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December 13, 2021

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted electronically via www.regulations.gov

Re: Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)

Dear Acting Assistant Secretary Khawar:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates this opportunity to comment on the Employee Benefits Security Administration (“EBSA”), U.S. Department of Labor’s (“the Department” or “DOL”) Notice of Proposed Rulemaking: *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, published at 86 Fed. Reg. 57272 (October 14, 2021) (the “Proposal” or “NPRM”). The Proposal would repeal and supplant two recent rulemakings: Financial Factors in Selecting Plan Investments, RIN 1210-AB95, 85 Fed. Reg. 72846 (November 13, 2020) (the “Financial Factors Rule”), and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210-AB91, 85 Fed. Reg. 81658 (December 16, 2020) (the “Proxy Voting Rule”).

The NCCMP is the only national organization devoted exclusively to protecting the interests of multiemployer plans, as well as the unions and the job-creating employers of America that sponsor them, and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusted by labor and management trustees.

Summary of Comments

With very few reservations, the NCCMP supports and applauds the approach taken by the Department in its NPRM. Unlike the Financial Factors and Proxy Voting Rules, the Proposal takes a balanced and uniform approach to plan investment decisions that neither manifests a bias against certain types of investment considerations based on how they are labeled nor incorporates grossly inaccurate presumptions against an entire class of investment-related decisions. Although the Financial Factors Rule represented a significant and positive retreat from the radical and onerous Notice of Proposed Rulemaking upon which it was based, 85 FR 39113 (June 30, 2020), its terminology and documentation requirements continued to reflect an anachronistic and unsupported bias against particular investment considerations merely because they are characterized as reflecting environmental, social, or governance (“ESG”) principles. Similarly, the Proxy Voting Rule also represented a positive retreat from the extreme and biased misconceptions reflected in its own notice of proposed rulemaking, 85 FR 55219 (Sept. 4, 2020). Nevertheless, it continued to reflect an unsupported bias against the voting of shares in material corporate matters.

Furthermore, both the prior rulemaking and the earlier sub-regulatory guidance reflected a presumption that decisions regarding the exercise of the rights appurtenant to the ownership of shares are different in kind from other investment decisions. By consolidating the investment and proxy voting regulations into a single rulemaking, the Department has demonstrated its appropriate acknowledgement that the rules applicable to plan investment decisions should be uniform and consistently applied.

As discussed in more detail below, while NCCMP supports the approach taken by the Department in the NPRM, we respectfully propose the following changes:

- *Consideration of ESG Factors.* NCCMP suggests that the example in proposed § 2550.401a-1(b)(4)(ii) be clarified to make clear the risk to shareholder assets posed by civil and criminal penalties. NCCMP also suggests that additional examples be added to § 2550.401a-1(b)(4) to demonstrate the expansive nature of material factors that fiduciaries may consider when making investment choices. Further, NCCMP encourages the Agency to focus its review of the research on the economic effects of ESG investing as conducted by organizations with professional experience and expertise in these issues.
- *Tiebreakers.* Multiemployer plans differ from other plans in the source and nature of their funding. Employer contributions to multiemployer plans are essential to the plans’ financial wellbeing. Under certain facts and circumstances, NCCMP believes that a plan may demonstrate that contributions derived from investments provide a direct benefit to the plan and its participants and beneficiaries. Accordingly, we suggest that proposed § 2550.401a-1(c)(3) be modified to include contributions as an example of a permissible investment consideration.

- *Self-Directed Defined Contribution Plans.* We suggest that the Agency revisit the disclosure requirements for redundancy in light of existing disclosure requirements.
- *Proxy Voting and Exercise of Shareholder Rights.* We suggest that proposed § 2550.404a-1(d)(2)(ii)(C) be clarified to be consistent with general investment rules of allowing for consideration of peripheral factors as tiebreakers.

Consideration of ESG Factors

The NCCMP supports the premise underlying the Proposal, namely, that consideration of relevant financial factors should not be discouraged simply because they have a particular label. This is particularly the case where the basis for discouraging such consideration is demonstrably false and contradicted by the U.S. and global financial markets, practices of fiduciaries, modern investment theory and common sense. Thus, so-called ESG factors are no different from any other investment consideration. How they apply to an individual investment decision must be considered under the facts and circumstances of that decision, just like any other potentially relevant consideration.

The examples in proposed § 2550.401a-1(b)(4) are helpful in emphasizing the economic import of investment considerations that may be characterized as ESG factors. We suggest two changes. First, in proposed § 2550.401a-1(b)(4)(ii), we suggest deleting the phrase “avoidance of criminal liability” and replacing it with “exposure to criminal and civil liability”. As noted in NCCMP’s October 5, 2020 comment letter¹ on the Proxy Voting Proposed Rule, public issuers had paid more than \$546 billion in civil and criminal penalties since 2000. The monies paid represent shareholder assets that they will never have access to, and a significant risk issue for shareholders to be concerned about. So it is really an issue of exposure, not avoidance.

Second, additional examples are warranted to demonstrate the expansive nature of material factors that fiduciaries may consider, and in fact always have. For example, we suggest adding to § 2550.401a-1(b)(4) the following sub-paragraphs:

- (iv) Material risks identified by the issuer(s) in their filings with the U.S. Securities and Exchange Commission, other regulatory agencies or governmental bodies; and
- (v) Other quantitative, qualitative or other factors identified by the fiduciaries as relevant to the analysis of investments or the investment courses of action.

We also suggest ending § 2550.401a-1(b)(2)(ii)(C) at “the objectives of the plan”, and removing “, which may often require an evaluation of the economic effects of climate change and other

¹ The National Coordinating Committee for Multiemployer Plans, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00249.pdf>, page 15.

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environmental, social, or governance factors on the particular investment or investment courses of action.” This wording is unnecessary given the addition of § 2550.401a-1(b)(4).

As the Department rightly concludes, most studies evaluating so-called ESG investing conclude that it has a positive effect. Furthermore, on a more granular level, arbitrarily discouraging the consideration of relevant ESG factors merely because of their labels will necessarily have a deleterious effect on plan investments overall.

Additionally, while the NCCMP appreciates the Agency’s efforts to provide a balanced review of the research on the economic effects of ESG investing, it is important to note that not all research is created equal. Some of the reports cited in the NPRM rely on deeply flawed research, which significantly undercuts the conclusions of those reports. We encourage the Department to focus on the more credible sources of both peer reviewed academic research, but much more importantly, on the comment letters filed with the Department from the CFA Institute², investment managers³,

² CFA Institute, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00620.pdf>.

³ BlackRock, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00701.pdf>; TIAA, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00580.pdf>; State Street Global Advisors, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00580.pdf>; Lazard Asset Management, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00591.pdf>; Putnam Investments, July 29, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00485.pdf>; Franklin Templeton, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00604.pdf>; T. Rowe Price, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00581.pdf>; CalStrs, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00708.pdf>; Voya Financial Inc., July 29, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00540.pdf>; and BNY Mellon, July 29, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00513.pdf>.

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industry trade groups⁴, standard setting organizations⁵, and other organizations⁶ with actual professional experience and expertise in these issues. Collectively, all of these letters went into great detail rebutting the erroneous assertions that the Financial Factors Proposed Rule was built upon, and that the Final Rule embraced to varying degrees. Their letters make clear that the fundamental principle of performance is foremost in the minds of these financial market participants as they consider ESG factors. Two additional perspectives on the material nature of ESG issues have since come out from within the U.S. Government itself, specifically from the Commodity Futures Trading Commission⁷ and the Financial Stability Oversight Council (FSOC)⁸, which should also inform the Department.

To the extent that studies on the effect of considering ESG factors may be mixed, that is far from an indictment of ESG investing. Rather, it is proof that investing is a complicated endeavor that cannot be encapsulated on a bumper sticker. Over particular periods, specific investment considerations may be in or out of favor. Far from being a feature unique to ESG investing, this is common to the full range of relevant investment considerations, and serves to demonstrate the need to make thoughtful and reasoned investment decisions. As the Department is careful to note, impeding the ability of plan fiduciaries to make investment decisions because of arbitrary labels attached to certain appropriate considerations is affirmatively harmful to the interests of plan participants and beneficiaries. Simply put, Congress never intended for ERISA to second guess the investment decisions of the fiduciaries, but instead provided a broad framework to support a prudent investment decision-making process.

⁴ SIFMA, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00618.pdf>; Investment Company Institute, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00638.pdf>; and Managed Funds Association and the Alternative Investment Management Association, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00689.pdf>.

⁵ Sustainability Accounting Standards Board, July 29, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00144.pdf>; The Forum for Sustainable and Responsible Investment (US SIF), July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00709.pdf>; and Principles for Responsible Investment, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00619.pdf>.

⁶ Morningstar, July 29, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00486.pdf>.

⁷ Commodity Futures Trading Commission, Managing Climate Risk in the U.S. Financial System, Release 8234-20, September 9, 2020. Accessed at <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

⁸ Financial Stability Oversight Council (FSOC), Report on Climate Related Financial Risk, October 21, 2021, accessed at <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

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We also suggest that the Department take note of the numerous efforts by the investment management industry⁹ and the U.S. Securities and Exchange Commission¹⁰ to address the evolving analytical and reporting framework, as well as product disclosure requirements for the growing ESG market.

Tiebreakers

The NCCMP also supports the restoration of the “tiebreaker” or “all things being equal” rule to its original form. As the NCCMP noted in its comments¹¹ on the Financial Factors Rule’s NPRM, that proposal effectively eliminated the tiebreaker principle by defining “equal” in such a perversely narrow way as to ensure that the rule would never apply. Although the final Financial Factors Rule backed away from that overly rigid definition of “equal” in its explanation, it continued to use the loaded phrase “economically indistinguishable” as the test for whether two investment alternatives are equal. Additionally, it also continued to require an extraordinary and unnecessary level of additional documentation, manifesting a continuing skepticism and jaundiced view of the use of legitimate tiebreakers in making investment decisions.

The Proposal correctly and appropriately acknowledges that, in the context of a balanced and well-diversified investment portfolio, “equal” must be determined in the context of the portfolio as a whole. Furthermore, it acknowledges the legitimacy of external considerations, particularly those that may bring collateral benefits to the participants and beneficiaries in the plan making the investment.

The Proposal adds a helpful safe harbor for the application of tiebreakers, which codifies the tiebreaker rule in a way that is clear and understandable. Although it incorporates the general fiduciary principles applicable to any investment decision, its inclusion as a specific safe harbor eliminates any doubt that collateral considerations that do not subordinate the interests of a plan’s participants and beneficiaries are permissible. For this reason, it is our view that any redundancy is outweighed by the benefit of the provision.

⁹ For example, CFA Institute, Global SG Disclosure Standards for Investment Products, November 1, 2021, accessed at <https://www.cfainstitute.org/-/media/documents/ESG-standards/Global-ESG-Disclosure-Standards-for-Investment-Products.pdf>; CFA Institute, Climate Change Analysis in the Investment Process, September 11, 2020, accessed at <https://www.cfainstitute.org/-/media/documents/article/industry-research/climate-change-analysis.pdf>; and CFA Institute, Future of Sustainability in Investment Management: From Ideas to Reality, 2020, accessed at <https://www.cfainstitute.org/-/media/documents/survey/future-of-sustainability.pdf>.

¹⁰ U.S. Securities and Exchange Commission, The Division of Examinations’ Review of ESG Investing, April 9, 2021, accessed at <https://www.sec.gov/files/esg-risk-alert.pdf>; and U.S. Securities and Exchange Commission, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues, March 4, 2021, accessed at <https://www.sec.gov/news/press-release/2021-42>.

¹¹ The National Coordinating Committee for Multiemployer Plans, July 30, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00594.pdf>.

The NCCMP is also entirely supportive of the Department's judgment to remove the unnecessary and redundant additional documentation requirements for the use of tiebreakers. Financial decisions by plan fiduciaries are already subject to documentation requirements, and, as the Department correctly points out, singling out such considerations for special documentation requirements inappropriately suggests that they are inherently suspect.

Additionally, the NCCMP generally agrees that fiduciaries should be able to consider external considerations of collateral benefits that are in the best interests of a plan's participants and beneficiaries, or otherwise reflect their shared values or interests. This is true of both examples that the Department identified, specifically participant's jobs and contributions to the plan.

As the NCCMP explained in its comment¹² on the Financial Factors Rule's NPRM, multiemployer plans differ in a fundamental way from other plans as the result of the source and nature of their funding. Further, multiemployer plans are able to make investments that not only earn competitive risk-adjusted returns, but that also put their members to work, which generates new contributions to the plan. Making such investments is consistent with (1) trustees acting "solely in the interests of the participants and beneficiaries" and the "exclusive purpose" requirement of "providing benefits", and (2) the prohibited transaction provision of 29 USC §1106.

Multiemployer pension plans receive plan contributions principally based on the hours worked by individual participants. In general, if an investment puts a participant to work, the plan receives contributions that it would not have otherwise had, the participant earns a pension benefit, and the plan receives contributions that pay for the normal cost of the benefit accrued as a result of the current work. Excess contributions not needed to fund the normal cost can be used to pay the benefits of current retirees and/or used to reduce the unfunded accrued liabilities of the plan. For a given investment and project, a reasonable estimate can be made with respect to the person-hours and contributions that will be generated by that trade/craft.

Analysis of DOL Form 5500 data reveals the material and financial importance of contributions to multiemployer pensions. The chart below demonstrates that, over the past four years for which multiemployer pension Form 5500 data is available, between 35% and 37% of the contributions provided by multiemployer plans were needed to meet the normal cost of the plan. This results in between 63% and 65% of the contributions being available to meet the vested accrued liabilities of the plan.

¹² Ibid, 5-7.

Multiemployer Pension Data (Source: U.S. Department of Labor, Form 5500)

Plan Year Ending	2015	2016	2017	2018
Number of Multiemployer Plans	1,296	1,242	1,231	1,220
Assets (\$ Billions)	\$474.5	\$480.9	\$527.6	\$523.3
Benefits Paid (\$ Billions)	\$41.0	\$42.0	\$45.5	\$43.9
Plan Contributions (\$ Billions)	\$27.9	\$28.3	\$30.0	\$32.3
Normal Cost (\$ Billions)	\$9.8	\$10.5	\$11.0	\$11.6
Normal Cost as a % of Contributions	35.1%	37.1%	36.7%	35.9%
% of Contributions Available for Accrued Unfunded Liabilities	64.9%	62.9%	63.3%	64.1%

The DOL Form 5500 data supports the fact that the vast majority of contributions are used to pay down the unfunded accrued liabilities of the plan which further demonstrates the material impact of contributions, and that they are (1) solely in the interest of the participants and beneficiaries¹³ and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan¹⁴ and (2) consistent with “an ‘eye single’ to maximizing the funds available to pay retirement benefits.”¹⁵

We believe that it is possible for plans, depending on the specific facts and circumstances of an investment and the related impact on the workforce, to demonstrate that contributions derived from investments provide a direct financial benefit to a plan, its participants and beneficiaries. As such, we believe that the Final Rule should modify § 2550.401a-1(c)(3) to provide plan contributions as an example of “collateral benefits other than investment returns”.¹⁶

Self-Directed Defined Contribution Plans

The NCCMP agrees that disclosure of peripheral investment considerations in self-directed defined contribution plans should be full, clear, and complete in the materials provided to participants. We would, however, expect such disclosure to be provided even in the absence of the language in proposed § 2550.404a-1(c)(3). The disclosure requirements under 29 C.F.R. §§ 2550.404a-5 and 2550.404c-1(b)(2)(B)(2) already appear to require such disclosure. For qualified default investment alternatives (“QDIAs”), there are the additional disclosure

¹³ 29 USC § 1104(a)(1)

¹⁴ 29 USC § 1104(a)(1)(i) and (ii)

¹⁵ *Donovan v. Bierwirth*, supra. 680 F.2d at 271.

¹⁶ Additionally, in evaluating the economic impact of the Proposal and of any final regulations, the Department is understating their positive economic benefits by not accounting for the effects of encouraging investments that will result in increased plan contributions.

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requirement under 29 C.F.R. § 2550.404c-5(c)(3), (d)(3), which would also provide for such disclosure.

The NCCMP also supports the Department's decision to eliminate the prohibition on using otherwise lawful and appropriate tiebreakers in the selection of QDIAs. As the Department notes in the NPRM, such an arbitrary prohibition would not provide any benefit to a plan's participants and beneficiaries, and would likely result in harm.

Proxy Voting and the Exercise of Shareholder Rights

The NCCMP is highly supportive of the Department's decision to eliminate the unnecessary burdens on proxy voting imposed by the 2020 Proxy Voting Final Rule as well as the decision to eliminate the safe harbors for not voting shares.

NCCMP's comment letter¹⁷ to the Proxy Voting Proposed Rule provided significant evidence of the material nature of every matter that an issuer brings to shareholders for a vote, and addressed the numerous incomplete, inaccurate, erroneous, and unsupported assertions that served as the foundation for the Proxy Voting Proposed Rule, including those related to the cost of voting and ESG issues. The Final Rule was equally flawed.

The Department also received numerous comment letters providing evidence of the incorrect and fatally flawed analysis used in the Proxy Voting Proposed Rule, including from the CFA

¹⁷ The National Coordinating Committee for Multiemployer Plans, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00249.pdf>.

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Institute¹⁸, investment managers¹⁹, industry trade groups²⁰, standard setting organizations²¹, and the Securities and Exchange Commission²², all of whom have deep professional experience and expertise in the issues of proxy voting.

The Proposal does, however, continue to include some potentially problematic language, as follows:

(ii) When deciding whether to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must:

* * *

(C) Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any other objective, *or*

¹⁸ CFA Institute, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00300.pdf>.

¹⁹ BlackRock, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00279.pdf>; TIAA, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00266.pdf>; State Street Global Advisors, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00221.pdf>; Fidelity Investments, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00264.pdf>; The Vanguard Group, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00239.pdf>; Wellington Management Company LP, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00234.pdf>; Legal and General Investment Management America, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00182.pdf>; Manulife Investment Management, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00291.pdf>; Federated Hermes, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00262.pdf>; and T. Rowe Price, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00268.pdf>.

²⁰ SIFMA, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00261.pdf>; and Investment Company Institute, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00287.pdf>.

²¹ The Forum for Sustainable and Responsible Investment (US SIF), October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00288.pdf>; and Principles for Responsible Investment, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00267.pdf>.

²² U.S. Securities and Exchange Commission, Commissioner Allison Herren Lee and Caroline Crenshaw, October 5, 2020, accessed at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00299.pdf>.

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promote benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries;

Proposed § 2550.404a-1(d)(2)(ii). Our concern with this language is that it appears to be inconsistent with the general investment rules. Where a particular exercise of a shareholder right would not be expected to directly affect shareholder value, this provision could be read to prohibit such an exercise. By contrast, the general approach to investment decisions by fiduciaries allows for the consideration of peripheral factors as tiebreakers. Such a distinction is not warranted and therefore, we suggest amending proposed § 2550.404a-1(d)(2)(ii)(C) by deleting “, or promote benefits or goals unrelated to those financial interests of the plan’s participants and beneficiaries”.

Summary and Conclusion

Although, as noted above, there are some ways in which the NPRM may be improved, the NCCMP appreciates and supports the commonsense approach taken by the Department. We believe that it bolsters the general principles applicable to plan investments under ERISA’s fiduciary standards, without imposing either undue and arbitrary burdens or unfounded and anachronistic biases on fiduciary decision-making. Furthermore, it provides a much-needed step towards consistency in the rules applicable to all fiduciary decisions.

Regards,



Michael D. Scott
Executive Director