BOYDEN GRAY & ASSOCIATES PLLC
801 17TH STREET, NW, SUITE 350
WASHINGTON, DC 20006
(202) 955-0620

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Mr. Fred Wong
Office of Regulations and Interpretations
Employee Benefits Security Association
U.S. Department of Labor
200 Constitution Ave., NW
Room N-5655
Washington, D.C. 20210

Re: RIN 121-AC03

Proposed Regulation: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Dear Mr. Wong:

This letter comments on the U.S. Department of Labor's proposed rule "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the "proposal") published in the Federal Register on October 14, 2021, at 86 Fed. Reg. 57272 through 57304. This letter refers to the Department's final rules "Financial Factors in Selecting Plan Investments," published on November 13, 2020 at 85 Fed. Reg. 72846 through 72885, and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" published on December 16, 2020 at 85 Fed Reg. 81658 through 81695, as "the 2020 Rules."

I previously served this Department as Acting and Principal Deputy Assistant Secretary for Policy. During my tenure, I was proud to partner with your office in the development of regulations to expand worker access—especially through small-business employers—to group health and retirement plans. I write to express my grave concerns that the proposal, if adopted, would divert the use of retirement plan and other benefit plan assets from the express statutory mandate that they be used for the exclusive purpose of providing benefits and defraying reasonable administrative expenses as required by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). This would be unlawful and would undermine the retirement security of millions of Americans. The Department does not have legal authority to execute its proposed pivot away from its statutory mandate.

I provide more specific comments on the proposal in the following discussion.

1. **The proposal, if finalized, would confuse rather than clarify.**

The proposal does not achieve its stated purpose "to clarify…ERISA's fiduciary rules."[1] On the contrary, it dilutes and distends ERISA's cornerstone fiduciary principle that ERISA funds must be used for the exclusive purpose of providing ERISA benefits, by encouraging the diversion of ERISA funds to other, impermissible purposes.[2] It does this by conflating traditional economic principles of risk and return with a thinly disguised agenda of promoting the policy goals of the managerial class and its political allies. The traditional principles of risk and return are relevant because they are necessary for fiduciaries to determine how to advance the *particular* welfare of the beneficiaries in whose interests they must act. Social policy goals, by contrast, are about benefitting the *general* welfare. The proposal would couch the latter as a *per se* economic factor relevant to the former in a way that effaces this key distinction. No man can serve two masters, however, and the introduction of competing goals into the rules governing fiduciaries will create significant and intractable confusion.

2. **The proposal is antithetical to the mission of the Employee Benefits Security Administration.**

The mission of the Employee Benefits Security Administration ("EBSA") is to ensure the retirement, health, and other workplace benefits of America's workers and their families.[3] This proposal, however, would have EBSA depart from its mission of protecting retirees' economic security in favor of liberalizing access to the great honey pot of retirement savings to use for social engineering. The Department seeks to clear the way to the use of retirement funds to: (i) further pet policy goals, (ii) promote higher active investment management fees that often accompany ESG investing, and (iii) promote the greenwashing windfalls enjoyed by hucksters—all at the (literal) expense of retirees.

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[1] 86 Fed. Reg. 57272. *See also* the proposal's economic analysis stating that the "primary benefit of the proposal is clarification of legal standards and the prevention of confusion to plan fiduciaries that otherwise might persist as a result of certain provisions in the current regulation that are the subject of the proposed amendment." 85 Fed. Reg. at 57284.

[2] ERISA section 404(a) states, in relevant part, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -- (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."

[3] EBSA, Our Mission, at https://www.dol.gov/agencies/ebsa/about-ebsa-/about-us/mission-statement.

ERISA *already* elects the ESG goal EBSA must honor. As EBSA previously put it: "Providing a secure retirement for American workers is the paramount, and eminently worthy, 'social' goal of ERISA plans." 85 Fed. Reg. at 72,848. Protecting retirement savings to ensure those funds are used for the exclusive purpose of funding retirement is a good policy in and of itself. Assuring the security of American workers' retirement benefits is EBSA's mission and the sole area of its expertise.[4] EBSA will turn its back on that mission if EBSA finalizes this proposal.[5]

3. The sarcastic tone in the proposal reveals bias and prejudgment of the outcome.

Unfortunately, the proposal's preamble exhibits a biased and sarcastic tone, which I fear implies the Department has pre-judged the outcome of the final rule. For example, the proposal states that its purpose is to "clarify the application of ERISA's fiduciary duties" (at 57272) while referring to the 2020 Rules as having "a *stated* objective…to address *perceived* confusion." (emphasis added). This unsupported slur against the professionalism and candor of the public servants (both political and career) who developed those rules undermines the credibility of the proposal, and of your office in general. The preamble's approach (which ranges from cherry picking history[6] to simply misstating facts[7]), leads a reader to conclude that the Department's real aim is simply to cast aspersions on the 2020 Rules to bolster credibility for the Department's abrupt departure from ERISA's core fiduciary duties. The preamble's biased tone foreshadows the predetermined outcome and the predictable result of the rulemaking: to open the honey pot of vast retiree savings to finance the latest pet policy goals. Can there be any other result?

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[4] *Cf.* C.S. Lewis, *The Abolition of Man* 6 (Samizdat ed., 2014) (1943) ("A man would be annoyed if his son returned from the dentist with his teeth untouched and his head crammed with the dentist's *obiter dicta* on bimetallism or the Baconian theory.").

[5] EBSA is a small agency with a big mission. EBSA has limited resources, and proactive guidance is badly needed by stakeholders seeking advisory opinions and prohibited transaction exemptions that remain backlogged for years. And yet EBSA chooses to use its limited resources to promote special interests through this proposal instead.

[6] For example, the preamble gives significant discussion to IB 94-1 while barely mentioning IB 2008-01 and the concerns created by IB 94-1 that IB 2008-01 addressed. 86 Fed. Reg. 57273. Further the preamble unaccountably omits any reference to the 2014 unanimous Supreme Court decision in *Fifth Third Bancorp v. Dudenhoeffer*, a significant decision with direct bearing on whether ERISA's fiduciary provisions allow the use of plan assets for non-pecuniary benefits. In crafting a final rule, if any, this decision should be addressed not only in the preamble but the regulatory text (including any tie-breaker rule text) should be conformed to follow this national precedent.

[7] *See e.g.,* the representation that "the current regulation could continue to have a negative impact on plans' financial performance" which is unsupported by facts. 86 Fed. Reg. 57284.

To portray this abrupt change in policy between 2020 and 2021 as anything other than a predetermined outcome is duplicitous.[8]

4. EBSA's rationale for revising the 2020 Rules appears to be based on improper *ex parte* communications.

It appears that, after the November 2020 election, and perhaps even before the inauguration of the new administration, EBSA career staff began selective private meetings to build support in overturning the 2020 Rules on the basis that there must be "perceived confusion" about how to interpret them. Because these meetings were private and the parties to the meetings remain unreported, this leaves the public to wonder if these meetings were with those who seek to use pension funds to promote pet policy goals or who might benefit from honey pot access. Given the enormous amount of money at stake and the potential for abuse, this is extremely troubling and undercuts this Administration's claim that it will be the most transparent in U.S. history.

These *ex parte* meetings were not held as part of an open and impartial public meeting; rather they were held privately and secretly. EBSA then based its revision or reversal of the 2020 Rules, which were issued under an open and public notice and comment process, on EBSA's reported input from these private meetings. To the public, these private meetings appear to be actions to systematically and selectively build what would appear a "wide base" of select support for EBSA staff to disregard the 2020 Rules. What other reason can be given for holding these meetings in private and not through a public hearing process?

For example, on March 10, 2021, EBSA issued a press release announcing a nonenforcement policy based on EBSA's own outreach and meetings held in private. If EBSA was concerned about public input, why not hold an open public hearing for all to observe? Instead, EBSA announced that "These rules have created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments…." *If* such a perception existed, it could have been easily dispelled in a *public* hearing process (or by issuing clarifying FAQs) that reiterated the statements in the preamble to the

[8] Since the last iteration of ESG and proxy voting subregulatory guidance that sought to water down ERISA's retiree protections, the Supreme Court issued a unanimous opinion that leaves no room for the use of collateral factors in investment decisions. *See Fifth Third Bancorp. v. Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014) (holding that ERISA's duty of prudence does not vary depending on non-pecuniary goals and that the term "benefits" in ERISA's section 404(a)(1)(A) *exclusive* benefit rule refers to financial benefits).

2020 Rule affirming the appropriate use of ESG that has a material effect on the risk/return of an investment.[9]

The proposal's preamble confirms that "the Department engaged in informal outreach to hear views from interested stakeholders on how to craft regulations that better recognize the important role that…ESG factors can play in the evaluation and management of plan investments."[10] These private meetings and efforts to

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[9] *See* 85 Fed. Reg. 72871 ("The final rule does not preclude consideration of any factor that is financially material to an investment or investment course of action"); 85 Fed. Reg. 72870, 72871 ("Nothing in the final rule is intended to or does prevent a fiduciary from appropriately considering any material risk with respect to an investment."); 85 Fed. Reg. 72848 ("The final rule recognizes that there are instances where one or more environmental, social, or governance factors will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories."); 85 Fed. Reg. 72860 (The Department has acknowledged in the proposal and in this final rule that particular environmental or social factors may present material and current business risks or opportunities for specific companies (and may be reflected in potential market risk and return)."); 85 Fed. Reg. 72857 ("In the preamble to the proposal, the Department recognized that there could be instances when ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. In such situations, these issues are themselves appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. The proposal even provided additional guidance as to when it was appropriate to consider ESG matters as pecuniary factors in making investment decisions. Thus, the proposal fundamentally accepted, rather than ignored as claimed by some commenters, the economic literature and fiduciary investment experience that showed ESG considerations may present issues of material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. Rather, the proposal sought to make clear that, from a fiduciary perspective, the relevant question is not whether a factor under consideration is "ESG", but whether it is a pecuniary factor relevant to an evaluation of the investment or investment course of action under consideration."); 85 Fed Reg. 72858 ("The Department anticipates that when a fiduciary is faced with a purported ESG factor in an investment, the regulatory requirement will be clearer and more consistent if it demands that fiduciaries focus on providing participants with the financial benefits promised under the plan and focus on whether a factor is pecuniary, rather than being required to navigate imprecise and ambiguous ESG terminology. The ERISA fiduciary duty of prudence requires portfolio-level attention to risk and return objectives reasonably suited to the purpose of the account, diversification, cost-sensitivity, documentation, and ongoing monitoring. The proposal was not intended to suggest that these principles apply other than neutrally to all investment decisions by a trustee or other fiduciary, whether in the context of a direct investment or menu construction in an individual account plan. For similar reasons, the Department declines to follow suggestions from some commenters that ESG factors are necessarily pecuniary and that the Department should specifically mandate that fiduciaries consider ESG factors as part of their investment duties.").

[10] 86 Fed. Reg. 57275.

garner support for the upcoming "pong" in EBSA's ESG/proxy ping pong game were, according to its own preamble, initiated by EBSA.

Because these meetings purportedly provided the direct impetus for the proposal, the Department should provide information about the meetings, including who was present, what was stated, and what documents were shown during the meeting or produced as a result. This would reduce the secretive nature of the proceedings and also allow the public to confirm that there is, in fact, "confusion" about the 2020 Rules, rather than that merely being an agency-invented explanation for substantially changing the Department's existing position. There can be no reason to keep this information secret. These materials would be part of the administrative record and thus would have to be turned over in litigation anyway.

5. **Moreover, the proposal appears to have omitted any data demonstrating that "confusion" about the 2020 Rules actually caused a reduction in ESG investments.**

The proposal states that "11 percent is our best approximation of the share of plans that were using ESG factors under the prior non-regulatory guidance," 86 Fed. Reg. at 57,286, but there does not seem to be any data on whether that percent changed *after* the 2020 Rules were issued. If fiduciaries were actually "confused" and "chilled" from investing in ESG-factored securities, there would surely be a dramatic drop in the percent of plans using ESG factors. But the Department apparently did not see fit to determine whether that assumption—which underlies the entire proposal—is even borne out by the data.

6. **The proposal's incorporation of ESG-type factors into the language of the regulation would be perceived as mandating certain considerations for investment selection and introducing regulatory bias.**

Proposed paragraph (b)(2)(ii)(C). The proposal's language in paragraph (b)(2)(ii) singles out environmental, social, or governance factors as an evaluation that "may be required" in a prudent process. Specific directions to investment fiduciaries within the text of a regulation of what factors to consider as economic factors substitute the judgment of labor regulators for that of investment professionals. Further, such language introduces regulatory bias and puts a thumb on the scale. The language will be construed as mandating consideration of ESG and will blur the line between (i) what is a risk/return factor in a reasoned analysis of an investment professional with (ii) speculative and creative risk/return

justifications (espoused by the preamble) for the use of retirement funds to advance pet policy objectives. This causes the same problem EBSA claims to be solving with the proposal—*i.e.*, putting a thumb on the scale—except now it is in the opposite direction. It is internally inconsistent, and therefore arbitrary and capricious, for an agency to "eliminate" a perceived problem about bias by simply switching from bias in *favor* of that action to bias *against* it.[11] At the very least, it would be arbitrary and capricious for the Department not to recognize and explain this obvious inconsistency.

The new "thumb on the scale" in favor of ESG investing is transparent from almost every aspect of the proposal, but perhaps would be most insidiously achieved by the proposal's shifting language about when ESG factors can be considered. At the beginning, the proposal says "in appropriate cases" ESG factors should be considered, and it then lists examples that "may include" things like climate. 86 Fed. Reg. at 57,278. In the middle, the proposal shifts to saying that climate change and ESG "are often material" and that "it is often appropriate to treat climate change as a material risk-return factor." *Id.* at 57,287, 57,289. And by the end, "the Department welcomes comments on whether fiduciaries should consider climate change as presumptively material." *Id.* at 57,290. The goal of this incrementally changing language is to confuse or convince fiduciaries into believing they now have a duty to consider ESG factors at almost every turn.

The Department should leave sound economic analysis in the hands of the investment fiduciary. ERISA's prudence requirement requires, among other things, that a fiduciary act with care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Evaluating the risk/return characteristics of an investment is best left in the hands of a prudent expert. The proposed paragraph (b)(2)(ii)(C) should be omitted from the final rule.

Proposed paragraph (b)(4). Proposed paragraph (b)(4) introduces examples of factors that the Department suggests may be material to an investment course of action: "Climate change-related factors…; Governance factors…; and Workforce factors…." Despite using language that fiduciaries "may consider any factor that is material," by choosing only ESG factors as examples, the DOL creates the perception that fiduciaries may take ESG factors—and only ESG factors—into

[11] *Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 879 F.3d 1202, 1214 (D.C. Cir. 2018) ("[I]t would be arbitrary and capricious for the agency's decision making to be 'internally inconsistent.'"). An agency cannot say it is solving problem X by causing problem X.

account. The suggestion of what is, and is not, a material economic factor is inappropriate pet policy pushing and does not leave the determination of what is relevant to a sound economic analysis in the hands of the fiduciary. These examples should be omitted from the final rule as no factor should be given higher priority in an investment professional's risk/return analysis.

General discussion of proposed paragraphs (b)(2)(ii) and (b)(4). The preamble to the proposal explains these provisions are "intended to counteract negative perception of the climate change and other ESG factors caused by the 2020 Rules." And yet the 2020 Rules did not mention ESG in the regulatory text. Further, as discussed above and as demonstrated in footnote 9, the 2020 Rules' preamble was clear that risk/return ESG is an appropriate consideration in evaluating potential investments or investment courses of action. The 2020 Rules correctly cite only pecuniary factors and in doing so remained neutral, as required by ERISA itself. Further, unlike the proposal, the 2020 Rules are based on governing precedent, as set forth in a unanimous Supreme Court opinion in *Fifth Third Bancorp v. Dudenhoeffer*.

The Department should eliminate the references to ESG in the proposal's paragraphs (b)(2)(ii) and (b)(4) from the final rule to eliminate regulatory bias. Further the presence of such regulatory bias almost certainly invites future revisions from administrations concerned about the misuse of retirement benefits to further pet policy goals, and thus continue to destabilize fiduciaries' expectations about their obligations. Finally, the 2020 Rules were neutral as to what constitutes a risk/return factor. The proposal should be withdrawn and the 2020 Rules should be left in place.

7. EBSA offers a false restatement of the 2020 Rules as a basis for reversing those Rules.

EBSA inappropriately characterizes the 2020 Rules as "chilling ESG investment." The preamble to the proposal states that "The Department has also heard from stakeholders that the current regulation, and investor confusion about it, including whether climate changes and other ESG factors may be treated as 'pecuniary factors' under the regulation, has already had a chilling effect on appropriate integration of climate change and other ESG factors." This claim is undeveloped and is belied by the 2020 Rules' unambiguous statements that *any* material risk/return factor is relevant.[12] A public hearing or a set of FAQs could

[12] *Supra* note 9.

have easily dispelled misperceptions that EBSA mined from its private meetings, if indeed the proposal's intent is as stated.

Likewise, the proposal's regulatory impact analysis (RIA) creates confusion, rather than dispelling it. At best, the RIA appears to be grounded on information gleaned from private meetings held outside of the public eye. At worst, the RIA appears to be a storyline, made up, with no facts or numbers to sustain the claims. The RIA states that "investor confusion…could *continue to have* (a) a negative impact on plans' financial performance."[13] Where is that negative impact demonstrated? The 2020 Rules stated that any factor that had a material financial impact is appropriately considered.[14] And yet the new economic analysis blithely states, *ipse dixit,* that the rule has negative financial effects. More telling, the RIA cites broader economic/societal impacts that could stem from using plan assets exclusively for the purpose of providing financial benefits under a plan.[15] Put another way, the RIA expressly references—and values—the collateral benefits EBSA expects to flow from the use of ERISA plan assets for purposes other than pecuniary benefits. This is in direct contravention to ERISA's exclusive benefit rule under section 404(a) and the *Dudenhoeffer* case discussed below in this letter. Moreover, agencies must always rely on genuine, not pretextual, reasons for changing positions,[16] and the RIA's affirmation of collateral benefits indicates that EBSA's stated motivations are indeed pretextual.

8. The proposal is based on false premises.

The proposal's preamble claims that as "additional evidence on the materiality of climate change in particular has emerged in intervening years, the Department believes the consideration of the projected return of the portfolio relative to the funding objectives of the plan not only allows but in many instances may require an evaluation of the economic effects of climate change on the particular investment or investment course of action . . . . Climate change is particularly pertinent to the projected returns of pension portfolios that, because of

[13] 86 Fed. Reg. at 57284.
[14] *Supra* note 9.
[15] *See* 86 Fed. Reg. 57284 stating that "the current regulation could continue to have…broader negative economic/societal impacts (e.g., negative impacts on climate change, on workers' productivity and engagement, and on corporate managers' accountability)."
[16] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better") (emphasis in original).

the nature of their obligations to participants and beneficiaries, typically have long-term investment horizons."[17]

These claims do not stand up under scrutiny.

First, this wrongly assumes that long-term investment strategies operate by holding onto specific stocks for a long time. In reality, studies indicate that investment portfolios with long term horizons typically hold stocks for no more than 1 to 3 years.[18] EBSA's confusion of long-term effects of climate change with portfolio turnover (and the investment horizon for assets in long term portfolios) serves to underscore how inappropriate it is for the Department to dictate investment economics to those who do understand their own investment horizons.

Second, the proposal asserts rather than demonstrates that climate-related risks bear on an ERISA fiduciary's duties. While EBSA does not make precisely clear what climate-related risks they are referring to, the proposal's grounding in EO 14030 gives some clue. EO 14030 describes two types of climate-related risk: (1) physical risk such as the "risk from increased extreme weather leading to supply chain disruptions" and (2) transition risk which stems from the "global shift away from carbon-intensive energy sources."[19] Neither provides an actionable risk during the timescale contemplated by fiduciaries.

Instead, these risks fall far outside the normal window informing investment decisions and are subject to so many contingencies that their potentially mandatory inclusion in risk assessment will serve only to confuse. Climate change is a long-term risk and there is no consensus on what its ultimate effects will be 50, 100, 200, or 500 years from now. On the proposal's logic, other speculative long-term risks should also be included: risks of a massive asteroid impact,[20] destruction of the electrical grid by a solar flare,[21] a communist revolution in the United States,[22]

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[17] 86 Fed. Reg. at 57276.
[18] *See* Mercer et al., The Long and Winding Road: How Long-only Equity Managers Turn Over Their Portfolios Every 1.7 Years (Feb 2017), https://2degrees-investing.org/wp-content/uploads/2017/02/the-long-and-winding-rad-1.pdf. *See also* Vanguard, Vanguard Institutional Target Retirement 2065 Fund Summary Prospectus Dated January 31, 2021, reporting a turnover rate of 14% for the 2020 calendar year (for an average turnover rate of less than 7 years) in a portfolio with a stated investment horizon of 45 years.
[19] 86 Fed. Reg. 27967.
[20] *See* Graciela Chichilnisky, *Asteroids: Assessing Catastrophic Risks*, (July 2005) https://dx.doi.org/10.2139/ssrn.1525939.
[21] *See* Karen C. Fox, *Impacts of Strong Solar Flares*, NASA (May 13, 2013) https://www.nasa.gov/mission_pages/sunearth/news/flare-impacts.html.
[22] *See* Gordon S. Watkins, Revolutionary Communism in the United States, 14 Am. Pol. Sci. R. (Feb. 1920), https://doi.org/10.2307/1945723.

dramatic population decline,[23] a "technological singularity,"[24] or even perhaps the Second Coming[25] should get the same billing as climate change.

It may be argued that climate change is different and more pressing than these other "black swan" risks. But the proposal does not present evidence to bear this out.

Weather risks for businesses are of course real and, in fact, are nothing new. The risks of weather to business, for example, is a key plot device in *The Merchant of Venice*. But it is simply not true that we have reason to fear "increased extreme weather risks" in the near term. In reality, the evidence on physical risk posed by weather is modest, and the risk appears to be decreasing. According to one report, weather-related damages as a fraction of GDP have actually been decreasing over the last 30 years, down from 0.26% in 1990 to 0.18% in 2020.[26] Similarly, deaths from natural disasters like storms, floods, wildfires, and extreme heat have decreased over time. In 1900, approximately 1 of every 100,000 Americans died from natural disasters. In 2020 it was 1 of every 1,000,000—a full order of magnitude *less*.[27] According to another summary, "a hundred years ago, flooding and hurricane costs were much more devastating for American communities. Both nationally for the United States and across the developed and developing world, extreme weather is causing less suffering both in terms of deaths and in terms of share of GDP."[28] Even if these damages were increasing, they are not relevant to the vast majority of investment decisions since it is extremely unlikely that the frequency of extreme weather will increase unexpectedly because of climate change over the 1- to 3-year investment horizon referenced previously in this section.

The second risk—transition risk and so-called stranded assets—is not climate-related risk at all, but climate-*policy* risk. While the potential for stranded assets created by rapidly changing climate policy is absolutely real, it is unclear what distinguishes this hypothetical climate policy change from all the millions of

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[23] *See* Paul Mackun et al., *More Than Half of U.S. Counties Were Smaller in 2020 Than in 2010,* U.S. Census Bureau (Aug. 12, 2021) https://www.census.gov/library/stories/2021/08/more-than-half-of-united-states-counties-were-smaller-in-2020-than-in-2010.html.

[24] *See* Ray Kurzweil, THE SINGULARITY IS NEAR 2005 (projecting the singularity by the mid 21st century).

[25] Rev. 22:20 ("He which testifieth these things saith, Surely I come quickly. Amen. Even so, come, Lord Jesus.")

[26] John H. Cochrane, A Convenient Myth: Climate Risk and the Financial System, National Review (Nov. 17, 2021).

[27] Hannah Ritchie & Max Roser, Natural Disasters, OurWorldInData.org (last accessed Dec. 7, 2021).

[28] Bjorn Lomborg, *False Alarm: How Climate Change Panic Costs Us Trillions, Hurts the Poor, and Fails to Fix the Planet* 76 & n.47 (2021) (citing sources).

other sorts of hypothetical policy changes that could affect asset value, such as reductions in the subsidies that inflate the value of investments in renewable energy, or policies to curtail investment in China because of its "mass surveillance, internment, forced labor, torture, sexual violence, sterilization, political indoctrination, and other severe human rights violations of over one million Uyghurs."[29] Instead, it seems that the purpose of disclosing "transition risk" is to force companies to self-identify so that they can be better targeted for transition—by asset managers and lenders.

9. The proposal inappropriately justifies negative screening in an abrupt u-turn from EBSA's historical guidance. Biased rhetoric such as this should be eliminated.

Negative screening is the exclusion of certain types of investments from an investment portfolio for non-economic or non-pecuniary reasons. Historically, EBSA has explained that a practice of negative screening risks violating ERISA on its face. For example, in a letter dated August 2, 1982, to Daniel O'Sullivan, DOL advised that excluding certain types of investments from an investment portfolio for reasons other than risk or return (such as to promote some collateral benefit) would violate ERISA's fiduciary duties.[30] Assistant Secretary Dennis M. Kass wrote to the Hon. Howard M. Metzenbaum on May 27, 1986 that "an investment policy that is on its face exclusionary runs the risk of being on its face imprudent."[31] Kass's letter further explained that "before a fiduciary of an ERISA covered pension plan can make a decision to exclude a category of investments, the fiduciary must first make a determination that the exclusion of such category of investments would not reduce the return or raise the risk of the plan's investment portfolio. If such a determination can be made, then social judgments as to the composition of the portfolio would be permissible."

The Department suggests several times in the proposal's preamble that it has determined that negative screening is appropriate in the context of carbon-intensive investments, based on "imminent or proposed regulations…and other policies

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[29] Letter from Sen. Marco Rubio to Gary Gensler, SEC Chair & Allison Herren Lee, SEC Commissioner (Oct. 6, 2021).

[30] I note that this letter is central to DOL's historical guidance on ESG, and accordingly is cited regularly. *See*, *e.g.*, DOL's Interpretive Bulletin 94-1, 59 Fed. Reg. 32606 (June 30, 1994); the 2020 rules, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 at note 6 (Nov. 13, 2020); *ERISA's Social Goals? ESG Considerations Under ERISA*, DECHERT, LLP (May 15, 2020) https://www.dechert.com/knowledge/onpoint/2020/5/erisa-s-social-goals--esg-considerations-under-erisa.html.

[31] 85 Fed. Reg. 72866 at note 51.

incentivizing a shift from carbon-intensive investments to low-carbon investments."[32] The Department declares such investments subject to "potentially serious risk…such as … the financial risks of investments for which government climate policies will affect performance."[33] In this way, the Department is declaring that the otherwise-rational markets do not appropriately reflect risk. Perhaps rational markets do not reflect the Department's policy preferences instead. As a result, the Department attempts to disguise its desired negative screening as simple consideration of the heretofore unknown economic risk/return factor for carbon-intensive investments.

Moreover, the proposal fails to address the serious reliance interests on the Department's decades-long position against negative screening. Because the agency is "'not writing on a blank slate,' it [is] required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[34] The failure to do so is arbitrary and capricious. *Id.* ERISA fiduciaries have long been able to invest (and thus undoubtedly have substantial holdings at this time) in certain securities without fear that the Department would bless negative screening and effectively rule entire segments of investments out of bounds. The Department must address those reliance interests.

Finally, if the Department is going to disfavor carbon-intensive investments in favor of "green" investments, the Department must faithfully consider and weigh the relevant costs and risks, not just the purported benefits.[35] Wind, solar, and electric vehicle businesses are heavily dependent on government subsidies, without which many would no longer be viable—let alone profit-maximizing—investments. The Department must address and weigh the tremendous downsides if it forces fiduciaries into investments that could lose their golden-egg-laying goose whenever the political winds change.

10. Consideration of reasonably available alternative investments should be retained.

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[32] 86 Fed. Reg. 57277. As explained further *infra* in the discussion of the major-questions doctrine, the Department lacks authority to alter fiduciaries' obligations on the basis of its policy projections.
[33] *Id.* The Department underscores its creative pseudo-economic reasoning with a reference to the longer term economic risk to plans' assets, once again blithely ignorant of basic investment concepts such as portfolio turnover.
[34] *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020) (internal citation omitted).
[35] *See Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The proposal carries over language in paragraph (b)(2)(i) from the 2020 Rules that requires consideration of how an investment or investment course of action compares to reasonably available alternative investments or investment courses of action.[36] The Department solicited comments on this clause. This common sense approach should be left in the regulation. Striking it from the regulation would imply that the Department no longer believes that the marketplace is a true forum and benchmark of the investment selection process.

11. The proposal espouses an investment course of action by broadly integrating collateral factors in the investment selection process—a course of action which is not compliant with ERISA.

The preamble to the proposal states that: "For many years, the Department's non-regulatory guidance has recognized that, under the appropriate circumstances, ERISA fiduciaries can make investment decisions that reflect climate change and other environmental, social, or governance ('ESG') considerations, including climate-related risk, and choose economically targeted investments ('ETIs') selected, in part for benefits apart from their investment return." This statement has drifted so far from the exclusive purpose rule of ERISA section 404(a)(1) as to be inaccurate on its face, particularly since 2014.

ERISA section 404(a)(1) states, in relevant part, that a "fiduciary shall discharge his duties with respect to a plan, solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits" under the plan. In 2014, in a unanimous decision, the Supreme Court in *Fifth Third Bancorp v. Dudenhoeffer* held that an ERISA fiduciary's obligation is unwavering with respect to its obligation to consider the participants' financial interest the plan's benefits, even in the face of collateral benefits.[37] The Court was clear when it stated "We cannot accept the claim that…ERISA's duty of prudence varies depending upon the specific nonpecuniary goal…such as what petitioners claim is the nonpecuniary goal here….Read in the context of ERISA as a whole, the term "benefits" in [ERISA 404(a)(1)] must be understood to refer to the sort of *financial* benefits (such as retirement income) that the trustees who manage investments typically seek to secure for the trust's beneficiaries….The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of stock." *Id.*

By encouraging and facilitating the use of nonpecuniary factors, the proposal would risk subjecting ERISA fiduciaries to liability for breaches of their duties, not

[36] 86 Fed. Reg. 57302.
[37] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014).

for misconduct, but for doing what they are required to do by the plain text of ERISA and binding Supreme Court precedent. The Court was interpreting the plain meaning of the statutory text, not choosing among one of several competing, reasonable interpretations, as demonstrated by the fact that not a single Justice disagreed. The opinion even says that any different interpretation "would make little sense," would not comply with "ERISA as a whole," and "cannot [be] accept[ed]." 134 S. Ct. at 420–21. The Department cannot use rulemaking to effectively change the unambiguous text of a statute, and doing so will only risk liability for ERISA fiduciaries, who are subject to liability in private actions, regardless of how the Department may construe ERISA.

In order to preserve the rule of the law rooted in ERISA's statutory provisions and as espoused in a unanimous Court in *Dudenhoeffer*, the 2020 Rules should stand.

12. The 2020 Rules' tie breaker provisions should be retained because they follow the Supreme Court's decision in *Dudenhoeffer*. The proposal's provisions do not.

ERISA section 404(a) provides, in relevant part, that an ERISA fiduciary has a duty to act for the exclusive purpose of providing benefits and defraying reasonable expenses.[38] In 2014, in a unanimous opinion, the Supreme Court stated that in the context of the exclusive purpose rule, "benefits" refers to financial benefits provided under the plan.[39] Following *Dudenhoeffer*, the 2020 Rules clearly set forth that investment selections should be based on financial benefits to the plan.[40] Further, the 2020 Rules provided that in the event investments could not be distinguished based on pecuniary factors, documentation should substantiate why and how the election was made. Thus the 2020 Rules uphold the principle set forth in *Dudenhoeffer*.

The proposal instead would substitute a broad equivalence standard for multiple investments that "equally serve the interests of the plan over the appropriate time horizon."[41] Specifically the proposal would declare a tie in the event "competing investment choices, or investment courses of action, equally serve

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[38] ERISA section 404(a)(1).
[39] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2468 (2014).
[40] 29 C.F.R. § 2550.404a-1(c) providing that a fiduciary's evaluation of an investment or investment course of action must be based on pecuniary factors unless the fiduciary is unable to distinguish on the basis of pecuniary factors alone.
[41] 86 Fed. Reg. 57303. See earlier comments on the Department's misunderstanding of portfolio turnover.

the financial interests of the plan." Such a broad standard amounts to virtually no standard and no accountability to ensure that the plan's and the participants' financial interest in their benefits are not subordinated to collateral objectives. This broad category would allow a plan fiduciary to sweep a universe of investments together without having to distinguish between investments based on financial factors. The 2020 Rule's standard brought clarity and should be preserved as the best construction of the statutory duty laid down by ERISA. The competing investments do not tie unless they cannot be distinguished based on economic risk/return ("pecuniary," in the language of the Supreme Court) factors.

13. Parameters should be added on the use of collateral factors.

The proposal does not place any parameters on which collateral benefits may be considered to break a tie. The 2020 Rules mitigated the risk of conflicts of interest that could influence a fiduciary's decision to choose an investment based on collateral factors. The 2020 Rules imposed this mitigation by requiring a fiduciary to explain, upon invoking the tie breaker rule, how the collateral benefit is consistent with the interests of participants and beneficiaries *in their retirement income or financial benefits under the plan.* The 2020 Rules' protective provisions should be preserved and enforced because they are a valuable curb against behavior that could otherwise lead to subordinating the interests of participants and beneficiaries in their retirement income.

Because the proposal places no restrictions on collateral factors, the proposed regulatory text is especially inviting to abuse and opens the door to using pension plan assets for policy agendas. In particular, paragraph (c)(3) of the proposal eliminates the requirement that a fiduciary document that he had invoked the tie breaker rule and explain why the collateral benefit is consistent with the interests of the plan participants. 86 Fed. Reg. at 57,279, 57,289. The proposal claims the documentation requirement is "burdensome" and has a "chilling effect on the[] use" of ESG that "is not material to the risk/return analysis." *Id.* The documentation requirement is important to ensuring that fiduciaries resort to nonpecuniary considerations only in the appropriate circumstances. It beggars belief that the Department would eliminate such an important transparency requirement in the name of saving some paperwork. In fact, the paperwork requirement is conceivably a burden only when a collateral benefit is not easily shown to be material in a pecuniary sense—precisely when investment would be the riskiest. That is exactly when paperwork should be required, not dispensed. It is also illogical to believe that having to show why an investment is material pecuniarily will "chill investment" in sound securities—the only thing it would chill would be risky investments that are

difficult to justify. Given these illogical rationales, it seems the only reasoning left for removing the documentation requirement is for the Department to give a wink and a nod to fiduciaries that they can consider almost anything under the tie breaker and never have to justify it—in fact, never even be called to account for it, as no one in the public will know the tie breaker was even invoked.

Finally, the entire text of the 2020 Rules tie-breaker provisions should be retained and enforced as they are protective of retirees' financial interest in their benefits. Consideration of collateral factors brings a heightened concern that pecuniary factors will not rule the day; and thus the added scrutiny of the 2020 Rules is entirely appropriate. The 2020 Rules should be retained and the proposal should be withdrawn.

14. The prominent display of the collateral benefits characteristic in disclosure materials should be retained and clarified.

The proposal would require that a fiduciary identify collateral benefits of any investment chosen on the basis of its collateral benefit. This requirement is good, and is in the interests of transparency for participants and beneficiaries. Because the proposal's terms blur the lines between risk/return ESG and collateral ESG, if the proposed tie-breaker provisions are finalized, the proposal's disclosure requirement should be retained and refined. However the disclosure should clearly identify the benefit as collateral and not economic if the benefit was invoked as a tie-breaker factor. Any such disclosure should clearly state what specific alternative investments were considered in breaking the tie. This is necessary for transparency.

15. QDIAs with investment objectives other than financial objectives should not be allowed.

The proposal would allow a QDIA that states, as one of its investment objectives, a goal other than financial return. This part of the proposal is a per se violation of ERISA's exclusive purpose rule as interpreted by the Supreme Court in *Dudenhoeffer*. That case is discussed in more detail above. The original provisions of the 2020 Rule should be retained as they were appropriate and protective of retirees.

16. Blurring the lines between risk/return ESG and collateral ESG.

While the proposal's preamble states that "all ESG is not equal," the preamble fails to create a structure that adequately distinguishes between ESG as a

material economic factor, or a "do well factor", and ESG, or a "do good" factor.[42] As discussed earlier in the comments, the Department suggests that climate effects should factor into pension plans investments today because a plan is long term. However as also discussed, the long term nature of a plan's obligations should not be confused with portfolio turnover in an investment fund. In this way, the Department makes unfounded arguments that "doing good" will inure to financial benefit over the long run, in order to blur the line between "doing good" and "doing well." This blurring of the line creates confusion and invites misuse of the regulatory text, and ultimately, retirement benefits. The 2020 Rules should be retained and any confusion can be cleared up by simply issuing FAQs that quote the preamble to the 2020 Rule.

17. The proposal's rewrite of the proxy rules forces plans to use proxy advisory firms that, in turn, base their votes on noneconomic ESG policy driven goals.

According to a May 27, 2021 article posted at the Harvard Law School Forum on Corporate Governance, "[p]roxy advisers have been the subject of fierce debate and criticism for over two decades. They have been criticized for lacking transparency… conflicts of interest…and committing factual and analytical errors…."[43] Rather than highlight the fiduciary status of these proxy voting firms, and the responsibilities of a plan fiduciary that seeks to outsource proxy voting services to these firms, the proposal's preamble, if followed, would virtually force plans to hand over voting services to these firms. The proposal's preamble amounts to a touchdown pass to the two largest proxy advisory firms that wield market power through their control of large voting blocs from institutional investors.[44]

The proposal's preamble embraces the fact that proxy advisory firms may be the only alternative for voting proxies in a cost-effective manner. Instead of acknowledging that the cost of proxy voting (including determining whether to vote) often outweighs its benefit, the Department states that the solution to the cost of proxy voting is not to abstain from voting but "wherever possible, to rely on

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[42] 86 Fed. Reg. 57279.
[43] Paul Rose, Proxy Advisors and Market Power: A Review of Institutional Investor Robovoting (May 27, 2021), *available at* https://corpgov.law.harvard.edu/2021/05/27/proxy-advisors-and-market-power-a-review-of-institutionalinvestor-robovoting/.
[44] *Id.*, stating that Institutional Shareholder Services and Glass, Lewis & Co. control more than 90% of the proxy advisory market.

effecting structures" such as proxy advisers.[45] Because these firms exist, the Department reasons, plans must use them (even through the plan may not need to vote all proxies because only proxies that have a financial effect on the plan should be voted). If it is in the economic interests of a plan to vote a proxy, investment advisors have every incentive to do so. The Department should not introduce bias through its regulation that would result in plans wholesale outsourcing the vote of all proxies to proxy advisory firms.[46] The 2020 Rules should be left undisturbed.

Further, the largest proxy advisory firms maintain proxy voting policies that are not always tied to economic factors but rather to furthering policy goals. For instance, Georgeson, a proxy and governance services firm, reports that ISS (one of the two largest proxy advisory firms) has a proxy voting policy that "generally recommends against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at [certain companies] where there are no women on the company's board."[47] But the SEC recently conducted an exhaustive survey of the evidence regarding diversity and company performance and found that any suggested causal link was "inconclusive" and (at best) "mixed." SEC, *Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes*, 86 Fed. Reg. 44,424, 44,432 (Aug. 12, 2021). In fact, the SEC reiterated that conclusion *four times*. *Id.* at 44,432 ("inconclusive"); *id.* at 44,433 ("inconclusive"); *id.* at 44,431 ("mixed"); *id.* at 44,432 ("mixed"). Given this, it cannot advance retirees' pecuniary interests for proxy advisors to use their voting rights to push for demographic diversity on boards. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1151 (D.C. Cir. 2011) ("In view of the admittedly (and at best) 'mixed' empirical evidence, we think the Commission has not sufficiently supported its conclusion that increasing the potential for election of directors nominated by shareholders will result in improved board and company performance and

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[45] 86 Fed. Reg. 57281 ("The solution to proxy voting costs is not total abstentions, but is, instead, for the fiduciary to be prudent in incurring expenses to make proxy decisions an, whenever possible, to rely on efficient structures (e.g., proxy voting guidelines, proxy advisers/managers that act on behalf of large aggregates of investors, etc.).").

[46] The Department's preamble hints of "legal repercussions" should plan fiduciaries broadly abstain from voting. *See* 86 Fed. Reg. 57282. This comment has already stated that abstention is often in the best economic interests of the plan because voting proxies is often not expected to have an economic benefit for the plan, even in the absence of cost. The proposal's preamble sets a default of always voting, which in turn requires the use of a proxy advisory firm to be cost effective.

[47] See Appendix, a "table representing a high level summary of select significant investors' and proxy advisors' policies with respect to board and workforce diversity" at https://www.georgeson.com/us/insights/corporate-governance-proxy/vanguard-2021-voting-policy-updates. The table includes other examples of proxy voting to achieve ESG type goals as well.

shareholder value."). Neither should a plan's assets be used for the purpose of furthering ESG goals.

Moreover, the proposal's armchair-professor recitation of studies allegedly showing the benefits of diversity in corporate boards is woefully inadequate. For example, the proposal claims that firms lose $64 billion a year from "unfairness and discrimination, 86 Fed. Reg. at 57,291—a transparent attempt to conflate discrimination (illegal) with unfairness (not illegal) in the hopes of making it sound like companies are engaging in massive discrimination, something the proposal has no evidence to justify (and even if there were such high levels of discrimination writ-large, the ESG factors look only at corporate *board* diversity, and the proposal references no evidence of discrimination on boards).

The attached expert report from Professor Jonathan Klick, which led the SEC to its conclusion that there is (at best) "inconclusive" evidence that board diversity causes improved performance, explains why most or all studies on this topic are poorly designed and likely suffer from omitted variable bias, making it impossible to infer causal effects from any correlation. Professor Klick's report addresses the flaws in the very same study cited in the proposal, *see* 86 Fed. Reg. at 57,291–57,292 & n.124, and his explanation readily applies to the other studies cited in the proposal, none of which purport to find a direct causal link from diversity to improved performance. Rather, they all seem to equate correlation with causation, with a more likely explanation for this relationship being that companies that are already rich tend to become diverse, not the other way around.

In effect, under the approach outlined in the proposal's preamble, the Department first requires the fiduciary to vote, then requires the fiduciary to hire a proxy advisory firm to manage the cost, which then in turn results in the plan's assets (the proxy vote) to be used to further ESG-type goals. The proposal fails to recognize that this is a direct violation of the ERISA's section 404(a)(1) exclusive benefit rule.

18. The proposal's rewrite of the proxy rules forces plans to use proxy advisory firms that base their votes on noneconomic ESG policy driven goals.

Investment managers understand that many proxy proposals have no real impact on the value of the investment.[48] The proposal's preamble would create a

[48] See for instance, a readily available proxy voting policy for a portfolio manager explaining that "In our assessment, the resolutions being voted on are typically routine and will not have significant

presumption that all proxies should be voted.[49] By creating the obligation to vote, and obligating plans to use proxy advisory firms, the Department is not advancing the economic interests of plans and their participants. Instead, the Department is creating a steady market for proxy advisory firms. The 2020 Rules' statement that "[t]he fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right" was to clarify that there is no such presumption. The proposal would take that statement out of the regulatory text. The proposal's preamble has instead included statements to recreate that ill-conceived presumption. The presumption espoused by the proposal is patently inconsistent with ERISA's fiduciary duties which are to manage plan assets exclusively for the purpose of providing benefits under the plan. ERISA does not create an obligation to vote proxies when such vote has no economic effect on the plan's investment. Neither does ERISA permit plan assets to be used to advance ESG and other causes through proxy voting. The proposal badly veers from ERISA's purpose and from EBSA's mission. The 2020 Rules should remain in place and the proposal should be withdrawn.

19. The final should not remove the 2020 Rules' specific monitoring obligations that apply to delegated proxy voting actions.

The proposal would also eliminate specific text in the regulation about a plan fiduciary's obligation to monitor a proxy advisory firm's activity.[50] So, while forcing plans to use proxy advisory firms, the proposal would also remove any guidance specifically directed toward monitoring proxy advisory firms as a reminder of the inherent dangers of delegating proxy voting. The Department should withdraw the proposal and preserve the important monitoring obligation reminder to give specific guidance to fiduciaries in this area to ensure that proxies are being voted for the exclusive (financial) benefit of the plan and not to further collateral goals.

20. The safe harbors in the 2020 Rules were important protections for plans and their participants to ensure that plan assets were used

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economic consequences and/or because the outcome would not be affected by voting all or a portion of [the] securities." Available at: https://hartfordfunds.com/dam/en/docs/pub/funddocuments/regulatorydocument/MellonProxyVotingPolicy.pdf.

[49] *See* 86 Fed. Reg. 57282 (stating that "The Department's longstanding view of ERISA is that proxies should be voted as part of the process of managing the plan's investment in company stock unless a responsible 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)").

[50] 86 Fed. Reg. 57281 (explaining that paragraph (e)(2)(iii) in the current regulation is eliminated as duplicative and therefore unnecessary).

exclusively to provide financial benefits, achieve cost savings, and mitigate regulatory overreach.

Absent the Department's regulatory bias, investment managers understand that routine proxy voting matters are not expected to have significant economic consequences to an investment held.[51] Further, investment managers also understand that in some cases the amount of stock held would not affect the outcome of the vote.[52] Without the express provision of safe harbors recognizing these economic realities and their effects on an investment fiduciary's duties, ERISA fiduciaries find the path of least resistance is to hire a proxy advisory firm to vote all proxies.[53] Such a step results in the plan's assets being used, *not for the exclusive purpose of providing financial benefits under the plan,* but to promote ESG type policies in accordance with proxy advisory firm policies.

The 2020 Rules recognized those instances in which a proxy vote would not be expected to have an economic effect and provided safe harbor protection for fiduciaries. The proposal would eliminate this safe harbor to force ERISA fiduciaries to participate in a proxy advisory system that is an engine of pet policy initiatives. The 2020 Rule should be restored to protect plan assets from being used for the purpose of pushing pet policy initiatives that do not promote the financial interests of the plan.

The proposal states that the 2020 Rules' safe harbor cannot be applied in the case of multiple investment managers of sub-portfolios.[54] However, the safe harbor expressly states that it can be applied to the assets under management in the case of an investment manager. In any case, whether the safe harbor is useful in all cases should not preclude its availability in other cases.

The 2020 Rules' safe harbors should not be eliminated.

21. The final rule should not eliminate the requirement for plan fiduciaries to maintain records of proxy voting.

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[51] *See* Hartford Funds, *supra* note 33.
[52] *Id.*
[53] Particularly in the face of threatened "legal repercussions" (*supra* note 46) such as Department investigations that are costly, no matter the outcome. Therefore the perception is that it is cheaper to hire a proxy firm than to risk the Department's overreach.
[54] 86 Fed. Reg. 57282.

The 2020 Rules have an express requirement for plan fiduciaries to maintain records of proxy voting.[55] Such records are a necessary demonstration of due diligence and prudence and the regulations should retain this requirement.

22. The final rule should retain the 2020 Rule provisions that require prudence and diligence in the selection and monitoring of persons chosen to exercise shareholder rights.

The proposal would carry over the 2020 Rule's provisions from paragraphs (d)(2)(i) and (iii) of the 2020 Rules to remind fiduciaries that they may not delegate proxy voting responsibilities without exercising prudence and diligence in their selection and in monitoring. Further, the fiduciary may not adopt a practice of following recommendations without determining that the provider's voting guidelines are consistent with the fiduciary's obligations. These provisions are necessary curbs to ensuring that plan assets are used for the exclusive purpose of providing financial benefits under the plan. The preamble to the final rule should also address what the ERISA's exclusive purpose rule (and *Dudenhoeffer*) mean in this context. That is, that a plan's proxies may not be used to create non-pecuniary benefits such as ESG collateral benefits.

23. The proposal should apply those principles set forth in *Dudenhoeffer* and preserve the use of the term "pecuniary" as a reminder of the principles in that case.

The proposal would remove the term "pecuniary." This removal reflects the Department's moves to eliminate all reference to the guiding principles set forth in a unanimous Supreme Court opinion regarding the meaning of exclusive benefit under Section 404(a). *Dudenhoeffer*, as discussed earlier, leaves no room for the use of plan assets for anything other than providing financial benefits under a plan. The removal of the term "pecuniary" is minor, but it represents the Department's move to remove all traces of the Supreme Court's decision from its rule. The proposal should be withdrawn and the 2020 Rules should stand as-is.

24. The proposal interprets ERISA in a way that runs afoul of the major-questions doctrine.

By seeking to regulate matters of significant economic and political matters like climate through the guise of ERISA fiduciary obligations, the proposal violates the "major questions doctrine," which requires Congress to "speak[] clearly when it

[55] 29 C.F.R. 2550.404a-1(e)(2)(ii)(E).24.

delegates the power to make decisions of vast economic and political significance" to an agency.[56] There is no clear statutory indication that Congress intended the Department to have the power to make decisions of vast economic and political significance in the realm of climate. When an agency "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism."[57] Nor would *Chevron* deference be appropriate here, for the same reasons.[58] The proposal should be withdrawn because otherwise it is likely that a court will find that the proposal lacks a basis in statutory authority.

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I am grateful for the opportunity to comment on the regulation and appreciate your consideration of my comments. Please let me know if I can provide further information with respect to our comments.

Very truly yours,
Jonathan Berry

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[56] *DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1925 (2020) (Thomas, J., concurring in part); *see King v. Burwell*, 576 U.S. 473, 486 (2015).
[57] *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014).
[58] *Cf. King*, 576 U.S. at 486 ("It is especially unlikely that Congress would have delegated this decision to the [Department], which has no expertise in crafting [climate, etc.] policy of this sort.").