



Institute for  
**Policy Integrity**  
NEW YORK UNIVERSITY SCHOOL OF LAW



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 NW  
Washington, DC 20210

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

To Whom It May Concern:

Environmental Defense Fund (“EDF”), the Institute for Policy Integrity at NYU School of Law (“Policy Integrity”),<sup>1</sup> and the Initiative on Climate Risk and Resilience Law (“ICRRL”) respectfully submit the following comments and attached materials to the Department of Labor (the “Department”) in response to its proposed rule *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, published on October 14, 2021 (the “Proposed Rule”).<sup>2</sup> EDF is a non-partisan, non-governmental environmental organization representing over two million members and supporters nationwide. Since 1967, EDF has linked law, policy, science, and economics to create innovative and cost-effective solutions to today’s most pressing environmental problems. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. ICRRL is a joint initiative of Policy Integrity, EDF, Columbia Law School’s Sabin Center for Climate Change Law, and Vanderbilt Law School, focused on legal efforts on climate risk and resilience, particularly at the intersection of practice and scholarship.<sup>3</sup>

EDF, Policy Integrity, and ICRRL support the Proposed Rule, which would correct the harmful effects of the *Financial Factors in Selecting Plan Investments Rule* (the “2020 Investing Rule”)<sup>4</sup> and the *Fiduciary*

---

<sup>1</sup> These comments do not necessarily reflect the views of NYU School of Law, if any.

<sup>2</sup> *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57,273 (Oct. 14, 2021) [hereinafter Proposed Rule].

<sup>3</sup> This document does not necessarily represent the views of each ICRRL partner organization. For more information on ICRRL, see <https://icrri.org>.

<sup>4</sup> *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72,846 (Nov. 13, 2020) [hereinafter 2020 Investing Rule].

*Duties Regarding Proxy Voting and Shareholder Rights* Rule (the “2020 Proxy Rule”)<sup>5</sup> (collectively, the “2020 Rules”). EDF and Policy Integrity jointly submitted comments opposing the proposed versions of the 2020 Rules,<sup>6</sup> but many issues we identified were not corrected in the final versions.

The 2020 Rules constrain fiduciaries’ ability to integrate climate-related financial risk and other environmental, social, and governance (“ESG”) factors into investment and proxy voting decisions, in contravention of longstanding Employee Retirement Income Security Act (“ERISA”) law and regulation. As a result, fiduciaries have been pushed to overlook cost-competitive, high-performing fund options to the detriment of plan participants. The Proposed Rule rightly restores the longstanding pre-2020 framework and clarifies its application in the context of the significant and increasing importance of climate and other ESG factors to the financial interests of retirement plan participants.<sup>7</sup> As the Proposed Rule affirms, ERISA fiduciaries *can* consider climate risk in decisionmaking, and, moreover, *should* do so when climate risk is relevant to the risk-return analysis, like any other risk-return factor.

EDF, Policy Integrity, and ICRRRL recommend that the Department work expeditiously to finalize its Proposed Rule, which will ensure that plan fiduciaries meet their obligations under ERISA by allowing them to consider climate-related financial risk and other ESG factors in investment and voting strategies as appropriate. We offer the following comments to (1) provide support for revision or rescission of the harmful provisions of the 2020 Rules and finalization of the Proposed Rule; (2) catalog evidence that climate-related financial risk is an important aspect of investment decisionmaking; and (3) suggest potential improvements to the Proposed Rule.

---

<sup>5</sup> Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020) [hereinafter 2020 Proxy Rule].

<sup>6</sup> See Env’t Def. Fund & Inst. for Pol’y Integrity at NYU School of Law, Comment Letter on Financial Factors in Selecting Plan Investments under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB95) (July 30, 2020) (with Appendix of Sources) (appended as Attachment 2); Env’t Def. Fund & Inst. for Pol’y Integrity at NYU School of Law, Comment Letter on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB91) (Oct. 5, 2020) (appended as Attachment 3). Stakeholders submitted 8,737 comments to the Department on the proposed 2020 Investing Rule, over 95% of which opposed the rule. See JULIE GORTE ET AL., US SIF, PUBLIC COMMENTS OVERWHELMINGLY OPPOSE PROPOSED RULE LIMITING THE USE OF ESG IN ERISA RETIREMENT PLANS (2020), <https://perma.cc/CJ5L-78A3>. Stakeholders submitted 318 comment letters on the proposed 2020 Proxy Rule, with the majority opposing the rule; several of these were petition letters with thousands of signatures. See JULIE GORTE ET AL., US SIF, MAJORITY OF PUBLIC COMMENTS OPPOSE DOL PROPOSAL CURTAILING SHAREHOLDER VOTING RIGHTS IN ERISA RETIREMENT PLANS (2020), <https://perma.cc/54RW-4QS8> (“96% of asset managers and investment advisers; 97% of investor organizations, multiemployer plans and labor unions; and 91% of financial services providers opposed the rule. Excluding individual comment letters, nearly 70% of all commenters opposed the rule.”).

<sup>7</sup> These comments focus on climate because it is an area of expertise for our organizations. Other ESG factors can likewise have significance for risk-return analysis, as detailed in the submissions of other commenters.

Our comments address the following points:

- I. The 2020 Rules impair ERISA fiduciary decisionmaking, harm ERISA beneficiaries, and should be revised or rescinded as contemplated in the Proposed Rule.
- II. Climate change is a risk-return factor for retirement investments.
  - A. A large and growing body of evidence shows the relevance of climate change to investment risk and return.
  - B. The Proposed Rule rightly affirms that ERISA fiduciaries can and often should consider climate as a risk-return factor in decisionmaking, but the Department could further clarify the scope of fiduciaries' discretion.
- III. The Proposed Rule rightly allows for fiduciary discretion in the "tie-breaker" and collateral benefits standards, but the Department could further clarify the scope of fiduciaries' discretion.
- IV. The Proposed Rule rightly applies prudence and loyalty standards consistently to both QDIAs and other investment alternatives.
- V. The Proposed Rule rightly requires that fiduciaries steward shareholder rights subject to the same standards as other plan assets.

**I. The 2020 Rules impair ERISA fiduciary decisionmaking, harm ERISA beneficiaries, and should be revised or rescinded as contemplated in the Proposed Rule.**

As the Proposed Rule explains, the 2020 Rules depart from longstanding ERISA practice and impair ERISA fiduciaries' ability to carry out their duties to plan participants by constraining fiduciaries' consideration of climate and other ESG factors. The harmful provisions promulgated in the 2020 Rules should therefore be revised or rescinded as contemplated in the Proposed Rule.

Climate and other ESG factors can—and often do—affect the risk-return characteristics of investments. The assets and operations of different companies, sectors, and regions are exposed to varying degrees to the physical risks of extreme weather events or shifting environmental baselines and the transition risks of climate-related regulation, litigation, and market shifts.<sup>8</sup> Given this context, in order to make sound investment or voting decisions, fiduciaries often need to consider information on how various climate factors may affect a company.

By arbitrarily barring or disincentivizing fiduciaries from assessing climate-related risk factors, the 2020 Rules created confusion and interfered with fiduciaries' prudent decisionmaking processes.<sup>9</sup> The 2020 Rules distort selection of investments and exercise of shareholder rights in a manner that is likely to result in lower returns, higher risks, or other costs to beneficiaries.<sup>10</sup> The Department can remedy these

---

<sup>8</sup> See, e.g., COMMODITY FUTURES TRADING COMM'N, CLIMATE-RELATED MARKET RISK SUBCOMM. OF THE CFTC MARKET RISK ADVISORY COMM., MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM (2020), <https://perma.cc/PXD6-4RKH> [hereinafter CFTC REPORT]; Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2021), <https://perma.cc/GA3T-K9UT>. These risks are also discussed in greater detail in Section II, *infra*.

<sup>9</sup> See Proposed Rule, 86 Fed. Reg. at 57,275.

<sup>10</sup> See *id.* at 57,284; see also Section II, *infra*.

ongoing harms by issuing a final rule that rescinds or revises, as appropriate, the detrimental provisions of the 2020 Rules.

## **II. Climate change is a risk-return factor for retirement investments.**

### **A. A large and growing body of evidence shows the relevance of climate change to investment risk and return.**

Myriad analyses demonstrate the financial significance of climate and other ESG factors, including sources cited in the Proposed Rule and numerous others, a small subset of which we highlight below. As the Proposed Rule recognizes, consideration of these factors is relevant for assessing the risk-return characteristics of all types of investment options, not just ESG-labeled funds. We commend the Department's use of empirical data and other relevant analyses, and encourage the Department to specifically cite and incorporate into the administrative record any additional sources that inform its analysis when finalizing the Proposed Rule.<sup>11</sup>

As the preamble of the Proposed Rule reflects, climate-related financial risks are often grouped into two categories: physical risk and transition risk.<sup>12</sup> Physical risk encompasses the increases in extreme weather events and changes to environmental baseline conditions that can threaten human health, safety, and lives; damage facilities, infrastructure, and other assets; and otherwise disrupt the functioning of society and the economy.<sup>13</sup> These risks are increasing the frequency of billion-dollar disasters in the U.S., along with other acute and chronic impacts.<sup>14</sup> Transition risk encompasses the effects of societal responses to climate change, such as risks to particular companies, sectors, or the economy broadly from climate-related legislation, regulation, litigation, reputational harms, and shifts in consumer preferences.<sup>15</sup> For example, a combination of these factors is causing increasing numbers of fossil fuel assets to become "stranded," meaning that planned and paid-for assets are unable to be used in the anticipated manner.<sup>16</sup> High exposure to climate-related transition risks negatively affects credit-

---

<sup>11</sup> In particular, we encourage the Department to consider incorporating by reference into this administrative record all submissions to the administrative record for the 2020 Rules, as many of those submissions contain data and considerations relevant to this Proposed Rule.

<sup>12</sup> See Proposed Rule, 86 Fed. Reg. at 57,276–77, 57,289–90.

<sup>13</sup> See Condon et al., *supra* note 8 (manuscript at 4–9).

<sup>14</sup> See, e.g., Adam B. Smith, *2010–2019: A Landmark Decade of U.S. Billion-Dollar Weather and Climate Disasters*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 8, 2020), <https://perma.cc/8CEX-HB92> ("Four of the five most costly U.S. billion-dollar disasters occurred in the 2010s (i.e., Hurricanes Harvey, Irma, Maria, and Sandy). In addition, the two most destructive and costly wildfire seasons in U.S. history have taken place over the last three years, with losses exceeding \$40 billion, with much of this damage in California."); ENTERGY CORP., BUILDING A RESILIENT ENERGY GULF COAST: EXECUTIVE REPORT 6–7 (2010), <https://perma.cc/S3KU-S3V9> (estimating additional billions of dollars in annual costs of extreme storms for the Gulf Coast, in terms of losses of physical assets and the economic value of business interruption, depending on the extent of climate change).

<sup>15</sup> See Condon et al., *supra* note 8 (manuscript at 9–12).

<sup>16</sup> See, e.g., Drew Riedl, *Why Market Actors Fuel the Carbon Bubble: The Agency, Governance, and Incentive Problems that Distort Corporate Climate Risk Management*, J. SUSTAINABLE FIN. & INV. (June 1, 2020), <https://www.tandfonline.com/doi/full/10.1080/20430795.2020.1769986> (permalink unavailable) ("A significant portion of fossil fuel assets will eventually become 'stranded' – prematurely obsolete over their expected lives."); TYLER FITCH, CARBON STRANDING: CLIMATE RISK AND STRANDED ASSETS IN DUKE'S INTEGRATED RESOURCE PLAN ii (2020), <https://perma.cc/42EX-U95S> (estimating stranded asset costs of approximately \$5 billion if Duke Energy proceeds consistent with the terms of both its net-zero carbon commitment and its 2020 Carolinas integrated resource

worthiness of firms, which has implications for these firms' ability to raise capital and overall stability.<sup>17</sup> Transition risk is expected to have substantial negative impacts on the financial system.<sup>18</sup>

These effects of climate change on companies, sectors, and overall economic growth and stability are relevant to financial risk-return analyses, especially for retirement investing. At the firm level, academics and corporate leaders have found that climate change imposes a current and increasing risk premium.<sup>19</sup> At the macroeconomic level, regulators and researchers have concluded that climate change could pose systemic risks and constitutes an emerging threat to the financial system, with a possibility of trillions of dollars in annual economic losses.<sup>20</sup> While many retirement funds are broadly diversified, the systemic risks that climate change poses cannot be managed through diversification alone.<sup>21</sup> Universal owners—investors who own a diversified portfolio representative of much of the economy, like many retirement funds—have a rational interest in macroeconomic factors and in how the externalities of particular firms may affect the rest of their holdings.<sup>22</sup> Thus, the overall impact of climate change on the economy is

---

plans); JONATHAN SIMS ET AL., PUT GAS ON STANDBY 50 (2021), <https://perma.cc/VK7J-A6RA> (“Close to \$16 bn could be stranded if gas plant closures are brought forward for net zero alignment.”); DENNIS WAMSTED, RAPIDLY CHANGING INVESTMENT CLIMATE CHALLENGES PLANNED PJM GAS PLANTS 13 (2021), <https://perma.cc/V8P3-6YRK> (noting increasing obstacles to completion of planned gas plants, including New York State’s October 2021 denial of permits for two new gas-fired power plants based on inconsistency with the state’s Climate Act of constructing and operating new fossil fuel-fired plants).

<sup>17</sup> See Giusy Capasso et al., *Climate Change and Credit Risk*, 266 J. CLEANER PROD. 121634, at 3 (2020), <https://perma.cc/MW43-6VY2> (finding that “companies with high carbon footprint[s] are perceived by the market as more likely to default,” indicating that “the exposure to climate risks affects the creditworthiness of loans and bonds issued by corporates”).

<sup>18</sup> See Madison Condon, *Market Myopia’s Climate Bubble*, UTAH L. REV. (forthcoming 2022) (manuscript at 50–51), <https://perma.cc/J64F-JDUL> (“Sarah Breeden, the head of International Banks Supervisor at the Bank of England, has said that transition risk alone could constitute up to a \$20 trillion loss to the financial system.” (citing Sarah Breeden, *Avoiding the Storm: Climate Change and the Financial System*, Address at the Official Monetary & Financial Institutions Forum in London (Apr. 15, 2019))).

<sup>19</sup> See, e.g., Inst. for Pol’y Integrity at NYU School of Law, Comment Letter on Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information (Apr. 28, 2020), <https://perma.cc/NW3E-8T7Y>; Christos Karydas & Anastasios Xepapadeas, *Pricing Climate Change Risks: CAPM with Rare Disasters and Stochastic Probabilities* (CER-ETH Working Paper Series, Working Paper No. 19/311, 2019), <https://perma.cc/L695-MBMP> (“[T]he latest academic work in creating asset pricing models that account for both carbon emissions and stochastically varying risk confirm that ‘climate change entails a positive and increasing risk premium.’”); Brad Plumer, *Companies See Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (June 4, 2019), <https://perma.cc/UJA5-SAYF>.

<sup>20</sup> See, e.g., CFTC REPORT, *supra* note 8, at ii (“A central finding of this report is that climate change could pose systemic risks to the U.S. financial system.”); FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK 3 (2021), <https://perma.cc/RLD5-L7AS> (“Climate change is an emerging threat to the financial stability of the United States.”); Tom Kompas et al., *The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris Climate Accord*, 6 EARTH’S FUTURE 1153, 1160 (2018), <https://perma.cc/4KRT-9GMR> (estimating over \$17 trillion in additional annual global GDP losses by 2100 in a 4°C warming scenario versus a 2°C warming scenario).

<sup>21</sup> See Miguel A. Centeno et al., *The Emergence of Global Systemic Risk*, 41 ANN. REV. SOCIOL. 65 (2015), <https://perma.cc/KN66-A28Y>.

<sup>22</sup> See Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 1 (2020), <https://perma.cc/H7AA-CEJH> (arguing that “diversified investors should rationally be motivated to internalize intra-portfolio negative externalities,” which “can explain the increasing climate change related activism of institutional investors, who have applied coordinated shareholder power to pressure fossil fuel producers into

relevant to the interests of ERISA plan participants, especially in light of the long time horizons inherent in retirement investing.<sup>23</sup>

Many experts and investors agree that climate risks are not yet fully reflected in asset prices.<sup>24</sup> As a result, the benefits of pursuing such strategies have not yet fully accrued. Furthermore, while climate risks do currently affect companies and the broader economy,<sup>25</sup> such impacts are likely to grow significantly in the future.<sup>26</sup> As physical and transition impacts of climate change continue to materialize

---

substantially reducing greenhouse gas emissions”); UN PRI, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS 40 (2011), <https://perma.cc/R9AW-PUX6> (“Universal Ownership theory and the notion that investors should care about externalities is part of the bedrock principles of responsible investment – investors will pay at some point even if they don’t know the cost now – for example, liabilities from the Exxon oil spill, or use of asbestos and bankruptcies.”); James P. Hawley & Andrew T. Williams, *The Universal Owner’s Role in Sustainable Economic Development*, 9 CORP. ENV’T STRATEGY 284, 284 (2002), <https://perma.cc/JFG4-QB8W> (“A universal owner owns a small, but representative fraction of most of the companies in an economy. Thus, its ability to satisfy its fiduciary duties depends heavily on overall macroeconomic efficiency and performance rather than on the performance of any particular firm that it might own. Consequently, universal owners have a natural interest in issues of sustainable development because they receive the benefits from positive externalities generated by portfolio firms and are likewise harmed by their negative externalities.”).

<sup>23</sup> See Proposed Rule, 86 Fed. Reg. at 57,276–77; U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-327, RETIREMENT SAVINGS: FEDERAL WORKERS’ PORTFOLIOS SHOULD BE EVALUATED FOR POSSIBLE FINANCIAL RISKS RELATED TO CLIMATE CHANGE 8 (2021), <https://perma.cc/J8GD-H9DD> (“The literature we reviewed, and the stakeholders knowledgeable about climate change and the financial sector we interviewed, highlighted how retirement plans’ investments—which encompass the global economy over long time horizons—are potentially exposed to financial risks from climate change.”); Alicia McCarthy et al., *DOL Proposes New Rules Regulating ESG Investments*, HARV. CORP. GOV. FORUM (July 7, 2020), <https://perma.cc/76PH-Q66M> (quoting attorney Martin Lipton as acknowledging “growing investor recognition of the importance of ESG in risk management and mitigation, as well as the view that addressing ESG issues promotes long-term value creation” and stating that “[i]t is particularly anomalous, especially in these times, for the DOL to limit or unduly burden the ability of plan fiduciaries to exercise a judgment that items like good corporate governance, effectively navigating energy transitions or operating in a sustainable manner can enhance or protect returns”).

<sup>24</sup> See, e.g., Proposed Rule, 86 Fed. Reg. at 57,290 (“A 2019 report from BlackRock notes that the physical risk of extreme weather poses growing risks that are underpriced in certain sectors and asset classes.” (citing BLACKROCK INVESTMENT INST., GETTING PHYSICAL: SCENARIO ANALYSIS FOR ASSESSING CLIMATE RISKS (2019), <https://perma.cc/V9N2-7N85>)); Johannes Stroebel & Jeffrey Wurgler, *What Do You Think About Climate Finance?* (NBER Working Paper 29136, 2021), <https://perma.cc/49XR-K7YS> (“We survey 861 finance academics, professionals, and public sector regulators and policy economists about climate finance topics. They identify regulatory risk as the top climate risk to businesses and investors over the next five years, but they view physical risks as the top risk over the next 30 years. By an overwhelming margin, respondents believe that asset prices underestimate climate risks.”); Ruihong Jiang & Chengguo Weng, *Climate Change Risk and Agriculture-Related Stocks* (Jan. 9, 2020), <https://perma.cc/CR3Q-JMLE> (adopting a climate-risk-adjusted trading strategy for agricultural stocks and finding positive returns using a one-year holding period, suggesting that the market is “inefficient toward climate change risks”).

<sup>25</sup> See Proposed Rule, Fed. Reg. at 57,289 (“Climate change is already impacting or is anticipated to impact nearly every facet of the economy, including infrastructure, agriculture, residential and commercial property, as well as human health and labor productivity.” (quoting CFTC REPORT, *supra* note 8)).

<sup>26</sup> See *id.* at 57,289–90 (“We are already seeing significant economic costs as a result of warming, and a certain amount of additional warming is guaranteed based on the greenhouse gas pollution already in the atmosphere. This implies that the physical risks of climate change to our economy and to investments will persist. . . . Additionally, existing government policies and increasingly ambitious national and international greenhouse reduction goals will continue to create significant transition risk for investments.”).

and the information needed to assess companies' exposure to these risks becomes more available to investors through developments like the forthcoming SEC disclosure rule,<sup>27</sup> asset prices will adjust to reflect differences in climate-related exposure. Investors who proactively analyze climate-related risks should then see higher returns and lower risks from their investment holdings, including less exposure to sudden repricing of assets.<sup>28</sup>

Empirical data and analyses affirm that consideration of ESG criteria often correlates with better investment returns.<sup>29</sup> As the Proposed Rule notes, many studies have found that investing strategies that consider climate and other ESG factors have achieved greater returns than non-ESG strategies, with aggregated data from over 1,000 studies indicating that investments accounting for climate generally perform better financially.<sup>30</sup> The Proposed Rule recognizes that some types of ESG strategies have underperformed in the circumstances and timeframes assessed in certain studies.<sup>31</sup> However, it is impossible to constantly achieve maximum returns under any investing strategy, as market conditions cannot be predicted with absolute certainty. Overall, the evidence predominantly supports the large and growing financial significance of climate and other ESG factors.

The range of approaches and findings in the studies cited in the Proposed Rule underscores that "ESG strategies" is an umbrella term. ESG strategies encompass negative screening ESG funds (which exclude certain companies or sectors), positive screening ESG funds (which affirmatively select certain companies or sectors), evaluation of individual companies' scores on ESG indicators, and a multitude of

---

<sup>27</sup> See Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), <https://perma.cc/BT97-AZFH> ("I have asked SEC staff to develop a mandatory climate risk disclosure rule proposal for the Commission's consideration by the end of the year.").

<sup>28</sup> See Condon, *supra* note 18 (manuscript at 50).

<sup>29</sup> See, e.g., Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 210 (2015), <https://perma.cc/ND4E-W6VZ> (aggregating findings from over 2,000 studies on the relationship between ESG criteria and corporate financial performance ("CFP") and concluding that "[r]oughly 90% of studies find a nonnegative ESG-CFP relation" and "the large majority of studies reports positive findings"); Philipp Krüger, *Corporate Goodness and Shareholder Wealth*, 115 J. FIN. ECON. 304, 306 (2015), <https://perma.cc/NM4F-386S> ("[I]nvestors react strongly negatively to the arrival of negative [corporate social responsibility] news. The negative reaction is particularly pronounced for information regarding communities and the environment."); Emily Steinbarth & Scott Bennett, *Materiality Matters: Targeting the ESG Issues that Impact Performance*, HARV. CORP. GOV. FORUM (May 10, 2018), <https://perma.cc/2GEN-J7VW>; Siobhan Riding, *Majority of ESG Funds Outperform Wider Market Over 10 Years*, FIN. TIMES (June 14, 2020), <https://www.ft.com/content/733ee6ff-446e-4f8b-86b2-19ef42da3824> (permalink unavailable); Audrey Cher, *Sustainable Funds Are Outperforming Their Peers During the Pandemic*, BNP Paribas Says, CNBC (June 2, 2020), <https://perma.cc/5ULG-8DUU>.

<sup>30</sup> See Proposed Rule, 86 Fed. Reg. at 57,277 ("While it is not always the case, a growing body of evidence suggests a generally positive relationship between the financial performance of investments that address or account for climate change." (citing TENSIE WHELAN, ULRICH ATZ, TRACY VAN HOLT & CASEY CLARK, NYU STERN CTR. FOR SUSTAINABLE BUS. & ROCKEFELLER ASSET MGMT., *ESG AND FINANCIAL PERFORMANCE: UNCOVERING THE RELATIONSHIP BY AGGREGATING EVIDENCE FROM 1,000 PLUS STUDIES PUBLISHED BETWEEN 2015–2020* (2021), <https://perma.cc/6Z4Y-72FP>)); *id.* at 57,277 n.34 (explaining that in the Whelan et al. report, "when assessing 59 climate change, or low carbon, studies related to financial performance, the majority found a positive result"); *id.* at 57,289–90 (explaining multiple studies showing higher returns for ESG investing).

<sup>31</sup> See *id.* at 57,290–91.

other ways of incorporating ESG factors into decisions.<sup>32</sup> It is important to emphasize that ESG investing strategy is relevant to a much broader array of investing decisions than just selection of ESG-labeled funds. It encompasses analyzing and comparing climate-related and other ESG factors for all types of investment options.<sup>33</sup> ESG factors are relevant not only to ESG-focused companies and funds but to risk-return analysis generally, given that most if not all corporations face climate-related financial risk. For example, if industrial firms A, B, and C differ in their exposure to extreme weather or climate-related regulatory risk, the fiduciary should consider those factors in choosing which company may warrant investment. In terms of ESG-labeled funds, current and contemplated SEC actions and actions in other jurisdictions will provide greater rigor and clarity with respect to the characteristics needed for a fund to have such labels.<sup>34</sup>

**B. The Proposed Rule rightly affirms that ERISA fiduciaries can and often should consider climate as a risk-return factor in decisionmaking, but the Department could further clarify the scope of fiduciaries' discretion.**

In light of the severe and pervasive economic implications of climate change, the Proposed Rule provides important and well-founded clarification, in both the preamble and regulatory text, that ERISA fiduciaries can and often should consider climate as a risk-return factor.<sup>35</sup> With key points from the preamble noted in the prior section, this section focuses on the regulatory text itself, noting particularly

---

<sup>32</sup> See *id.* at 57,277, 57,289–91.

<sup>33</sup> See Fiona Reynolds, Letter to the Editor, *ESG Is Risk Management, Not an Asset Class*, WALL ST. J. (June 29, 2020), <https://perma.cc/J5CY-ZCKP> (“ESG isn’t an asset class, but rather prudent risk management. . . . It is the DOL’s responsibility to protect savers and the retirement incomes of millions of Americans—which means ensuring our 401(k)s and pensions consider all material risks, including ESG risks.”).

<sup>34</sup> See, e.g., Press Release, Sec. & Exch. Comm’n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), <https://perma.cc/B7QP-RU4Y> (“The task force will . . . analyze disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies.”); SEC. & EXCH. COMM’N, DIV. OF EXAMINATIONS, RISK ALERT, THE DIVISION OF EXAMINATIONS’ REVIEW OF ESG INVESTING (Apr. 9, 2021), <https://perma.cc/Q5UY-RLRR> (summarizing examinations on whether firms “are accurately disclosing their ESG investing approaches and have adopted and implemented policies, procedures, and practices that accord with their ESG-related disclosures”); Gary Gensler, Chair, Sec. & Exch. Comm’n, Prepared Remarks Before the Asset Management Advisory Committee (July 7, 2021), <https://perma.cc/6CVF-8NM9> (“As there’s not a standardized meaning of these sustainability-related terms, I’ve asked staff to consider recommendations about whether fund managers should disclose the criteria and underlying data they use.”); Avery Ellfeldt, *ESG Investments Fall as Europe Boots Pretenders*, E&E NEWS (July 20, 2021), <https://subscriber.politicopro.com/article/eenews/2021/07/20/esg-investments-fall-as-europe-boots-pretenders-224771> (permalink unavailable) (“The European Union recently cracked down on financial green washing by adopting regulations that require fund managers, banks and other finance firms to be more transparent about the strategies behind their sustainable products.”); Tim Quinson, *Regulators Intensify ESG Scrutiny as Greenwashing Explodes*, BLOOMBERG (Sept. 1, 2021), <https://perma.cc/3VGH-5LA3> (“[T]he U.S. Securities and Exchange Commission and BaFin, Germany’s financial regulator, initiated a probe into allegations that Deutsche Bank AG’s DWS Group asset-management arm has been misstating the environmental—and possibly the social—credentials of some of its ESG-labeled investment products.”).

<sup>35</sup> See Proposed Rule, 86 Fed. Reg. at 57,277 (“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.”).



significant improvements made by the Proposed Rule and offering a few suggestions for potential further clarification.

By eliminating the 2020 Rules' "pecuniary" and "non-pecuniary" terminology and referring instead to "risk-return" factors and "collateral benefits", the Proposed Rule provides greater clarity to fiduciaries and marks a return to longstanding ERISA law and practice. The 2020 Rules' framing of climate and other ESG factors as "non-pecuniary" discouraged fiduciaries from considering these factors in risk-return analysis even though these factors often have pecuniary effects.<sup>36</sup> An issue may have both pecuniary and non-pecuniary dimensions, and the non-pecuniary dimensions do not lessen the issue's pecuniary significance.<sup>37</sup>

By clarifying that fiduciaries should consider any factors relevant to risk-return analysis, the Proposed Rule benefits ERISA participants.<sup>38</sup> While it is difficult to quantify the precise extent of these benefits, given the myriad ways that climate and other ESG factors can affect investment risks and returns, the Department can reasonably conclude that the benefits are substantial, as there is voluminous evidence that these ESG factors matter to well-informed investors and have economic significance in many circumstances.<sup>39</sup> By pushing fiduciaries to ignore these factors, the 2020 Rules distorted fiduciaries' decisionmaking and would very likely systematically harm participants if left in place.<sup>40</sup> The Proposed Rule's restoration of fiduciary discretion to consider ESG factors whenever relevant, like any other factors, will thus benefit participants.

Also laudable is the Department's decision to expressly state in the Proposed Rule's regulatory text that a fiduciary may consider climate effects in risk-return analysis:

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, which might include, for example: (i) Climate change-related factors, such as a corporation's exposure to the real and potential economic effects of climate change including exposure to the physical and transitional risks of climate change

---

<sup>36</sup> See *id.* at 57,287–88.

<sup>37</sup> The case the Department cited when introducing "pecuniary" and "nonpecuniary" in the 2020 Investing Rule held that ERISA's duty of prudence does not vary based on a "specific nonpecuniary goal set out in an ERISA plan," and that ERISA fiduciaries are required to pursue "*financial* benefits (such as retirement income)" not "nonpecuniary benefits." See *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 420–21 (2014). The 2020 Investing Rule created confusion by forcing analytical *factors*, like climate risk, to be classified as "pecuniary" or "nonpecuniary," when such factors can have both pecuniary (i.e., relevant to financial risk-return analysis) and nonpecuniary benefits and costs. The Proposed Rule clarifies that all types of factors can be assessed for their relevance to financial risk-return analysis, which is consistent with *Fifth Third*.

<sup>38</sup> See Proposed Rule, 86 Fed. Reg. at 57,287–88 ("[A] significant benefit of the proposal is that it clearly permits plan fiduciaries to consider climate change and other ESG factors that are often material, and to exercise shareholder rights that may enhance the value of plan investments. . . . Acting on material climate change and other ESG factors . . . will redound, in the first instance, to employee benefit plans covered by ERISA and their participants and beneficiaries . . . . The Department anticipates that the resulting benefits will be appreciable.")

<sup>39</sup> See Section II.A., *supra*.

<sup>40</sup> The serious penalties for violations of ERISA fiduciary duties create a strong deterrent to pursuing strategies that the Department signals it disfavors, like ESG strategies in the 2020 Rules.

and the positive or negative effect of Government regulations and policies to mitigate climate change . . . .<sup>41</sup>

These climate change-related factors are rightly included among the Department’s list of examples, given the extensive effects of climate change on companies, sectors, and the economy broadly. As the Department explains in the preamble, these examples should help alleviate fiduciaries’ “concerns about investing in climate-change-focused or ESG-sensitive funds that are economically advantageous to plans,” therefore benefiting plan participants.<sup>42</sup> But the language is relevant not *only* to investment in “climate-change focused or ESG-sensitive funds.”<sup>43</sup> It also provides clarity to fiduciaries on the permissibility of considering climate and other ESG factors for *any* investment or investment course of action where such factors are relevant to risk-return. We support this clear acknowledgment of the fact that climate-related factors are often relevant to risk-return analysis for investment decisionmaking.

Regarding the Department’s inquiry on “whether fiduciaries should consider climate change as presumptively material in their assessment of investment risks and returns,”<sup>44</sup> our view is that the Proposed Rule already cogently makes clear, in both the preamble and regulatory text, that climate change is often relevant to investment risk-return analysis and fiduciaries should consider it whenever that is the case. As the Proposed Rule states, “the weight given to any factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk-return” and “[w]hether any particular consideration is such a factor depends on the particular facts and circumstances.”<sup>45</sup> Climate risk and other ESG factors vary greatly in type and degree between different companies and sectors and across different time horizons. The Proposed Rule rightly treats consideration of the relevance of these factors as a part of fiduciaries’ exercise of their general duties of prudence and loyalty, not as an idiosyncratic, separate analysis.

We also offer three suggestions on changes that could further clarify the standard for fiduciary risk-return analysis for the Department to consider in finalizing the language in paragraph (b)(4) of the Proposed Rule.

First, Proposed Rule paragraph (b)(4) states: “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.”<sup>46</sup> We suggest that the Department consider whether replacing “may” with “must” or “should” would more accurately reflect ERISA fiduciary duties to consider factors relevant to risk-return analysis.<sup>47</sup>

---

<sup>41</sup> Proposed Rule, 86 Fed. Reg. at 57,302 (to be codified at § 2550.404a–1(b)(4)).

<sup>42</sup> *Id.* at 57,288.

<sup>43</sup> *Id.*; see Section II.A., *supra* (discussing the relevance of climate and ESG considerations for more “traditional” investments as well as ESG-focused investments).

<sup>44</sup> Proposed Rule, 86 Fed. Reg. at 57,290.

<sup>45</sup> *Id.* at 57,278; see also *id.* at 57,279 (“All ESG is not equal, and when it is not material to the risk/return analysis, ESG still may be a legitimate collateral benefit for consideration under a tie-breaking analysis.”).

<sup>46</sup> *Id.*, 86 Fed. Reg. at 57,302.

<sup>47</sup> We note that even with this change, the regulatory text would not mandate fiduciaries to consider climate and other ESG factors in all circumstances, but rather only when consideration is relevant to risk-return, because the list of examples is still qualified by the “might include” language.

Second, regarding the phrase “material to the risk-return analysis” in Proposed Rule paragraph (b)(4), we suggest that the Department consider replacing “material” with “relevant” in this provision. This language would be consistent with longstanding ERISA law on consideration of all “relevant” factors.<sup>48</sup> It would also avoid any potential for confusion regarding the meaning of “material” given that word’s use as a legal term of art in the securities disclosure context.<sup>49</sup> If the Department retains “material” in the final rule, we recommend that it clarify that this standard is intended to follow the all-relevant-factors framework.

Third, as the Department notes in the Proposed Rule, “[t]he list of examples in paragraph (b)(4) . . . is not exclusive.”<sup>50</sup> The Department should consider slightly modifying the language preceding the list of examples to better emphasize the list’s non-exhaustive nature. One possible formulation of the (b)(4) language with this type of modification could be to add a period after “analysis” and start the next sentence with “Such factors might include, but are not limited to” followed by the colon and the list of examples. We also strongly encourage the Department to consider suggestions from other commenters for additional examples that might provide particularly valuable clarity to fiduciaries and benefits to participants.

### **III. The Proposed Rule rightly allows for fiduciary discretion in the “tie-breaker” and collateral benefits standards, but the Department could further clarify the scope of fiduciaries’ discretion.**

The Proposed Rule outlines an ERISA fiduciary’s duties in determining the set of investment options that serve the plan’s interests based on risk-return factors and then rightly allows fiduciaries to use their discretion to consider additional factors in selecting among the options that have met that threshold, subject to prudence and loyalty protections. We support the Proposed Rule’s sensible approach and offer a few suggestions for further clarifying the scope of fiduciaries’ discretion to consider collateral benefits.

As detailed above, climate and other ESG factors may affect the core risk-return analysis for an investment, in which case the Proposed Rule affirms that fiduciaries should consider them like any other

---

<sup>48</sup> See, e.g., Rules and Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the “Prudence” Rule, 44 Fed. Reg. 37,221, 37,225 (June 26, 1979) (codified at § 2550.404a–1(b)(1) in 1979 ERISA regulations) (“With regard to an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to his investment duties, the requirements of section 404(a)(1)(B) of the Act set forth in subsection (a) of this section are satisfied if the fiduciary (A) has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan’s investment portfolio with respect to which the fiduciary has investment duties; and (B) has acted accordingly.”).

<sup>49</sup> See Hana V. Vizcarra, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 50 ENVTL. L. REP. 10106, 10107 (2020), <https://perma.cc/AJU6-QDKH> (“Discussion of ‘material’ information is often conflated with information salient to various stakeholders. But material information has a particular, if somewhat nebulous, definition in U.S. securities law, which guides a company’s financial reporting to the U.S. Securities and Exchange Commission (SEC) and communications with its shareholders.”).

<sup>50</sup> Proposed Rule, 86 Fed. Reg. at 57,277.

risk-return factors.<sup>51</sup> As the Proposed Rule states, a fiduciary’s risk-return assessment should “us[e] appropriate investment horizons consistent with the plan’s investment objectives,” take into account “the individual facts and circumstances,” and weigh any factor based on “a prudent assessment of its impact on risk-return.”<sup>52</sup> The duty of loyalty furthermore requires that 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.”<sup>53</sup> These standards are intended to provide discretion to fiduciaries to use their expert judgment in making investment decisions, within the guardrails of prudence and loyalty.

If a fiduciary concludes through a prudent and loyal process that multiple investments would serve the plan’s investment objectives, there should not be arbitrary constraints on the fiduciary’s selection among these investment options.<sup>54</sup> The Proposed Rule accordingly provides that a fiduciary may consider collateral benefits when investments “equally serve the financial interests of the plan.”<sup>55</sup> We interpret this language to encompass investment options that may have different combinations of risks, returns, and other characteristics, but on balance serve the financial interests of the plan comparably well. As the preamble contemplates, investments that “differ on a wide range of attributes” may be “equally appropriate additions to the plan’s portfolio” because they could serve the financial interests of the plan in different ways.<sup>56</sup> For example, a fiduciary may prudently determine that a certain investment serves the financial interests of the plan because it provides a “hedge against a specific risk to the portfolio, even though the investment, when considered in isolation from the portfolio as a whole, is riskier or less likely to generate a significant positive return than other investments that do not serve the same hedging function.”<sup>57</sup>

---

<sup>51</sup> See *id.* at 57,303 (to be codified at § 2550.404a–1(c)(2)) (“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, . . . [which] may include the factors in paragraph (b)(4) of this section.”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (to be codified at § 2550.404a–1(c)(1)).

<sup>54</sup> See *id.* at 57,279 (“The proposal does not place parameters on the collateral benefits that may be considered by a fiduciary to break the tie. The Department believes this is consistent with prior nonregulatory guidance, but solicits comments on whether more specificity should be provided in the provision.”). Additional specificity on the collateral benefits that may be considered, or how a fiduciary may assess collateral benefits, is not necessary. Contrary to an editorial published shortly after the Proposed Rule, this framework does not “coerce workers and business into supporting progressive policies.” See The Editorial Board, *Your New Woke 401(k)*, WALL ST. J. (Oct. 20, 2021), <https://www.wsj.com/articles/your-new-woke-401-k-retirement-savings-esg-erisa-biden-administration-department-of-labor-proposal-11634753095> (permalink unavailable). Different participants have a range of policy opinions, moral values, and other objectives that they may wish to consider in their retirement investing. Under the Proposed Rule, a fiduciary selects investments based on risk-return considerations and then has discretion to use collateral benefits as a tie-breaker when multiple investments meet the risk-return criteria, subject to duties of prudence and loyalty. Participants receive information when collateral benefits are used as a tie-breaker, and participants who object to certain investments for any reason can direct their plan sponsor to allocate their contributions to different options.

<sup>55</sup> Proposed Rule, 86 Fed. Reg. at 57,303 (to be codified at § 2550.404a–1(c)(3)).

<sup>56</sup> *Id.* at 57,278.

<sup>57</sup> *Id.*

Regarding the Department’s solicitation of comments on whether the “equally serve” language is “sufficiently clear and appropriate in light of investment practices and strategies used by plan fiduciaries,”<sup>58</sup> we suggest that the Department consider whether it would be sensible to adopt alternative language. Possible alternatives include: replacing “equally” with “equivalently”<sup>59</sup> or “suitably”;<sup>60</sup> deleting “equally” in its current position and adding a phrase like “equally well” or “to an equal degree” after “plan”; or eliminating the adverb entirely. While we read “equally serve” as more clearly allowing prudent exercise of fiduciary discretion than the 2020 Investing Rule’s “indistinguishable” standard, and the preamble confirms that this is the Department’s intention, it seems possible that “equally” could be interpreted more narrowly than intended.<sup>61</sup> We thus recommend that the Department consider whether a slight modification to the “equally serve” language could more clearly encompass the prudent selection of investment options that serve the financial interests of the plan in different ways, providing fiduciaries with an appropriate level of discretion.

As noted above in this section, the Proposed Rule provides that if a fiduciary’s risk-return analysis identifies multiple investment options that serve the financial interests of the plan, the fiduciary may use collateral benefits as a tie-breaker to select among those options.<sup>62</sup> If the fiduciary uses such a tie-breaker in selecting an investment alternative for an individual account plan, the Proposed Rule requires the fiduciary to “ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries.”<sup>63</sup> We recommend that the Department consider clarifying what an adequate disclosure of a “collateral-benefit characteristic” would entail in terms of form and content.<sup>64</sup>

#### **IV. The Proposed Rule rightly applies prudence and loyalty standards consistently to both QDIAs and other investment alternatives.**

We support the Proposed Rule’s consistent application of prudence and loyalty standards to both Qualified Default Investment Alternatives (“QDIAs”) and other investment alternatives. Unlike the irrationally restrictive 2020 Investment Rule, this evenhanded approach will benefit participants by allowing fiduciaries to determine the investments best suited to serve as QDIAs.

ERISA fiduciaries select QDIAs, which are funds to which plan participants’ contributions are directed if they have not yet affirmatively selected investments to which their contributions should be allocated. As its name indicates, a QDIA is a non-coercive *alternative*; participants can always direct their plan sponsor

---

<sup>58</sup> *Id.* at 57,279.

<sup>59</sup> Definitions of “equivalent” include: “equal in force, amount, or value;” “like in signification or import;” and “corresponding or virtually identical especially in effect or function.” *Equivalent*, MERRIAM-WEBSTER, <https://perma.cc/K6ZY-N3W4>.

<sup>60</sup> Definitions of “suitable” include: “adapted to a use or purpose” and “satisfying propriety.” *Suitable*, MERRIAM-WEBSTER, <https://perma.cc/FZ34-2P87>.

<sup>61</sup> Definitions of “equally” include: “in an equal or uniform manner” and “to an equal degree.” *Equally*, MERRIAM-WEBSTER, <https://perma.cc/HAC2-ACSA>.

<sup>62</sup> See Proposed Rule, 86 Fed. Reg. at 57,303 (to be codified at § 2550.404a–1(c)(3)).

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* at 57,280 (“As with the tie-breaking provision in general, comments are solicited on the overall utility of this disclosure provision, including ideas on how best to operationalize the provision taking into account its intended purpose balanced against costs of implementation and compliance.”).

to change their allocations. The Proposed Rule correctly relies on application of the same fiduciary duties of prudence and loyalty to selection of QDIAs as to selection of all other investments, with the additional protections of the QDIA-specific 2007 rule.<sup>65</sup>

The 2020 Investing Rule, by contrast, arbitrarily bars fiduciaries from selecting QDIA funds that consider climate or other ESG factors. For the same reasons described above for retirement investment decisionmaking generally, barring such considerations from a fiduciary's QDIA selection would, as the Proposed Rule states, "only serve to harm participants by depriving them of otherwise financially prudent options as QDIAs."<sup>66</sup> The negative consequences of this ban would be substantial, affecting millions of Americans, as approximately 80 percent of new plan participant contributions are invested in QDIAs.<sup>67</sup> The Proposed Rule, by eliminating this ban and applying the same fiduciary duties to QDIAs as other investment alternatives, protects the interests of these stakeholders, as it enables fiduciaries to consider climate and other ESG factors in QDIA selection where relevant to the risk-return analysis.<sup>68</sup>

#### **V. The Proposed Rule rightly requires that fiduciaries steward shareholder rights subject to the same standards as other plan assets.**

With regard to proxy voting and exercise of shareholder rights more broadly, we support the Proposed Rule's revision of elements of the 2020 Proxy Rule that baselessly distort fiduciary decisionmaking. The modifications in the Proposed Rule will enable fiduciaries to more effectively use these important tools to protect participants' interests.

In particular, we support the Proposed Rule's removal of provisions that discourage fiduciaries from exercising shareholder rights. First, the Proposed Rule eliminates the statement in the 2020 Proxy Rule that fiduciary duty "does not require the voting of every proxy or the exercise of every shareholder right."<sup>69</sup> Second, the Proposed Rule eliminates the "safe harbor" provisions of the 2020 Proxy Rule that apply to proxy voting policies to limit voting to types of proposals "substantially related to the issuer's business activities or . . . expected to have a material effect on the value of the investment" and policies to "refrain from voting . . . when the plan's holding . . . relative to the plan's total investment assets is below a quantitative threshold."<sup>70</sup>

---

<sup>65</sup> See *id.* The Department's 2007 rule on QDIAs "describes the types of investments that qualify as default investment alternatives" and instructs fiduciaries to provide "advance notice to participants and beneficiaries describing the circumstances under which contributions or other assets will be invested on their behalf in a qualified default investment alternative, the investment objectives of the qualified default investment alternative, and the right of participants and beneficiaries to direct investments out of the qualified default investment alternative." Default Investment Alternatives Under Participant Directed Individual Account Plans, 72 Fed. Reg. 60,452, 60,452 (Oct. 24, 2007).

<sup>66</sup> Proposed Rule, 86 Fed. Reg. at 57,280.

<sup>67</sup> See Press Release, Ceres, Ceres Comments on Forthcoming U.S. Department of Labor Rule Proposal (Aug. 27, 2021), <https://perma.cc/K269-B4XG>.

<sup>68</sup> See Proposed Rule, 86 Fed. Reg. at 57,280.

<sup>69</sup> *Id.* at 57,281.

<sup>70</sup> See *id.*; 2020 Proxy Rule, 85 Fed. Reg. at 81,695.

Shareholder rights are a plan asset,<sup>71</sup> which fiduciaries should steward with prudence and loyalty like any other plan asset.<sup>72</sup> The 2020 Proxy Rule created incentives for fiduciaries to err on the side of waiving these rights rather than making a reasoned judgment on whether and how to exercise them. Exercise of shareholder rights, including through proxy voting, is an important tool for managing risk.<sup>73</sup> The Proposed Rule correctly recognizes the value of shareholder rights as a plan asset and sets forth the fiduciary duties of prudence and loyalty for managing these assets under ERISA, including acting solely in accordance with the plan’s economic interest, considering costs, and evaluating material facts.<sup>74</sup>

\* \* \*

We thank the Department for its attention to these crucial issues and its consideration of these comments.

Respectfully Submitted,

/s/ Stephanie Jones

Stephanie Jones

Michael Panfil

Environmental Defense Fund

[sjones@edf.org](mailto:sjones@edf.org)

[mpanfil@edf.org](mailto:mpanfil@edf.org)

/s/ Sarah Ladin

Sarah Ladin

Jack Lienke

Alexander Song

Institute for Policy Integrity

at New York University School of Law

[sarah.ladin@nyu.edu](mailto:sarah.ladin@nyu.edu)

[jack.lienke@nyu.edu](mailto:jack.lienke@nyu.edu)

[alex.song@nyu.edu](mailto:alex.song@nyu.edu)

\* \* \*

---

<sup>71</sup> See Proposed Rule, 86 Fed. Reg. at 57,303 (to be codified at § 2550.404a–1(d)(1)).

<sup>72</sup> See *id.* (to be codified at § 2550.404a–1(d)(2)(i)) (“When deciding whether to exercise shareholder rights and when exercising such rights, . . . fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.”).

<sup>73</sup> See Env’t Def. Fund & Inst. for Pol’y Integrity at NYU School of Law, Comment Letter on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB91) at 4 (Oct. 5, 2020) (appended as Attachment 3).

<sup>74</sup> See Proposed Rule, 86 Fed. Reg. at 57,303 (to be codified at § 2550.404a–1(d)(2)(ii)).

## Attachments to Filing

**Attachment 1** Environmental Defense Fund, Institute for Policy Integrity, & Initiative on Climate Risk & Resilience Law, Comment Letter on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03) (Dec. 13, 2021) (with Appendices of Sources)

### Attachment 1A Appendix A

1. JULIE GORTE ET AL., US SIF, PUBLIC COMMENTS OVERWHELMINGLY OPPOSE PROPOSED RULE LIMITING THE USE OF ESG IN ERISA RETIREMENT PLANS (2020), <https://perma.cc/CJ5L-78A3>.
2. JULIE GORTE ET AL., US SIF, MAJORITY OF PUBLIC COMMENTS OPPOSE DOL PROPOSAL CURTAILING SHAREHOLDER VOTING RIGHTS IN ERISA RETIREMENT PLANS (2020), <https://perma.cc/54RW-4QS8>
3. COMMODITY FUTURES TRADING COMM'N, CLIMATE-RELATED MARKET RISK SUBCOMM. OF THE CFTC MARKET RISK ADVISORY COMM., MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM (2020), <https://perma.cc/PXD6-4RKH>
4. Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2021), <https://perma.cc/GA3T-K9UT>
5. Adam B. Smith, *2010–2019: A Landmark Decade of U.S. Billion-Dollar Weather and Climate Disasters*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 8, 2020), <https://perma.cc/8CEX-HB92>
6. ENERGY CORP., BUILDING A RESILIENT ENERGY GULF COAST: EXECUTIVE REPORT (2010), <https://perma.cc/S3KU-S3V9>
7. Drew Riedl, *Why Market Actors Fuel the Carbon Bubble: The Agency, Governance, and Incentive Problems that Distort Corporate Climate Risk Management*, J. SUSTAINABLE FIN. & INV. (June 1, 2020), <https://www.tandfonline.com/doi/full/10.1080/20430795.2020.1769986> (permalink unavailable)
8. TYLER FITCH, CARBON STRANDING: CLIMATE RISK AND STRANDED ASSETS IN DUKE'S INTEGRATED RESOURCE PLAN (2020), <https://perma.cc/42EX-U95S>
9. JONATHAN SIMS ET AL., PUT GAS ON STANDBY (2021), <https://perma.cc/VK7J-A6RA>

### Attachment 1B Appendix B

10. DENNIS WAMSTED, RAPIDLY CHANGING INVESTMENT CLIMATE CHALLENGES PLANNED PJM GAS PLANTS (2021), <https://perma.cc/V8P3-6YRK>
11. Giusy Capasso et al., *Climate Change and Credit Risk*, 266 J. CLEANER PROD. 121634 (2020), <https://perma.cc/MW43-6VY2>
12. Madison Condon, *Market Myopia's Climate Bubble*, UTAH L. REV. (forthcoming 2022), <https://perma.cc/J64F-JDUL>
13. Inst. for Pol'y Integrity at NYU School of Law, Comment Letter on Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information (Apr. 28, 2020), <https://perma.cc/NW3E-8T7Y>
14. Christos Karydas & Anastasios Xepapadeas, *Pricing Climate Change Risks: CAPM with Rare Disasters and Stochastic Probabilities* (CER-ETH Working Paper Series, Working Paper No. 19/311, 2019), <https://perma.cc/L695-MBMP>
15. Brad Plumer, *Companies Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (June 4, 2019), <https://perma.cc/UJA5-SAYF>
16. FIN. STABILITY OVERSIGHT COUNCIL, REPORT ON CLIMATE-RELATED FINANCIAL RISK (2021), <https://perma.cc/RLD5-L7AS>



17. Tom Kompas et al., *The Effects of Climate Change on GDP by Country and the Global Economic Gains from Complying with the Paris Climate Accord*, 6 EARTH'S FUTURE 1153 (2018), <https://perma.cc/4KRT-9GMR>
18. Miguel A. Centeno et al., *The Emergence of Global Systemic Risk*, 41 ANN. REV. SOCIOLOGICAL 65 (2015), <https://perma.cc/KN66-A28Y>
19. Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020), <https://perma.cc/H7AA-CEJH>
20. UN PRI, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS (2011), <https://perma.cc/R9AW-PUX6>
21. James P. Hawley & Andrew T. Williams, *The Universal Owner's Role in Sustainable Economic Development*, 9 CORP. ENV'T STRATEGY 284 (2002), <https://perma.cc/JFG4-QB8W>
22. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-327, RETIREMENT SAVINGS: FEDERAL WORKERS' PORTFOLIOS SHOULD BE EVALUATED FOR POSSIBLE FINANCIAL RISKS RELATED TO CLIMATE CHANGE (2021), <https://perma.cc/J8GD-H9DD>
23. Alicia McCarthy et al., *DOL Proposes New Rules Regulating ESG Investments*, HARV. CORP. GOV. FORUM (July 7, 2020), <https://perma.cc/76PH-Q66M>
24. BLACKROCK INVESTMENT INST., GETTING PHYSICAL: SCENARIO ANALYSIS FOR ASSESSING CLIMATE RISKS (2019), <https://perma.cc/V9N2-7N85>

**Attachment 1C**      Appendix C

25. Johannes Stroebel & Jeffrey Wurgler, *What Do You Think About Climate Finance?* (NBER Working Paper 29136, 2021), <https://perma.cc/49XR-K7YS>
26. Ruihong Jiang & Chengguo Weng, *Climate Change Risk and Agriculture-Related Stocks* (Jan. 9, 2020), <https://perma.cc/CR3Q-JMLE>
27. Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), <https://perma.cc/BT97-AZFH>
28. Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210 (2015), <https://perma.cc/ND4E-W6VZ>
29. Philipp Krüger, *Corporate Goodness and Shareholder Wealth*, 115 J. FIN. ECON. 304 (2015), <https://perma.cc/NM4F-386S>
30. Emily Steinbarth & Scott Bennett, *Materiality Matters: Targeting the ESG Issues that Impact Performance*, HARV. CORP. GOV. FORUM (May 10, 2018), <https://perma.cc/2GEN-J7VW>
31. Siobhan Riding, *Majority of ESG Funds Outperform Wider Market Over 10 Years*, FIN. TIMES (June 14, 2020), <https://www.ft.com/content/733ee6ff-446e-4f8b-86b2-19ef42da3824> (permalink unavailable)
32. Audrey Cher, *Sustainable Funds Are Outperforming Their Peers During the Pandemic*, BNP Paribas Says, CNBC (June 2, 2020), <https://perma.cc/5ULG-8DUU>
33. TENSIE WHELAN, ULRICH ATZ, TRACY VAN HOLT & CASEY CLARK, NYU STERN CTR. FOR SUSTAINABLE BUS. & ROCKEFELLER ASSET MGMT., ESG AND FINANCIAL PERFORMANCE: UNCOVERING THE RELATIONSHIP BY AGGREGATING EVIDENCE FROM 1,000 PLUS STUDIES PUBLISHED BETWEEN 2015–2020 (2021), <https://perma.cc/6Z4Y-72FP>
34. Fiona Reynolds, Letter to the Editor, *ESG Is Risk Management, Not an Asset Class*, WALL ST. J. (June 29, 2020), <https://perma.cc/J5CY-ZCKP>
35. Press Release, Sec. & Exch. Comm'n, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), <https://perma.cc/B7QP-RU4Y>

36. SEC. & EXCH. COMM’N, DIV. OF EXAMINATIONS, RISK ALERT, THE DIVISION OF EXAMINATIONS’ REVIEW OF ESG INVESTING (Apr. 9, 2021), <https://perma.cc/Q5UY-RLRR>
37. Gary Gensler, Chair, Sec. & Exch. Comm’n, Prepared Remarks Before the Asset Management Advisory Committee (July 7, 2021), <https://perma.cc/6CVF-8NM9>
38. Avery Ellfeldt, *ESG Investments Fall as Europe Boots Pretenders*, E&E NEWS (July 20, 2021), <https://subscriber.politicopro.com/article/eenews/2021/07/20/esg-investments-fall-as-europe-boots-pretenders-224771> (permalink unavailable)
39. Tim Quinson, *Regulators Intensify ESG Scrutiny as Greenwashing Explodes*, BLOOMBERG (Sept. 1, 2021), <https://perma.cc/3VGH-5LA3>
40. Hana V. Vizcarra, *The Reasonable Investor and Climate-Related Information: Changing Expectations for Financial Disclosures*, 50 ENVTL. L. REP. 10106 (2020), <https://perma.cc/AJU6-QDKH>
41. The Editorial Board, *Your New Woke 401(k)*, WALL ST. J. (Oct. 20, 2021), <https://www.wsj.com/articles/your-new-woke-401-k-retirement-savings-esg-erisa-biden-administration-department-of-labor-proposal-11634753095> (permalink unavailable)
42. Press Release, Ceres, Ceres Comments on Forthcoming U.S. Department of Labor Rule Proposal (Aug. 27, 2021), <https://perma.cc/K269-B4XG>

**Attachment 2** Environmental Defense Fund & Institute for Policy Integrity, Comment Letter on Financial Factors in Selecting Plan Investments under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB95) (July 30, 2020) (with Appendices of Sources)

**Attachment 2A** Appendix 1

**Attachment 2B** Appendix 2

**Attachment 2C** Appendix 3

**Attachment 3** Environmental Defense Fund & Institute for Policy Integrity, Comment Letter on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB91) (Oct. 5, 2020)