



May 16, 2022

Office of Regulations and Interpretations  
Attention: Request for Information on Possible Agency Actions  
Employee Benefits Security Administration, Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Submitted via <https://www.regulations.gov>

Re: Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk  
Z-RIN 1210-ZA30

Dear Sir/Madam:

On behalf of the State of Utah, and the undersigned, we respectfully submit the following comments in response to the Department of Labor's Employee Benefits Security Administration ("Department")'s Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk (Z-RIN 1210-ZA30) ("RFI").<sup>1</sup> Our response echoes our response to the Department's proposed rule entitled Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (EBSA-2021-0013-0001) ("Proposed Rule").<sup>2</sup> The RFI's approach would irrationally require fiduciaries to elevate immaterial and speculative risks in employee retirement savings investment decisions. Instead, fiduciaries must be held to their duties of prudence and loyalty by considering only the material financial or pecuniary factors of each potential investment.

Additionally, it is risky to introduce relatively new and untested ESG (i.e., environmental, social, governance) investment measures and remove certain protections from the Employee Retirement Income Security Act's ("ERISA") rules, particularly at a time when inflation outpaces return on investments.

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<sup>1</sup> EBSA, Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk, 87 FR 8289 (Feb. 14, 2022), [https://www.federalregister.gov/documents/2022/02/14/2022-02798/request-for-information-on-possible-agency-actions-to-protect-life-savings-and-pensions-from-threats?utm\\_source=federalregister.gov&utm\\_medium=email&utm\\_campaign=subscription+mailing+list](https://www.federalregister.gov/documents/2022/02/14/2022-02798/request-for-information-on-possible-agency-actions-to-protect-life-savings-and-pensions-from-threats?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list).

<sup>2</sup> EBSA, Notice of Proposed Rulemaking, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 FR 57272 (Oct. 14, 2021), <https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

## **BACKGROUND**

ERISA applies to “retirement plans in private industry,” including defined benefit plans (e.g., pension) and defined contribution plans (e.g., 401(k)).<sup>3</sup> ERISA requires a plan fiduciary to exercise “care, skill, prudence, and diligence” in the exercise of its duties.<sup>4</sup> ERISA fiduciaries cannot subordinate the interests of retirement plan participants and beneficiaries to unrelated or other objectives.<sup>5</sup> Financial risks and reward to the beneficiaries are the paramount guidelines imposed by stringent standards of prudence and loyalty under Section 404(a).<sup>6</sup>

The prior Administration promulgated rules to clarify that the prudence and loyalty obligations required plan fiduciaries to select investments based “solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.”<sup>7</sup> In early 2021, the current rules went into effect, namely the rules entitled Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.<sup>8</sup>

On May 20, 2021, President Biden issued the Executive Order on Climate-Related Financial Risk (“Executive Order”).<sup>9</sup> Section 4 of that Order, captioned Resilience of Life Savings and Pensions, directs the Secretary of Labor to “identify agency actions that can be taken [ ] to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk.”<sup>10</sup> The Order further directs the Secretary to consider publishing administrative rules on ERISA that “suspend, revise, or rescind” the rules entitled Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.<sup>11</sup>

On October 14, 2021, the Department issued the Proposed Rule.<sup>12</sup> The Proposed Rule is intended to replace the rules entitled Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights. The Proposed Rule would allow ERISA fiduciaries to “make investment decisions that reflect climate change and other environmental, social, or governance (“ESG”) considerations, including climate-related financial

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<sup>3</sup> FAQs about Retirement Plans and ERISA, Department of Labor, Employee Benefits Security Administration, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf>.

<sup>4</sup> 29 USC § 1104(a)(1)(B).

<sup>5</sup> See 29 USC § 1104.

<sup>6</sup> See 29 USC § 1104.

<sup>7</sup> 85 Fed. Reg. 72846, 72846.

<sup>8</sup> See respectively, 85 Fed. Reg. 81658 (December 16, 2020) (codified at 29 CFR §§ 2509, 2550); 85 Fed. Reg. 72846 (Nov. 13, 2020) (codified at 29 CFR §§ 2509, 2550).

<sup>9</sup> Executive Office of the President, *Climate-Related Financial Risk*, Executive Order 14030, 86 FR 27967 (May 20, 2021), <https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk>.

<sup>10</sup> 86 Fed. Reg. 27967, 27968.

<sup>11</sup> *Id.* at 27968-69.

<sup>12</sup> EBSA, Notice of Proposed Rulemaking, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 FR 57272 (Oct. 14, 2021), <https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights>.

risk, and choose economically targeted investments (“ETIs”) selected, in part, for benefits apart from the investment return.”<sup>13</sup> The Proposed Rule eliminates the “pecuniary factors only” standard for assessing investment risk and reward.<sup>14</sup>

While the Department previously determined that ESG factors could present material risk, the Proposed Rule dramatically changes course. With the Proposed Rule, the Department concludes that the “duty of prudence” may “often require an evaluation of the effect of climate change and/or government policy changes to address climate change on investments’ risks and returns.”<sup>15</sup> Indeed, the Proposed Rule specifies examples of material factors to include ESG factors.<sup>16</sup> The Proposed Rule eliminates the prohibition in the current rule on including ESG funds in qualified default investment alternatives (“QDIA”).<sup>17</sup> The Proposed Rule would also eliminate from the current rule that a fiduciary need not vote every proxy or exercise every shareholder right.<sup>18</sup> And the Proposed Rule would remove both the proxy voting safe harbor when the fiduciary determines the decision will have a “material effect on the value of investment,” as well as the existing documentation requirements when a fiduciary decides to exercise shareholder rights.<sup>19</sup> The State of Utah, joined by 23 other states, submitted comments to the Proposed Rule.

On October 15, 2021, the Administration released “A Roadmap to Build a Climate-Resilient Economy” (“Roadmap”). The Roadmap is “a comprehensive, government-wide strategy to measure, disclose, manage, and mitigate the systemic risks climate change poses to American families, businesses, and the economy.”<sup>20</sup>

On February 14, 2022, the Department issued the RFI in response to the Executive Order.<sup>21</sup> Based on the RFI, the Department’s “efforts will focus on agency actions that can be taken under ERISA, the Federal Employees’ Retirement System Act of 1986 (“FERSA”), and any other relevant laws, to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.”<sup>22</sup> The RFI contains 22 questions, with subparts, under headings entitled General, Data Collection Regarding ERISA Covered Plans, ERISA Fiduciary Issues, FERSA, and Miscellaneous.

The RFI states that it is not seeking comments on the Proposed Rule.<sup>23</sup> Instead, it is “intended to further the goals of the Order and the Roadmap by assisting the Department in

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<sup>13</sup> See Notice of Proposed Rulemaking, 86 Fed. Reg. 57272, 57272 (Oct. 14, 2021).

<sup>14</sup> 86 Fed. Reg. 57272.

<sup>15</sup> *Id.* at 57276 (emphasis added).

<sup>16</sup> *Id.* at 57302-303 (e.g.,

<sup>17</sup> *Id.* at 57278.

<sup>18</sup> *Id.* at 57303.

<sup>19</sup> Compare 29 CFR § 2550.404a-1(e)(2)(ii) & (3)(iii) with 86 Fed. Reg. 57272, 57303.

<sup>20</sup> 87 FR 8289, 8289.

<sup>21</sup> EBSA, Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk, 87 FR 8289, 8289 (Feb. 14, 2022),

[https://www.federalregister.gov/documents/2022/02/14/2022-02798/request-for-information-on-possible-agency-actions-to-protect-life-savings-and-pensions-from-threats?utm\\_source=federalregister.gov&utm\\_medium=email&utm\\_campaign=subscription+mailing+list](https://www.federalregister.gov/documents/2022/02/14/2022-02798/request-for-information-on-possible-agency-actions-to-protect-life-savings-and-pensions-from-threats?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list).

<sup>22</sup> See *id.*

<sup>23</sup> 87 FR 8289, 8290.

identifying steps that it can take under applicable law to further protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.”<sup>24</sup>

## DISCUSSION

The Department must protect employee retirement savings by preventing fiduciaries and employers from substituting political decisions for financial decisions. In response to the Executive Order’s political directive to identify agency actions to protect retirement savings from “climate related financial risk,” the Department issued its October 2021 Proposed Rule that would undo the current rules and inappropriately encourage a plan fiduciary to disproportionately consider and weigh ESG factors commensurate with pecuniary factors. The RFI’s approach, however, would extend beyond that and *mandate* plan fiduciaries to elevate climate-related risk in investment decisions.

The RFI irrationally singles out climate-related risk for special treatment. Under existing law and regulations, a fiduciary must base its evaluation of investment choices and courses of action based on risk and return factors that are *material* to investment value. And the current rules recognize that ESG factors *could* present material risk.<sup>25</sup> But the RFI takes a big step further: no longer would a plan fiduciary simply treat climate-related risk as any other risk. Instead, a plan fiduciary would specifically focus on climate-related risk in a variety of ways.

The RFI suggests the use of the Form 5500 to require a benefit plan to annually report “how plan investment policy statements specifically address climate-related financial risk, whether service providers disclose or meet metrics related to such financial risks, and whether and how plans have factored climate-related financial risk into their analysis of individual investments or investment courses of action.”<sup>26</sup> Unlike any other risk, the RFI’s approach would require a plan fiduciary to develop specific policies, metrics, and analyses regarding climate-related financial risk, and report those to the Department.

Singling-out climate-related risk is unjustifiable. Climate-related eventualities do not pose greater risk than, for example, technological disruption, economic downturns, domestic political changes, foreign conflicts, civic unrest, changing consumer tastes, non-climatic natural disasters, and public health crises such as the one ravaging the globe today. For example, publicly owned companies are losing billions due to the loss of operations in Russia after the invasion of Ukraine, but “this is peanuts compared with what might lie ahead should China attempt to invade Taiwan.”<sup>27</sup> Even if climate-related risk were among the most important for some investment decisions, there is no reason to believe that is true for all. Yet the proposal singles out only climate-related risk.

Indeed, the RFI’s approach would require a plan fiduciary to consider speculative and immaterial risks. The RFI states that climate-related financial risk may encompass both physical

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<sup>24</sup> *Id.* at 8289.

<sup>25</sup> 85 Fed. Reg. 72846, 72860.

<sup>26</sup> 87 FR 8289, 8291.

<sup>27</sup> Milloy, Steve, *Companies Should Come Clean on Their Ties to China*, Wall Street Journal (May 9, 2022).

risks and transition risks.<sup>28</sup> Predictions about the physical risks of climate change vary wildly, ranging from increasing numbers of hurricanes and wildfires to destruction from climate-driven great-power conflict or even more speculative claims.<sup>29</sup> And predictive climate science is in its infancy. For these reasons the obstacles to understanding the risk of various climate eventualities, especially decades into the future, are immense. Yet a plan fiduciary would be required under the RFI's approach to account for these speculative risks in making investment decisions that impact Americans' retirement savings.

Fiduciary's duties of prudence and loyalty require the economic and financial interests of participants and beneficiaries in their retirement savings to be the paramount objective of plan investments and fiduciaries' actions. Fiduciaries must be held to their duties of prudence and loyalty by considering only the financial or pecuniary factors of each potential investment. Fiduciaries should not be encouraged to consider or be protected from legal action for elevating immaterial or speculative risks when investing or offering investment options for employee retirement savings. The Department should reiterate a fiduciary's duty of prudence and loyalty, not weaken it. ERISA has built the strict fiduciary guardrails of prudence and loyalty.<sup>30</sup> Employer-sponsored 401(k), deferred compensation, pensions, and profit-sharing plans are structured to carry employees to and through a secure retirement. At the very least, the Department should recognize in any proposed rulemaking that a plan fiduciary should not be required to treat climate-related risk differently than any other sort of risk.

Employees will bear the financial risk if the Department softens a fiduciary's duty of prudence and loyalty. Employees are already bearing the financial risk associated with choosing investment options. If the Department were to act in furtherance of the Executive Order and Roadmap it would only compound the financial risk participants already bear by adding an additional layer of risk that employees may not realize they are carrying. This country still suffers from the effects of COVID-19 and policies in response to it. Inflation continues to threaten the investments of all Americans' retirement savings. The war in Ukraine adversely affects economies and markets. The Department should be ensuring that fiduciaries satisfy their duties of prudence and loyalty, not introduce speculative and immaterial considerations that will make employee retirement investments riskier.

The Department issued the RFI in response to a political demand, not in reaction to market demand. With the RFI and Proposed Rule the Department is doing an about-face from the position it took in 2021 when it promulgated the Financial Factors in Selecting Plan Investments and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights rules. The Department should protect employee retirement security by not adopting a rule that encourages or emboldens employers or investment managers to consider ESG factors when investing employees' retirement savings. It is a particularly risky proposition to introduce relatively new and untested ESG investment measures and remove certain protections from ERISA's rules at a time when inflation outpaces return on investment.

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

<sup>29</sup> See Elizabeth Kolbert, "Three Scenarios for the Future of Climate Change," *New Yorker* (Oct. 5, 2020).

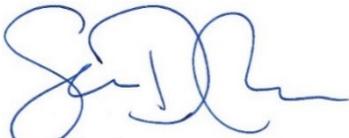
<sup>30</sup> See 29 USC § 1104.

CONCLUSION

For the reasons set forth herein, the Department should withdraw its Notice and Request for Comment. The Executive Order and Roadmap encourages the Department and others to supplant a financial decision with a political decision. Proceeding as directed by the Executive Order and Roadmap may allow employers and investment managers to invest employee retirement savings in a way that benefits social causes and corporate goals even if it adversely affects the return to the employee, promoting a social activist agenda over the interests of employees, retirees, and other retirement fund beneficiaries. At the very least, the Department should affirm that fiduciaries must be held to their duties of prudence and loyalty by considering only the material financial or pecuniary factors when making investment decisions for retirement savings accounts.

Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Utah Attorney General, the Utah Office of State Treasurer, or the Utah Office of the State Auditor.

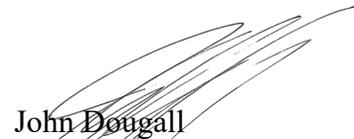
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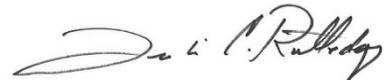
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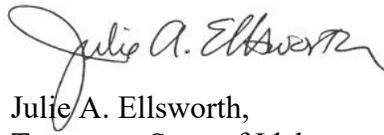
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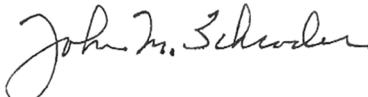
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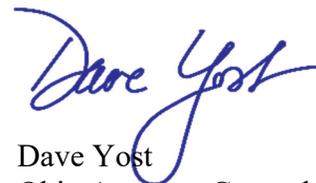
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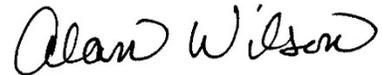
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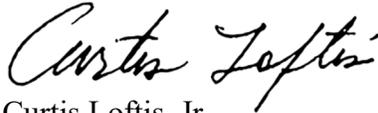
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