American Bankers Association

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December 13, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on proposed amendments (Proposal) [2] to the Department's Investment Duties regulation (Regulation)[3] that are intended to clarify the fiduciary duties of prudence and loyalty under the Employee Retirement Income Security Act of 1974 (ERISA). The Proposal is intended to address uncertainties of the Regulation's application to investment decision-making and proxy voting activity that involve consideration of environmental, social, or governance (ESG) factors, including climate change-related factors and financial risks.[4] Specifically, the Proposal would amend the regulatory standards of a fiduciary's selection of an "investment and investment course of action"[5] – including the selection of qualified default investment alternatives (QDIAs), exercising shareholder rights (such as proxy voting), and the use of written proxy voting policies and guidelines – to expressly authorize a fiduciary's consideration of ESG factors as part of a fiduciary's "appropriate consideration" of facts and circumstances that are relevant to such investments or investment courses of action.[6]

As ERISA fiduciaries and services providers to plans, our members have a great interest in the proposed amendments to the Regulation. We support the direction of the Department to make these rules more principles-based and to remove unnecessary barriers for fiduciaries to consider as part of a prudent process for ESG considerations.[7] In particular, we appreciate the removal of

[1] The American Bankers Association is the voice of the nation's $23.3 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits, and extend nearly $11 trillion in loans. Learn more at www.aba.com.
[2] *See* Department of Labor, Employee Benefits Security Administration, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 *Fed. Reg.* 57,272 (2021) (Proposal).
[3] *See* Investment Duties, 29 C.F.R. § 2550.404a-1 (2021).
[4] Proposal, 86 *Fed. Reg.* at 57,276.
[5] For purposes of this letter, the term "investment" shall include both investment *and* investment course of action.
[6] *See* 29 C.F.R. § 2550.404a-1(b)(1)(i) (proposed).
[7] A principles-based approach is consistent with ABA's ESG mission/policy statement: "Banks should be free to lend to, invest in, and generally do business with any entity or activity that is legal, without government interference,

the "pecuniary" requirement in the current rule, as well as the limitation on QDIAs in considering any factors, including ESG factors that may be prudent but which would not necessarily meet the Regulation's "pecuniary" standard.

To further the goal of allowing fiduciaries to consider prudently ESG factors in investment decision-making and proxy voting activity, we offer some comments and suggested amendments to help make this regulatory scheme consistent over administrations, to clarify compliance requirements, and to minimize potential operational risks. We believe that these recommended modifications would (i) achieve the Department's goal to clarify the Regulation's requirements, (ii) provide compliance certainty, (iii) minimize additional regulatory burdens and costs, and (iv) avoid unintended adverse consequences for fiduciaries, plans, and retirement investors, while still achieving the Department's regulatory objectives.

For ease of reference, we have divided our comments and recommendations below as follows: Part I (recommendations for Proposal's ESG investing provisions), Part II (recommendations for Proposal's proxy voting provisions), and Part III (recommendation regarding Proposal's applicability date).

I. <u>ABA Recommendations for Proposal's ESG Investing Provisions</u>.

The Proposal would amend the ESG investing portion of the Regulation by making "clear that climate change and other ESG factors are often material and that in many instances fiduciaries should consider climate change and other ESG factors in the assessment of investment risks and returns."[8] In particular, the amended Regulation among other things would:

(i) expressly include climate change and other ESG factors as part of the "appropriate consideration" to those facts and circumstances a fiduciary knows, or should know, is "relevant to the particular investment,"

(ii) permit a "prudent" fiduciary to consider "[c]limate change-related factors," "governance factors," and "workplace practices"[9] as part of the evaluation of an investment that is "material" to the risk-return analysis,

(iii) eliminate the Regulation's restrictions on the selection of QDIAs by applying the same fiduciary standard to a QDIA as applied to other investment alternatives, and

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and that banks should also be able to choose not to engage in lending, investing or other engagement so long as they do not violate fair lending, anti-discrimination or other applicable laws."

[8] Proposal, 86 *Fed. Reg.* at 57,276.

[9] "Climate change-related factors" would include "a corporation's exposure to real and potential economic effects of climate change including exposure to the physical and transitional risks of climate change and the positive or negative effect of Government regulations and policies to mitigate climate change." Proposal, paragraph (b)(4)(i), 86 *Fed. Reg.* at 57,302. "Governance factors" would include such matters as board composition and executive compensation. "Workplace practices" would include such matters as workforce diversity and inclusion and other drivers of employee hiring, promotion, and retention. *See* Proposal, paragraphs (b)(4)(ii) and (iii), 86 *Fed. Reg.* at 57,302.

(iv) amend the "tie breaker test" by permitting a fiduciary to select an investment based on collateral benefits other than investment returns, where competing investments equally serve the financial interests of the plan.[10]

The amended Regulation would omit the requirement that the evaluation of an investment be based solely on so-called "pecuniary" factors.[11]

President Biden's January 20, 2021, Executive Order[12] directed the Department to review this rule in furtherance of the climate policies set forth therein. Many of the proposed amendments are in keeping with those policies by permitting fiduciaries to consider ESG factors and investment strategies consistent with their duties under ERISA. However, we have concerns with several of the proposed amendments, which, if enacted as proposed, would deviate from the principles-based rules governing the prudent investment process. Therefore, with respect to the ESG investing portion of the Proposal, we recommend that the Department: (i) allow, but not require, the consideration of ESG factors in investment decision-making, (ii) avoid express references in proposed paragraph (b)(4) to specific, enumerated ESG factors, (iii) incorporate consistent language in the prudent safe harbors, and (iv) remove or amend the disclosure requirements in the collateral benefit safe harbor.

A. Express Requirement to Evaluate the Economic Effects of ESG Investments:

Allow, but do not require, the consideration of ESG factors as part of the investment decision-making process in proposed (b)(2)(C).

In the preamble to the Proposal and in proposed regulatory changes, the Department largely rectifies the perceived imbalance in the Regulation that has inappropriately restricted the prudent consideration of ESG factors and investment strategies. We believe an ERISA fiduciary should have the discretion to consider any factor that it may prudently deem relevant to a particular investment, such as diversification, liquidity, current return relative to expected cash flow, or projected returns. We believe that this is consistent with the statutory requirements of prudent investing under ERISA.[13]

An analysis of projected returns is an exercise that may encompass the consideration of a number of elements related to the investment, including ESG factors. However, although ESG factors may be prudent to consider, such factors are potentially no more or less relevant than other non-ESG factors. The proposed language in paragraph (b)(2)(C) would seemingly impose a requirement to consider "the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action."[14]

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[10] Proposal, 86 *Fed. Reg.* at 57,302-57,303. However, if the collateral benefits form the basis for an investment selection, then the fiduciary will need to disclose the specific collateral benefits considered. *See id.* at 57,303.
[11] *See* Regulation, 29 C.F.R. § 2550.404a-1(c).
[12] Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis'' (January 20, 2021).
[13] *See* ERISA, 29 U.S.C. § 1104(a) (prudent man standard of care).
[14] Proposal, 86 *Fed. Reg.* at 57,302.

Therefore, in an effort to establish a principles-based set of rules that are evergreen and neutral on their face, we recommend that the Department revise the subsection as follows:

> "The projected return of the portfolio relative to the funding objectives of the plan, which would not preclude an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action as the fiduciary prudently determines is appropriate under the circumstances."

This modified proposed amendment would permit fiduciaries to consider these factors appropriately while not imposing any requirement to do so if not prudent, nor imply a need to document why these factors were not considered.

B. Express Identification and Description of ESG Factors:

Avoid references to specific, enumerated ESG Factors in the text of proposed paragraph (b)(4)).

ABA members appreciate the intention to introduce regulatory clarity and assurance that ERISA fiduciaries may prudently consider ESG factors. We believe that although such guidance is helpful to emphasize the prudence of considering ESG factors, it should be incorporated into the preamble to the final rule and not into proposed paragraph (b)(4). Highlighting specific factors in paragraph (b)(4), even as a non-exclusive list, may unintentionally impose regulatory bias and restrict decisions made under evolving investment theories. For example, years from now a fiduciary may wish to consider environmental factors not currently conceived that nonetheless are relevant to the risk-return analysis, even if not specifically climate change-related. In such a case, would the fiduciary be obliged to meet heightened standards to consider those ESG factors that are not specifically recognized in the regulatory language?

With the intention to establish these factors as "no different than other 'traditional' material risk-return factors, and to remove any prejudice to the contrary,"[15] the language may inadvertently do just that with regard to those factors not listed. Future administrations may decide to tack on to this regulatory list other factors that may be in favor at that time, including those that may be inconsistent with those already listed. Ultimately, an express list of factors could undermine the principles-based approach that has worked well for many years and further present a liability/litigation risk to fiduciaries that either consider factors not listed, or do not consider factors that are listed. We recommend, therefore, that the Department refrain from listing ESG factors in the proposed paragraph (b)(4).

[15] *Id.* at 57,277.

C. Regulation's Disclosure Requirements:

Remove or amend the disclosure requirements in the collateral benefit safe harbor contained in proposed paragraph (c)(3).

The Department's incorporation of the collateral benefit concept into paragraph (c)(3) gives regulatory guidance to fiduciaries that such discretion is not a *per se* violation of the duty of loyalty. In order to take advantage of this provision, the fiduciary must ensure that the collateral-benefit characteristic of "the fund, product, or model portfolio is prominently displayed in disclosure materials" so that plan participants have sufficient information to assess the designated investment alternative.[16]

Although we appreciate the regulatory clarity on the collateral benefit doctrine, we urge the Department to remove the disclosure requirement for individual account plans. We believe the existing securities and other relevant laws governing disclosure are sufficient to give participants the information they need to make informed investment choices. No other loyalty decision in the ERISA framework requires such disclosure; hence, we are concerned that this anomalous instance will be both confusing to and potentially unduly influential on plan participants. Specifically, participants may inadvertently interpret the disclosure to mean that the employer wishes them to invest in the alternative. Ultimately, with the risk management concerns around such disclosure, the provision may not be as useful as it could be without the disclosure requirement.

If the Department decides to keep the disclosure requirement in the rule, we recommend a focus on reasonably apparent disclosure of the characteristics of the alternative that may result in a collateral benefit. This amended disclosure would enhance the ability for fiduciaries to ensure that third parties, which are often the ones providing the materials to participants, are meeting the requirements. Our recommended changes also provide some examples of such disclosure, either through the alternative investment's name, summary strategy or salient terms description, fund fact sheet, or in another writing:

> However, if the plan fiduciary makes such a selection in the case of a designated investment alternative for an individual account plan, the plan fiduciary must ensure that the characteristic(s) of the alternative that the fiduciary expects to result in a collateral benefit is reasonably apparent from the disclosure materials provided to participants and beneficiaries (*e.g.*, referenced in the alternative's name, the strategy description, salient terms description, or a fund fact sheet) or described to participants and beneficiaries in another writing.

[16] Proposal, 86 *Fed. Reg.* at 57,303.

D. Description of Investment Analysis Process:

1. Incorporate consistent language on the investment analysis process in proposed paragraphs (b)(1), (b)(4), and (c)(2).

The proposal includes an existing safe harbor in paragraph (b)(1), as well as two new sections describing how a fiduciary can meet its duties of prudence in paragraph (b)(4) and loyalty in paragraph (c)(2) when analyzing investment choices. In the prudence safe harbor (paragraph (b)(1)(i)), the fiduciary may consider facts and circumstances that "are *relevant* to the particular investment or investment course of action involved."[17] However, in paragraph (b)(4), the fiduciary may consider factors which are "*material* to the risk-return analysis" and in paragraph (c)(2), must consider factors that are "*material* to investment value."[18] Although there is precedent for the concept of relevance to be akin to that of materiality,[19] we are concerned that the latter term may denote an expectation of quantitative minimums, similar to what governs "materiality" in the federal securities laws.[20]

In order to address these concerns, we request that the Department either employ the "relevance" concept throughout the rule or, if finalizing the language as proposed, explicitly acknowledge the equality of those two terms either in the preamble or in the Regulation itself. We would like to avoid a potential divergence in the retirement industry's understanding of those terms where factors that may be relevant may not be material or vice versa.

2. Amend the provision on analysis of "reasonably available alternatives" in (b)(2)(i) to focus on a "reasonably selected set of alternatives."

The proposal retains language in (b)(2)(i), amended in 2020, that requires fiduciaries to consider various risks and other considerations "associated with reasonably available alternatives with similar risks." Fiduciaries do not always have the resources to conduct full-fledged research on all available alternatives, potentially a large universe of options, and typically will identify a limited selection from which to compare and analyze. We, therefore, urge the Department to amend the provision in the following way, which will preserve the fiduciary's ability to manage the investments in a prudent and reasonable fashion, as allowed under the general principles of ERISA and the prudent man rule:

> A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action (a) compared to the opportunity for gain (or other return) associated with a reasonably selected set of

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[17] Proposal, 86 *Fed. Reg.* at 57,302. [Emphasis added.]
[18] *Id.* at 57,302-57,303.
[19] *See* Department of Labor, Field Assistance Bulletin (FAB) 2018–01 (April 23, 2018).
[20] *See* Securities and Exchange Commission, Staff Accounting Bulletin: No. 99 – Materiality (1999), available at https://www.sec.gov/interps/account/sab99.htm.

available alternatives with similar risks, or (b) based on other prudently selected comparators, such as benchmarks or other market data; and

II. **ABA Recommendations for Proposal's Proxy Voting Provisions**.

In addition to addressing ESG investing, the Proposal would amend the proxy voting provisions of the Regulation by (i) deleting the statement that a fiduciary is not required to vote every proxy, (ii) eliminating the monitoring obligations when delegating the voting of proxies to an investment manager (since general prudence and loyalty obligations already impose this duty on fiduciaries), (iii) removing the two "safe harbors" that allow a fiduciary to abstain from voting, or limit voting to certain specific matters, and (iv) eliminating the requirement that obligates a fiduciary to maintain records on proxy voting activity. The Proposal's proxy voting section further would delete from the Regulation any reference to "pecuniary" and "non-pecuniary" objectives, benefits, or goals since the Proposal does not use or rely on that term.

We generally support the proposed amendments and revisions to the Regulation's proxy voting requirements since they would generally streamline the proxy voting process and administration while upholding shareholder protections. There are, however, several provisions in the Proposal that are over-prescriptive and would increase regulatory burdens and costs, in some cases creating or maintaining undue and unmanageable fiduciary liability and litigation risks without any tangible benefit to plans. Affected fiduciaries will include, among others, our bank members that act as service providers for defined contribution plans or manage collective investment funds (CIFs) on behalf of retirement investors. As with the Regulation, we remain concerned about the Department's inadvertent support of regulatory conflicts arising from possible inconsistencies with requirements and/or expectations of the Office of the Comptroller of the Currency (OCC) concerning CIF administration, as well as federal and state fiduciary law requirements applicable to bank CIFs.[21]

A. **Investment Managers of Pooled Investment Vehicles**:

Delete proposed paragraph (d)(4)(ii) and revise proposed paragraph (d)(4)(i)(B) to explicitly cover investment managers for pooled investment vehicles that hold plan assets.

Our members include banks that act as investment managers of pooled investment vehicles, (*e.g.*, sponsors, trustees, and administrators of CIFs). CIFs are widely used as investments by ERISA-governed plans (participating plans) as a means to achieve their investment objectives and for diversification of invested assets. Under the terms of the trust that establishes the CIF, the bank trustee of the CIF generally has full responsibility and authority for proxy voting (and for the exercise of other shareholder rights) with respect to all of the trust's securities and other

[21] For example, it is not clear that the OCC would agree with the Department's position in the Proposal that a national bank trustee of a CIF should, in managing the CIF's portfolio, attempt "to reconcile, insofar as possible, the conflicting [investment] policies [of plans]" – which inevitably may favor some plans over others – as this position may be inconsistent with OCC expectations regarding that bank's treatment of CIF participants. *See* 29 C.F.R. § 2550.404a-1(d)(4)(ii) (proposed).

assets. In the case of CIFs and other pooled vehicles that hold ERISA plan assets, the bank or registered investment adviser that manages the CIF or other pooled vehicle acts as an investment manager pursuant to section 403(a)(2) of ERISA with respect to the ERISA plan assets invested in that CIF or other pooled vehicle.

The Proposal would retain the Regulation's requirement that "[a]n investment manager of a pooled investment vehicle that holds assets of more than one plan may be subject to an investment policy statement that conflicts with the policy of another plan," and that in such cases, ERISA requires the manager to "reconcile, insofar as possible, the conflicting policies."[22] In the case of proxy voting, the Regulation further states that "the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle."[23] The Regulation permits the investment manager to require participating plans to accept the investment manager's investment policy as a condition of investment, however. In such instance, a fiduciary would be required to assess whether the investment manager's investment policy, including any proxy voting policy, is consistent with ERISA (including the Proposal's requirements) before deciding to retain the investment manager.

As stated in our previous comment letter, this regulatory approach does not accurately reflect industry standard practice and could result in conflicting or misinterpreted regulatory expectations.[24] We are generally not aware of any CIFs or other pooled investment vehicles that do not have their own investment objectives, guidelines, and/or policies that must be accepted as a condition for investment, since it would be completely impractical (if not impossible) for the manager of a pooled investment vehicle to comply with multiple (and potentially conflicting) investment policies. The governing documents for CIFs (and other pooled vehicles that hold ERISA assets) typically provide that the trustee or investment manager with authority to manage the assets pursuant to section 403(a)(2) has full authority to vote proxies on securities in the CIF's or other pooled vehicle's portfolio because proportionate voting of proxies may not be practical or possible.

We recommend, therefore, that the Department delete proposed paragraph (d)(4)(ii) (Rule 404a-1(e)(4)(ii) in the Regulation) in its entirety, and revise proposed paragraph (d)(4)(i)(B) to explicitly cover investment managers for pooled investment vehicles that hold plan assets. These revisions would reflect the industry standard practice followed by investment managers for CIFs and other pooled investment vehicles that hold ERISA plan assets. These changes further would be entirely consistent with ERISA and avoid the confusion arising from the language in the Regulation and in the Proposal.

[22] 29 C.F.R. § 2550.404a-1(e)(4)(ii).
[23] *Id.*
[24] *See* ABA Comment Letter responding to Department proposal, *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights* (Oct. 5, 2020).

B. Reference to "Other Shareholder Rights" in Addition to Proxy Voting:

Delete references throughout the Proposal of a fiduciary's "exercise of shareholder rights" in addition to proxy voting since such rights are distinct from proxy voting, are not substantively addressed in the Proposal, and are not necessarily tied to the economic interest of the plan or its participants and beneficiaries.

Throughout the Proposal and Regulation, reference is broadly made to the "exercise of shareholder rights" in addition to proxy voting, when in fact the requirements of both the Proposal and Regulation focus *exclusively* on proxy voting. Other shareholder rights, however, do not necessarily share the same objectives as those of proxy voting in connection with stock ownership. Moreover, the exercise of such other rights, which can include such disparate things as inspecting the issuer's corporate record books and participating in corporate actions taken by the issuer, is substantively separate and distinct from proxy voting. Decisions on corporate actions like stock splits, tender offers, exchange offers on bond issues, and mergers and acquisitions are generally not governed by proxy voting policies or undertaken with advice from proxy voting advisers. For this reason, the treatment of other shareholder rights should not be coupled with proxy voting in the regulation.

Thus, we recommend that the Department delete from the Proposal and the Regulation all references to the "exercise of shareholder rights" and focus only on proxy voting. The Department can undertake a subsequent rulemaking should it wish the amend the investment duties regulation by specifically addressing other shareholder rights.

C. Clarification of Fiduciary Duties on Proxy Voting:

Clarify in proposed paragraph (d)(3)(i) that a fiduciary may make a prudent determination not to vote every proxy, based on general fiduciary principles.

The Proposal would eliminate the Regulation's requirement that "the 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."[25] The Department states this provision could be misread to suggest that plan fiduciaries "should be indifferent" to the exercise of shareholder rights, particularly where "the cost is minimal as is typical of voting proxies."[26] Rather, according to the Department, "fiduciaries should take their rights as shareholders seriously, and conscientiously exercise those rights to protect the interests of plan participants."[27] The Department, however, further states that the removal of the requirement "does not mean that fiduciaries must always vote proxies or engage in shareholder activism."[28] Nevertheless, in order to dispel any notion that all proxies *must* be voted, we recommend that language be added at the end of proposed paragraph (d)(3)(i) to clarify that, under appropriate facts and

[25] Rule 404a-1(e)(2)(i), 29 C.F.R. § 2550.404a-1(e)(2)(ii).
[26] *Id.*
[27] Proposal, 86 *Fed. Reg.* at 57,281.
[28] *Id.*

circumstances, a fiduciary may make a prudent determination to vote or not vote a proxy based on the general fiduciary principles set forth in section 404(a) of ERISA.

D. Selection and Monitoring of Service Providers and Proxy Advisory Firms:

Simplify the provisions on the selection and monitoring of service providers and proxy advisory firms by deleting the illustrative list of services in proposed paragraph (d)(2)(ii)(E).

The Regulation provides that, as part of its duties under the current regulation, a fiduciary must exercise prudence and diligence in the selection and monitoring of any persons appointed to advise or assist the fiduciary with the exercise of voting proxies, such as in providing (i) recommendations regarding proxy votes, (ii) research and analysis, (iii) administrative services in connection with proxy voting, and (iv) recordkeeping and reporting services.[29] The Proposal would retain this regulatory requirement.[30] The Department, however, "specifically invites comments on whether these provisions are necessary and whether they may be read as creating special duties and requirements beyond what ERISA section 404(a)(1)(B) would demand."[31]

Since fiduciaries are already required under ERISA to monitor proxy voting decisions that have been delegated to a third party, the Proposal's delegation requirements appear superfluous. As we stated in our prior comment letter, it is not necessary for the Department to codify an itemized list of duties that fiduciaries routinely delegate to investment managers and proxy voting firms. In doing so, the Proposal does not address which specific types of services may be necessary or appropriate for a particular proxy voting activity. This omission may lead to confusion or uncertainty over regulatory expectations regarding any delegation of these fiduciary responsibilities to a third party. We recommend, therefore, that the Department streamline the fiduciary delegation provisions by deleting the illustrative list of services in proposed paragraph (d)(2)(ii)(E).

E. Responsibility for Voting Proxies.

Add language to proposed paragraph (d)(4)(i) to reflect that, in participant directed plans, the trustee shall be responsible for voting proxies solely as directed by plan participants.

The Proposal would retain the Regulation's provision that identifies the parties responsible for voting proxies and exercising other shareholder rights. Specifically, paragraph (e)(4)(i) of the Regulation states that the responsibility lies exclusively with the plan trustee except to the extent that (i) the trustee is subject to the directions of a named fiduciary, or (ii) the power to manage, acquire, or dispose of the assets has been delegated by a named fiduciary to an investment manager.[32] As pointed out in our prior comment letter, this section omits voting responsibility with respect to participant-directed plans (*e.g.*, through brokerage windows) that provide for

[29] *See* 29 C.F.R. § 2550.404a-1(e)(2)(ii)(F).
[30] *See* Proposal, 86 *Fed. Reg.* at 57,303.
[31] *Id.* at 57,282.
[32] *See* 29 C.F.R. § 2550.404a-1(e)(4)(i).

participant voting of proxies. The Department, therefore, should add language to this paragraph stating that, for such participant-directed plans, a trustee's responsibility for exercising proxy voting shall be in accordance with the investment directions of the relevant participants of such plan as provided under Department regulations.

III. <u>ABA Recommendation for Applicability Date of Proposal</u>:

<u>The Department should direct that the Proposal have an immediate effective date, while allowing for a compliance date at least 12 months after the effective date in order to allow fiduciaries and other affected entities the time that may be required to transition to the amended Regulation's requirements</u>.

The Proposal does not state an effective date for the amendments if enacted. We believe that plan sponsors, investment managers, proxy advisory firms, and other fiduciaries should have the flexibility and opportunity to expeditiously restructure and adjust their retirement service operations and activities to better serve their retirement customers by considering ESG-related investments and proxy voting proposals immediately upon adoption (*i.e.*, the effective date) of the Proposal. However, for some fiduciaries, it is possible that the Proposal will require a significant transitional period to review and modify their policies, procedures, and practices to conform to the amended Regulation's requirements. Fiduciaries may further need sufficient time to renegotiate contracts and arrangements with proxy advisory firms and other third parties, including reworked representations and covenants and proxy voting services.

We recommend, therefore, that the Department (i) establish the effective date immediately upon adoption of the amendments to the Regulation, with a compliance date at least 12 months after the date of final rule's publication in the *Federal Register*, and (ii) confirm that fiduciaries may comply voluntarily, in whole or in part, with the Proposal's amendments that are adopted by a final rule upon the rule's effective date, rather than upon the (later) compliance date.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned signatories at 202-663-7063 (phoebep@aba.com) or 202-663-5479 (tkeehan@aba.com).

Sincerely,

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