



State of California  
Office of the Attorney General

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ATTORNEY GENERAL

December 13, 2021

**VIA ELECTRONIC SUBMISSION**

United States Department of Labor  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
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:

On behalf of the undersigned Attorneys General, we submit this letter in response to the Department of Labor's ("DOL") proposed rule, titled *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, RIN 1210-AC03 ("Proposed Rule").<sup>1</sup> We endorse the Proposed Rule, particularly as it relates to consideration of environmental, social, and governance ("ESG") factors in evaluating and selecting plan investments, and write in support of its adoption.<sup>2</sup>

**I. SUMMARY**

States have a significant interest in the success of employee benefit plans covered under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA").<sup>3</sup> For a substantial percentage of our residents, ERISA-covered plans make up the bulk of retirement savings and are an important income source after retirement. In addition to affecting states' tax revenue and

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<sup>1</sup> 86 Fed. Reg. 57,272 (Oct. 14, 2021).

<sup>2</sup> This letter focuses on the DOL's proposed changes to the risk-return analysis regulation (*see* 86 Fed. Reg. at 57,276-277) and the "tie-breaker" regulation (*see* 86 Fed. Reg. at 57,278-279). With regard to the DOL's proposed changes to the proxy voting and exercise of shareholder rights regulation (*see* 86 Fed. Reg. at 57,280-281), we support the DOL's proposed clarification that ERISA fiduciaries' exercise of such rights that promote the retirement income or financial benefit of participants and beneficiaries, such as ESG objectives, would be appropriate.

<sup>3</sup> 29 U.S.C. § 1101 *et seq.*

public aid expenses, the success of ERISA-covered plans helps ensure that our residents have adequate financial resources in retirement.

Key to the success of ERISA-covered plans is the ability of ERISA fiduciaries to consider all material factors when making their investment decisions. Environmental, social, and governance (“ESG”) factors, particularly the costs and impacts of climate change, already have material effects on many industries, and the effects of climate change are likely to increase over the long-term horizons of most ERISA-covered plans. The current rule has caused confusion as to whether ESG factors can be considered at all under the category of pecuniary factors. The Proposed Rule is essential to resolve any confusion and dispel the chill that the current rule imposes on ERISA fiduciaries by explicitly allowing them to consider climate change and other ESG factors.

## II. COMMENTS

### A. States Have a Significant Interest in Robust Investment Returns in Private-Employer-Sponsored Retirement Plans.

States have a key interest in the standards for ERISA fiduciaries because ERISA-covered plans make up a critical portion of the earnings of our retired residents and of the retirement savings of our non-retired residents. According to the Bureau of Labor Statistics, in 2020, 68% of private sector employees had access to a retirement plan, and 51% of private sector employees participated in their employer’s retirement plan.<sup>4</sup> Employer retirement plans are a key source of income for current retirees, with 68% of current retirees aged 65 years old and up receiving income from a pension, the second most-common source of income after Social Security.<sup>5</sup> Private pensions and income from defined contribution plans, like 401(k)s, constitute a significant percentage of current retirees’ overall retirement income.<sup>6</sup>

Given the importance of ERISA-covered plans as current and future sources of retirement income for our residents, states have a vested interest in ensuring their successful management. According to the Internal Revenue Service’s preliminary data on 2019 tax returns, income from pensions, annuities, and individual retirement account distributions was the second largest

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<sup>4</sup> Bureau of Lab. Stat., *Nat’l Comp. Surv.: Emp. Benefits in the U.S.*, Mar. 2021 189 (Sept. 2021), <https://www.bls.gov/ncs/ebs/benefits/2021/employee-benefits-in-the-united-states-march-2021.pdf>.

<sup>5</sup> Fed. Reserve, *Rep. on the Econ. Well-Being of Ams. in 2020* (May 2021), <https://www.federalreserve.gov/publications/2021-economic-well-being-of-us-households-in-2020-retirement.htm>. Note that the Federal Reserve did not differentiate between private sector and public sector pension plans.

<sup>6</sup> According to 2014 data analyzed by the Economic Policy Institute, for individuals 65 and older, private pensions constituted approximately 31% of average income, and earnings from 401(k)s, IRAs, and other defined contribution plans constituted approximately 9.5% of average income. Monique Morrissey, Econ. Pol’y Inst., *The State of Am. Ret.: How 401(k)s Have Failed Most Am. Workers* (Mar. 3, 2016), <https://www.epi.org/publication/retirement-in-america/#chart1>.

category of reported income, constituting over \$1 trillion.<sup>7</sup> That income is an important source of tax revenue for many states to invest in their communities, including through public programs and infrastructure improvements.

For retired residents with inadequate sources of income, states frequently make up the shortfall with public aid.<sup>8</sup> For example, in 2020, New York apportioned more than \$142 million for services to elderly residents; in its 2019-2020 budget, California apportioned \$535.3 million for services to elderly residents; and for its 2020 fiscal year, the District of Columbia apportioned more than \$54 million for its Department of Aging and Community Living.<sup>9</sup> More broadly, states want to ensure that their residents have adequate financial resources to live comfortably in their retirement years. The DOL's standards for ERISA fiduciaries are one of the keys to achieving that goal.

## **B. ESG Factors, Particularly Climate Change, Are Often Material to ERISA Fiduciaries' Prudent Investment Decisions.**

As the DOL observed in the rule package, ESG factors are often material to ERISA fiduciaries' investment decisions.<sup>10</sup> The physical and transition impacts from climate change, for example, are already materially affecting public companies and financial institutions, and those effects will only increase over subsequent decades.<sup>11</sup> As the DOL accurately noted, long-term climate change risks are particularly relevant to the long-term investment horizons of most ERISA-covered plans.<sup>12</sup>

Examples of some of the impacts from climate change illustrate how critical it is for ERISA fiduciaries to be able to consider climate change, among other ESG factors, as they make

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<sup>7</sup> IRS, Prelim. Data, Stat. Tables, Table 1—Indiv. Income Tax Returns: Selected Income & Tax Items, Tax Years 2019-2018, <https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns> (last visited Dec. 5, 2021).

<sup>8</sup> Philip Trostel, Univ. of Me., *The Fiscal Implications of Inadeq. Ret. Savs. in Me.* 10, <https://mcspolicycenter.umaine.edu/wp-content/uploads/sites/122/2017/03/final-aarp-report.pdf> (chart showing cost to states for public aid to retirement-age individuals without adequate retirement savings).

<sup>9</sup> See N.Y. State Assemb., Comm. on Aging, 2020 Ann. Rep. 2 (Dec. 15, 2020), <https://nyassembly.gov/comm/?id=1&sec=story&story=96751>; State of California, Cal. State Budget: 2019-2020 54-56 (2019), <https://www.ebudget.ca.gov/2019-20/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf>; D.C., Dep't of Aging & Cmty. Living, Fiscal Year 2020 Budget 1 (2019), [https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/by\\_dacl\\_chapter\\_2020j.pdf](https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/by_dacl_chapter_2020j.pdf).

<sup>10</sup> 86 Fed. Reg. at 57,276-279.

<sup>11</sup> CFTC, Clim.-Related Market Risk Subcomm. of the Mkt. Risk Advisory Comm., *Managing Clim. Risk in the U.S. Fin. Sys.* ii-iii, 11-23 (2020); Fin. Stability Bd., *The Implications of Clim. Change for Fin. Stability* 5-6, 12-13 (Nov. 23, 2020); Task Force on Clim.-Related Fin. Discl., *Final Rep.: Recoms. of the Task Force on Clim.-Rel. Fin. Discl.* 6, 10-11 (2017) (“TCFD Final Report”); see also Nat'l Oceanic & Atmosph. Admin., *Billion-Dollar Weather & Clim. Disasters*, Nat'l Ctrs. for Env't Info. (2021), <https://www.ncdc.noaa.gov/billions/summary-stats> (upward trend in costs from weather disasters).

<sup>12</sup> 86 Fed. Reg. at 57,276.

their investment decisions. Rising temperatures, heat waves, more frequent and severe weather events, sea level rise, water and food scarcity, and other climate change impacts are damaging critical infrastructure and property, disrupting businesses, and harming human health and natural resources across the United States and around the globe.<sup>13</sup> And “[w]ith every additional increment of global warming, changes in extremes continue to become larger.”<sup>14</sup>

In 2021 alone, the East Coast encountered record rainfall that flooded apartment buildings, resulting in numerous fatalities, and impaired utility infrastructure; the West Coast and Minnesota endured unprecedented wildfires that destroyed homes and businesses and significantly impaired air quality; Texas faced record snowfall that overwhelmed its utilities, resulting in loss of power to millions of customers for days at a time; and the Pacific Northwest experienced a record heat wave that stressed its utilities and resulted in hundreds of heat-related fatalities.<sup>15</sup> California is in the midst of a severe drought that is depleting its reservoirs and affecting its hydroelectric power sources.<sup>16</sup> Sea level rise, which is expected to accelerate over the coming decades, contributes to tidal flooding, beach erosion, and increased salinity in fresh water sources in U.S. coastal communities.<sup>17</sup> These and other physical impacts result in companies shutting down or limiting operations, amidst trying to assist employees facing property damage as well as negative health outcomes.<sup>18</sup>

In response to climate change, the international community has adopted increasingly ambitious policies that, if successful, will result in “nothing less than a complete transformation

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<sup>13</sup> See generally, e.g., U.S. Glob. Change Rsch. Prog., *Fourth Nat’l Clim. Assessment, Vol. II: Impacts, Risks, & Adaptation in the U.S.* (D.R. Reidmiller et al. eds., 2018), <https://nca2018.globalchange.gov/> (“*Fourth Nat’l Clim. Assessment*”); Richard P. Allan et al., *Clim. Change 2021: The Physical Science Basis, Summary for Policymakers, Contribution of Working Grp. I to the Sixth Assessment Rep. of the Intergov. Panel on Clim. Change* (V. Masson-Delmotte et al., eds. 2021), [https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC\\_AR6\\_WGI\\_SPM\\_final.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf) (“*Climate Change 2021*”).

<sup>14</sup> *Climate Change 2021* at 15.

<sup>15</sup> Arian Campo-Flores, Katherine Blunt, *Am.’s Infrastr. Struggles with New Weather Forecast*, Wall St. J. (Nov. 15, 2021), <https://www.wsj.com/articles/america-infrastructure-climate-change-extreme-weather-rain-heat-11636755095> (“*Am.’s Infrastr. Struggles*”); Nadja Popovich, Winston Choi-Schagrin, *Hidden Toll of the Nw. Heat Wave: Hundreds of Extra Deaths*, N.Y. Times (Aug. 11, 2021), <https://www.nytimes.com/interactive/2021/08/11/climate/deaths-pacific-northwest-heat-wave.html>; Chris Stipes, Univ. of Houston, *New Rep. Details Impact of Winter Storm Uri on Texans* (Mar. 29, 2021), <https://uh.edu/news-events/stories/2021/march-2021/03292021-hobby-winter-storm.php>.

<sup>16</sup> *Am.’s Infrastr. Struggles*; Nat’l Oceanic & Atmosph. Admin., *Current U.S. Drought Monitor Conditions for Cal.*, Drought.gov, <https://www.drought.gov/states/california> (last visited Nov. 29, 2021).

<sup>17</sup> *Fourth Nat’l Clim. Assessment*.

<sup>18</sup> See, e.g., *Am.’s Infrastr. Struggles*; Saul Elbein, Sharon Udasin, *In a Chaotic World, Planning for Disaster Is Everyone’s Job*, Equilib./Sustain’y (The Hill), Oct. 21, 2021; Christopher Flavell, et al., *Overlapping Disasters Expose Harsh Clim. Reality; The U.S. Is Not Ready*, N.Y. Times (Sept. 2, 2021), <https://www.nytimes.com/2021/09/02/climate/new-york-rain-floods-climate-change.html>; Jennifer Calfas, *Wildfires Burn Across U.S. W. as Temperatures Soar*, Wall St. J. (July 12, 2021), [https://www.wsj.com/articles/wildfires-burn-across-u-s-west-as-temperatures-soar-11626111226?mod=mhp&utm\\_source&utm\\_medium=email&utm\\_campaign=40664](https://www.wsj.com/articles/wildfires-burn-across-u-s-west-as-temperatures-soar-11626111226?mod=mhp&utm_source&utm_medium=email&utm_campaign=40664).

of how we produce, transport, and consume energy.”<sup>19</sup> The global warming limits agreed to at the 2015 Paris Climate Agreement, for instance, effectively require global greenhouse emissions to be net zero by 2050.<sup>20</sup> The 2021 Glasgow Climate Change Conference resulted in new global agreements on emissions reductions, climate change adaptation, and regulations regarding carbon-emissions credit trading.<sup>21</sup>

National governments, in turn, are increasingly legislating, regulating, and investing toward a low- and zero-carbon future. For example, the United States has introduced several new regulations with the goal of meeting its obligations under the Paris Climate Agreement,<sup>22</sup> including restrictions on hydrofluorocarbon emissions and methane emissions and stricter federal standards on greenhouse gas emissions for light-duty vehicles starting with model year 2023.<sup>23</sup> In addition to regulations, the United States Congress recently passed an infrastructure bill that includes billions in funds for climate resiliency of American infrastructure.<sup>24</sup> The European Union (“EU”) is also moving more aggressively to address climate change. In June 2021, the EU adopted the European Climate Law, which creates a framework for the EU to reach net-zero carbon emissions by 2050. In July 2021, the EU adopted a proposal for a Carbon Border Adjustment Mechanism that would impose fees on imports from countries with less aggressive climate-mitigation policies.<sup>25</sup>

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<sup>19</sup> Int’l Energy Agency, *Net Zero by 2050: A Roadmap for the Glob. Energy Sector* 181 (2021), <https://www.iea.org/reports/net-zero-by-2050> (“Net Zero by 2050”).

<sup>20</sup> U.N. Framework Convention on Clim. Change (“UNFCCC”), *Adoption of the Paris Agreement*, U.N. Doc. FCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>; *Net Zero by 2050*.

<sup>21</sup> UNFCCC, *COP26 Reaches Consensus on Key Actions to Address Clim. Change* (Nov. 13, 2021), <https://unfccc.int/news/cop26-reaches-consensus-on-key-actions-to-address-climate-change>; *The Glasgow Clim. Pact, Annotated*, Wash. Post (Nov. 13, 2021), <https://www.washingtonpost.com/climate-environment/interactive/2021/glasgow-climate-pact-full-text-cop26/>.

<sup>22</sup> The United States recently submitted its “Nationally Determined Contribution,” which outlines how the United States will reduce its greenhouse gas emissions in line with the goals of the Paris Climate Agreement. *See The U.S. Nat’ly Determined Contrib.* 1, 6 (2021), <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%202021%202021%20Final.pdf>.

<sup>23</sup> *See* 86 Fed. Reg. 55,116 (Oct. 5, 2021) (final rule mandating the phasedown of hydrofluorocarbon emissions through an allowance-trading program); 86 Fed. Reg. 63,110 (Nov. 15, 2021) (proposed federal standards limiting methane pollution from oil and gas sector sources); 86 Fed. Reg. 43,726 (Aug. 10, 2021) (proposed federal standards increasing the stringency of limits on greenhouse gas emissions from light-duty vehicles for 2023 and later model years)

<sup>24</sup> Coral Davenport, Christopher Flavelle, *Infrastr. Bill Makes First Major U.S. Inv. in Clim. Resilience*, N.Y. Times (Nov. 6, 2021), <https://www.nytimes.com/2021/11/06/climate/infrastructure-bill-climate.html>; The White House, *Fact Sheet: The Bipartisan Infrastr. Deal* (Nov. 6, 2021).

<sup>25</sup> Reg. (E.U.) 2021/1119, Eur. Parliament & Council (Sept. 7, 2021), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R1119&from=EN>; Eur. Comm’n, *Carbon Border Adjustment Mechanism*, [https://ec.europa.eu/taxation\\_customs/green-taxation-0/carbon-border-adjustment-mechanism\\_en](https://ec.europa.eu/taxation_customs/green-taxation-0/carbon-border-adjustment-mechanism_en) (last visited Dec. 5, 2021).



U.S. states and localities have already adopted (and continue to adopt) ambitious policies to reduce greenhouse gas emissions, advance clean energy, and increase climate resilience and justice.<sup>26</sup> For example, several states, including California, Massachusetts, and New York, have adopted aggressive mandates to reduce economy-wide greenhouse gas emissions.<sup>27</sup> A majority of states require that a certain percentage of electricity sold comes from renewable sources,<sup>28</sup> and twelve states have implemented their own carbon-emissions trading programs.<sup>29</sup> California and more than a dozen other states—which together comprise more than one-third of the U.S. market for new light-duty vehicles<sup>30</sup>—have adopted ambitious standards to limit greenhouse gas emissions from cars and trucks, with California notably aiming for all new cars and passenger trucks to be zero-emissions by 2035.<sup>31</sup> And New York’s Climate Leadership and Community Protection Act, which became law in 2020, requires statewide greenhouse gas emission reductions of 40 percent by 2030 and 85 percent by 2050 from 1990 levels.<sup>32</sup>

These public policy actions, as well as related technology and market shifts, present both risks and opportunities<sup>33</sup> that ERISA fiduciaries should be able to consider as they make investment decisions. For example, in one analysis regarding physical risks from climate change, nearly 60% of the companies in the S&P 500 have assets with a high risk of exposure to extreme

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<sup>26</sup> See, e.g., U.S. Clim. All., *Inventory of Clim. & Clean Energy Policies*, <http://www.usclimatealliance.org/state-climate-energy-policies> (last visited Dec. 5, 2021).

<sup>27</sup> See, e.g., Mass. Gen. Laws c. 21N, §§ 3(b), 4 (imposing a legally binding requirement on Massachusetts to achieve net-zero greenhouse gas emissions by 2050); Cal. Health & Saf. Code § 38566 (imposing a legally binding requirement on California to reduce its greenhouse gas emissions to 1990 levels by 2020 and an additional 40% by 2030).

<sup>28</sup> N.C. Clean Energy, *Renewable & Clean Energy Standards* (Sept. 2020), <https://ncsolarcenprod.s3.amazonaws.com/wp-content/uploads/2020/09/RPS-CES-Sept2020.pdf> (map of states with renewable portfolio requirements).

<sup>29</sup> *Welcome, The Reg’l Greenhouse Gas Initiative: An Initiative of E. States of the U.S.*, <https://www.rggi.org/> (last visited Nov. 29, 2021); *AB 32 Glob. Warming Sols. Act of 2006*, Cal. Air Res. Bd., <https://ww2.arb.ca.gov/resources/fact-sheets/ab-32-global-warming-solutions-act-2006> (last visited Nov. 29, 2021).

<sup>30</sup> Cal. Air. Res. Bd., *States That Have Adopted Cal.’s Vehicle Standards Under Section 177 of the Fed. Clean Air Act* (Aug. 19, 2019), <https://ww2.arb.ca.gov/sites/default/files/2019-03/177-states.pdf>.

<sup>31</sup> Office of Gov. Gavin Newsom, *Gov. Newsom Announces Cal. Will Phase Out Gas.-Powered Cars & Drastically Reduce Demand for Fossil Fuel in Cal.’s Fight Against Clim. Change*, CA.gov (Sept. 23, 2020), <https://www.gov.ca.gov/2020/09/23/governor-newsom-announces-california-will-phase-out-gasoline-powered-cars-drastically-reduce-demand-for-fossil-fuel-in-californias-fight-against-climate-change/>.

<sup>32</sup> S. 6599, 2019-2020 Sen. (N.Y. 2019).

<sup>33</sup> See Madison Condon et al., *Mandating Disclosure of Clim.-Related Fin. Risk* 3-9 (2021); Rick Lord et al., S&P Global & DWS Group, *Understanding Clim. Risk at the Asset Level: The Interplay of Transition & Physical Risks* 3 (2021), <https://www.spglobal.com/en/research-insights/featured/understanding-climate-risk-at-the-asset-level-the-interplay-of-transition-and-physical-risks> (“*Understanding Clim. Risk*”).

weather events resulting from climate change.<sup>34</sup> Analyses regarding transition risks to a low-carbon economy also suggest significant impacts to companies, such as stranded assets worth trillions of dollars.<sup>35</sup> The financial system also faces disruption, with Moody's estimating that financial firms holding \$22 trillion in loans and investments are exposed to transition risks.<sup>36</sup> Many industries, particularly the fossil fuel industry, are likely to significantly shrink, if not become altogether obsolete, in the coming decades.<sup>37</sup> Other industries, such as the automotive, airline, hospitality, construction, and shipping industries, will have to undergo significant changes as they adjust to a low-carbon economy.<sup>38</sup> The low-carbon shift, however, presents opportunities as well, especially for industries that are aiding in the transition to a low-carbon future (such as renewable energy companies and manufacturers of equipment for public transit) and those that are well-prepared for the transition (such as automotive companies already shifting to electric vehicles).<sup>39</sup> Indeed, "the expected transition to a lower-carbon economy is estimated to require around \$1 trillion of investments a year for the foreseeable future."<sup>40</sup>

While we have focused on climate change in this letter, we believe that ERISA fiduciaries should be able to consider other ESG factors as well. As the DOL observed in its rule

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<sup>34</sup> *Understanding Clim. Risk* at 6 (2021). The study looked at the likelihood of exposure to at least one of seven extreme weather events: wildfire, cold wave, heat wave, water stress, flood, coastal flood, and hurricane. *Id.* at 7.

<sup>35</sup> Jean Eaglesham, Vipal Monga, *Trillions in Assets May Be Left Stranded as Cos. Address Clim. Change*, Wall St. J. (Nov. 20, 2021), <https://www.wsj.com/articles/trillions-in-assets-may-be-left-stranded-as-companies-address-climate-change-11637416980> ("Trillions in Assets"). See also Carbon Tracker, *Adapt to Survive: Why Oil Cos. Must Plan for Net Zero & Avoid Stranded Assets* (Sept. 9, 2021), <https://carbontracker.org/reports/adapt-to-survive/> ("*Adapt to Survive*") (under net-zero emissions by 2050 plan, oil production for major American oil companies will drop between 39% and 71%).

<sup>36</sup> Moody's Inv. Serv., *Rsch. Announcement: Moody's – Fin. Firms that Take Rapid, Predictable Pace to Zero Financed Emissions Will Win the Race* (Oct. 12, 2021), [https://www.moody.com/research/Moodys-Financial-firms-that-take-rapid-predictable-pace-to-zero-PBC\\_1305598](https://www.moody.com/research/Moodys-Financial-firms-that-take-rapid-predictable-pace-to-zero-PBC_1305598).

<sup>37</sup> *Trillions in Assets*; Saul Elbein, Sharon Udasin, *Advocates Warn of Fossil Fuel Inv. Risk, Equilib./Sustain'y* (The Hill), Oct. 27, 2021; *Adapt to Survive*.

<sup>38</sup> See, e.g., *Decl. on Zero Emission Cars; Decl. on Int'l Aviation*; World Travel & Tourism Council, *A Net Zero Roadmap for Travel & Tourism* 21-23, 29, 38-44 (Nov. 2021), [https://wttc.org/Portals/0/Documents/Reports/2021/WTTC\\_Net\\_Zero\\_Roadmap.pdf?utm\\_source=&utm\\_medium=email&utm\\_campaign=44344](https://wttc.org/Portals/0/Documents/Reports/2021/WTTC_Net_Zero_Roadmap.pdf?utm_source=&utm_medium=email&utm_campaign=44344); Sharon Udasin, *Buttigieg Warns of Sharp Rise in Aviation Emissions Without Rapid Change*, The Hill (Nov. 10, 2021), <https://thehill.com/policy/equilibrium-sustainability/580931-buttigieg-warns-of-sharp-rise-in-aviation-emissions-without>; Sharon Udasin, *Meat Indus. Grps. Pledge to Meet Paris Agreement Emissions Targets by 2030*, The Hill (Nov. 9, 2021), <https://tinyurl.com/2p8h372s>; *Supercharging Indus. Decarbonisation*, [missionpossiblepartnership.org](https://missionpossiblepartnership.org) (last visited Nov. 29, 2021).

<sup>39</sup> See, e.g., *The Argument, Got Clim. Doom?*, N.Y. Times, (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/opinion/climate-change-personal-actions.html?show Transcript=1>; Kepler Cheuvreux Transition Research, *Transition Risks in the Auto. Sector*, *Clim. Change Scenarios Risks & Opportunities* 5 (July 30, 2016), <https://et-risk.eu/wp-content/uploads/2018/07/Transition-risks-for-autos.pdf>

<sup>40</sup> TCFD *Final Report* at ii.

package, there are studies showing the positive correlation between social factors like workforce diversity and treatment of employees, on the one hand, and company success on the other.<sup>41</sup> And governance factors, like executive compensation and board oversight, are likely to impact company performance as well.<sup>42</sup>

### **C. The Proposed Rule Corrects the Current Rule’s Misguided Discouragement of ERISA Fiduciaries’ Consideration of ESG Factors.**

We agree with the DOL’s assessment that the current regulation is likely to have a chilling effect on ERISA fiduciaries’ consideration of ESG factors in their investment decision-making.<sup>43</sup> Adopted through a 2020 rulemaking package, the current rule requires ERISA fiduciaries to evaluate investments based “only on pecuniary factors.”<sup>44</sup> The current rule also codified the so-called “tie-breaker” rule, allowing ERISA fiduciaries to consider non-pecuniary factors only when they are “unable to distinguish” between two investments based on pecuniary factors.<sup>45</sup> Notably, the 2020 notice of rulemaking singled out ESG factors as a target of the DOL’s rule.<sup>46</sup> Given that focus as well as the current rule’s use of the terms “pecuniary” versus “non-pecuniary” factors and objectives; its documentation requirements for consideration of “non-pecuniary” collateral benefits under the “tie-breaker” rule; and its prohibition on utilizing ESG-focused investment options as qualified default investment alternatives (“QDIAs”), we are unsurprised that stakeholders have informed the DOL that the current rule dissuades ERISA fiduciaries from considering ESG factors, even when consideration of those factors may be critical to making the best investment decisions.

The Proposed Rule is a balanced approach, addressing the current rule’s flaws while still ensuring that the focus of ERISA fiduciaries remains the financial benefit to plan beneficiaries and participants. We endorse the DOL’s proposed removal of the terms “pecuniary” and “non-pecuniary” and the amended language allowing ERISA fiduciaries to consider “any” factor that would be material to the risk-return analysis.<sup>47</sup> We also endorse the Proposed Rule’s examples of

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<sup>41</sup> 86 Fed. Reg. at 57,291.

<sup>42</sup> See, e.g., Grant Thornton, *Corp. Governance & Co. Perform.* 5, 10 (2019), <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/documents/corporate-governance-and-company-performance.pdf>; Deloitte, *Good Governance Driving Corp. Perform.? A Meta-Analysis of Acad. Rsch. & Invit. to Engage in the Dialogue* (Dec. 2016), <https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-good-governance-driving-corporate-performance.pdf>.

<sup>43</sup> See, e.g., 29 C.F.R. § 2550.404a-1(c), (d), (e)(2)(ii)(C).

<sup>44</sup> 29 C.F.R. § 2550.404a-1(c)(1).

<sup>45</sup> 29 C.F.R. § 2550.404a-1(c)(2). The current rule also requires documentation of the ERISA fiduciary’s determination that pecuniary factors, alone, were insufficient to distinguish between two investments, as well as how the chosen non-pecuniary factor is “consistent with the interests” of ERISA plan participants and beneficiaries. *Id.*

<sup>46</sup> Fin. Factors in Selecting Plan Invs., Final Rule, 85 Fed. Reg. 72846, 72848 (Nov. 13, 2020); Fin. Factors in Selecting Plan Invs., 85 Fed. Reg. 39113, 39115-16 (proposed June 30, 2020).

<sup>47</sup> 86 Fed. Reg. at 57,276, 57,302.



ESG factors as potentially material information for ERISA fiduciaries to consider.<sup>48</sup> The examples will serve as reminders to ERISA fiduciaries that ESG factors often do have an impact on investments.

We believe the Proposed Rule better aligns the duties of ERISA fiduciaries with the perspectives and interests of plan beneficiaries and participants. An increasing number of retail investors (many of whom are likely to also have ERISA-covered retirement plans) consider ESG factors—and climate change in particular—to be material to their investment decisions.<sup>49</sup> The current rule, in contrast, discourages consideration of such factors in investment decision-making, which risks placing ERISA fiduciaries at odds with the beneficiaries and participants they are tasked with protecting.

Similarly, we support the DOL’s amendments to the tie-breaker rule. The current rule permits ERISA fiduciaries to consider the collateral benefits between two investments only if the fiduciaries are “unable to distinguish” between two investments and investment courses of action based on pecuniary factors.<sup>50</sup> As a practical matter, it may be unclear under what circumstances, if any, two investment courses of action could meet the current rule’s “unable to distinguish” standard.<sup>51</sup> The Proposed Rule, in contrast, recognizes that two investments or investment courses of action can serve beneficiaries’ financial interests equally and be equally appropriate.<sup>52</sup> In those circumstances, ERISA fiduciaries should be able to employ the tie-breaker rule. Under the Proposed Rule, beneficiaries will remain protected by virtue of their financial interests being equally served (a point the Proposed Rule makes explicit by prohibiting pursuit of collateral benefits at the expense of financial returns). And, ERISA fiduciaries should have some discretion to pursue collateral benefits, which may include ESG goals.

We also support the DOL’s proposed requirement that ERISA fiduciaries disclose the collateral benefits of QDIAs and other designated investment alternatives that are chosen through the tie-breaker rule. Plan participants and beneficiaries should have information about whether an individual plan that they can choose espouses collateral benefits that they may or may not endorse. This may further incentivize plan participants who have not specified an asset allocation

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<sup>48</sup> 86 Fed. Reg. at 57,276-277, 57,302.

<sup>49</sup> Forum for Sustain. & Resp. Inv., *2020 Rep. on U.S. Sustain. & Impact Inv. Trends* (2020), [https://www.ussif.org/files/Trends/2020\\_Trends\\_Highlights\\_OnePager.pdf](https://www.ussif.org/files/Trends/2020_Trends_Highlights_OnePager.pdf); Sean Collis & Kristen Sullivan, *Advancing ESG Inv.: A Holistic Approach for Inv. Mgmt Firms*, Harv. L. School Forum on Corp. Gov. (Mar. 11, 2020), <https://tinyurl.com/vahuxfy8>; Morgan Stanley Inst. For Sustain. Inv., *Sustain. Signals: Individ. Inv. Interest Driven by Impact, Conviction & Choice 2* (2019), <https://tinyurl.com/tzjut9ts>.

<sup>50</sup> 29 C.F.R. § 2550.404a-1(c)(2).

<sup>51</sup> See Proskauer Rose, *DOL’s Latest ESG Proposal: The More Things Change, the More They Stay the Same* (Nov. 22, 2021), <https://www.proskauer.com/blog/dols-latest-esg-proposal-the-more-things-change-the-more-they-stay-the-same> (“Under the current rule, ‘non-pecuniary’ factors could only be considered as a ‘tiebreaker’ if the applicable investments could not be distinguished based on ‘pecuniary factors’ alone, a very difficult standard to meet in practice.”).

<sup>52</sup> 86 Fed. Reg. at 57,278.

to be more proactive in selecting the funds to which their contributions are directed, rather than simply defaulting to designated alternatives.

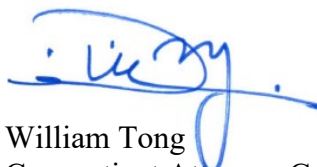
**III. CONCLUSION**

We appreciate the opportunity to comment on this important proposal. For all of the reasons discussed above, we support the Proposed Rule and encourage the DOL to adopt it.

Sincerely,



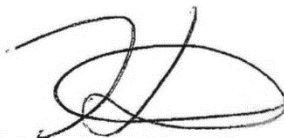
Rob Bonta  
California Attorney General



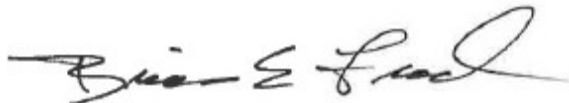
William Tong  
Connecticut Attorney General



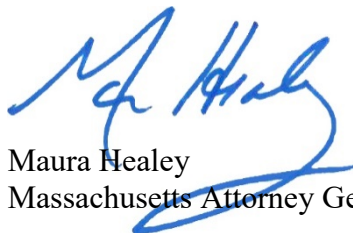
Kathleen Jennings  
Delaware Attorney General



Karl Racine  
District of Columbia Attorney General



Brian E. Frosh  
Maryland Attorney General



Maura Healey  
Massachusetts Attorney General



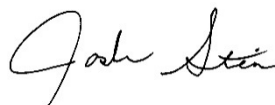
Keith Ellison  
Minnesota Attorney General



Hector Balderas  
New Mexico Attorney General



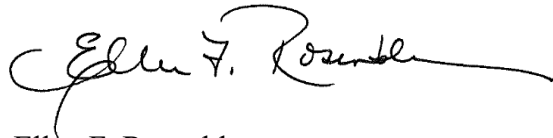
Letitia James  
New York Attorney General



Joshua H. Stein  
North Carolina Attorney General

December 13, 2021

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A handwritten signature in black ink, reading "Ellen F. Rosenblum". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ellen F. Rosenblum  
Oregon Attorney General

A handwritten signature in black ink, reading "Thomas J. Donovan, Jr.". The signature is stylized and cursive, with a prominent initial "TJ" and a long horizontal stroke.

Thomas J. Donovan, Jr.  
Vermont Attorney General