Honorable Martin J. Walsh, Secretary of Labor

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<sup>28</sup> <https://fossilfreefunds.org>