December 13, 2021

Fred Wong
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 Under Title 1 of the Employee Retirement Income Security Act (ERISA) RIN 1210-AC03

Dear Mr. Wong:

For the last several years, there has been increased activism in the marketplace to elevate non-pecuniary Environmental, Social and Governance (ESG) factors and climate goals over the traditional evaluation of investment risk and returns. Western Energy Alliance supported the 2020 rule because it rightfully elevated pecuniary measures above subjective, ill-defined ESG factors. The 2020 rule also helped guard against political agendas overruling the basic standard of maximizing financial returns and minimizing risks for pension plans.

By upending the protections in the 2020 rule, the proposed rule potentially elevates the subjective over market fundamentals and the political above financial analytical rigor. As such, we strongly recommend that the department not move forward with the proposed rule. Assuming DOL continues nevertheless, we believe some key aspects of the 2020 rule should be preserved such as the documentation requirement and default plan provisions, and we appreciate the opportunity to comment.

Western Energy Alliance represents 200 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

The US Oil & Gas Association is the only national association with Divisions in the states along the vital Gulf of Mexico. Because of the Gulf region's importance to our current and future domestic energy supplies, national policy debates often center on the Gulf of Mexico, making our coordination of national and regional activities an important industry asset. The most distinguishing characteristic of the US Oil & Gas Association is the strong support it receives from a membership covering the full spectrum of the domestic petroleum industry.

Our Interests in the Rule

Western Energy Alliance is providing comments to this rule as an interested stakeholder. As a trade association for the upstream petroleum industry, we do not manage pension plans nor are we directly engaged in the financial sector. Rather, our members are affected indirectly by the rule but materially when asset managers make investment decisions discriminating against the oil and natural gas sector based on non-pecuniary factors resulting largely from politicized ESG advocacy. The fact that our products are used in just about every facet of modern life speaks to their intrinsic value, and hence, their investment worthiness. Further, as recent research as shown, the fluctuations in returns to oil and natural gas investments relative to those in other sectors mean that oil and natural gas have the effect of reducing portfolio risk for investors and fund beneficiaries.[1] Any reasonable energy projection shows oil and natural gas remaining primary energy sources for many decades, with the latest Energy Information Administration projection showing petroleum "remains the most-consumed fuel" through 2050.[2]

We have observed how ESG advocacy has negatively affected the industry's access to capital over the last few years as proponents consider only a narrow view of ESG and ignore all the benefits we provide, some of which are articulated in the section below. By overturning aspects of the 2020 rule that helped ensure pecuniary factors prevail in ERISA pension funds, the proposed rule would increase uncertainty and help to advance the goal of halting investment in a sector that provides about 70% of American energy.[3] Such an outcome is not only contrary to broader ESG goals but results in such aberrations as the White House pleading with Russia and OPEC to increase their production, which is particularly counterproductive given that American oil and natural gas are produced in a sustainable manner under strict environmental controls almost completely lacking in those countries. Denying those holding defined benefit or defined contribution plans access to the portfolio investment advantages of American oil and natural gas production would not be in their best interests nor to the eminently worthy goal of providing a secure retirement for American workers, which is a better measurement of environmental justice (EJ) than most proffered by EJ advocates.

Further, shareholder activists have been pressuring companies, investors, and pension funds to make financial decisions that reflect political objectives they have been unable to achieve through the normal democratic process. Throughout the preamble to the rule, the department makes oblique references to "stakeholders" concerned about the "uncertainty" of the 2020 rule without identifying the types of stakeholders and whether their interests are merely political or if they truly are fiduciaries who were having difficulties understanding the 2020 rule. We suspect it is the former and that the department in reality is acting in the interests of activists wishing to pursue a political agenda. We remind the department that ERISA mandates that pecuniary factors are paramount over nonpecuniary interests and political agendas. We appreciate that the commitment is retained in paragraphs (a) and (b)(1), but are concerned that paragraphs (b)(2) and (b)(4) undermine that fiduciary commitment to maximize returns for pension funds by focusing so heavily on speculative climate and ESG factors.

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[1] *Fossil Fuel Divestment: A Costly and Ineffective Investment Strategy*, Prof. Daniel R. Fischel commissioned by the Independent Petroleum Association of America, Feb. 10, 2015.
[2] *Annual Energy Outlook 2021*, EIA, February 2021.
[3] *U.S. primary energy consumption by energy source, 2019*, U.S. Energy Information Administration (EIA), as updated May 7, 2020.

Activist groups have been able to convince neither the American people nor the majority of their representatives in Congress to stop using our products before a viable alternative is found, as it would mean fundamentally altering their healthy, safe and prosperous lifestyles. Knowing that they cannot get Congress to pass laws that prevent people from using our products or that prevent us from producing them, activists have shifted to pressuring pension funds and other financial entities to divest from fossil fuels. Likewise elevating climate change considerations over investment returns is not supported by statute. These investor pressures can detract from ensuring maximum returns of pension funds and could cause DOL to deviate from its ERISA commitments.

The Oil & Natural Gas Industry as an ESG Partner

Western Energy Alliance members have embraced the true spirit of ESG. Our members constantly innovate to improve the efficiency of operations and to lessen environmental impact. We continue to meet every legitimate environmental challenge. With continual improvements in horizontal drilling combined with hydraulic fracturing, we produce more energy from each well while reducing the amount of land used by nearly 70%, and decreasing air emissions and fresh water use per unit of production.[4] Every energy source has an environmental impact, whether oil, natural gas, coal, wind, solar, nuclear, biofuels or hydroelectric. Whereas some sources are not held to account for their full impacts, oil and natural gas are heavily regulated at the federal and state levels. In addition, companies routinely go above and beyond what is required by regulation to implement best practices, innovate, and further reduce impacts. ESG reporting has given companies a means to tell these good stories, but ESG reporting should not be weaponized as a means to eliminate American oil and natural gas production.

Oil and natural gas also provide a net benefit to the environment. Countries with greater access to reliable, affordable energy not only have higher standards of living, but also cleaner environments and healthier populations. Increased use of natural gas electricity generation leads to lower levels of air pollution and offers a tangible solution for reducing greenhouse gas emissions. Natural gas, as acknowledged by the U.S. Energy Information Administration (EIA) and the International Energy Agency (IEA), is the number one reason the United States has reduced more greenhouse gas emissions than any other country over more than a decade.[5]

Fuel switching from coal to natural gas in the electricity sector has reduced more greenhouse gas emissions than have wind and solar energy combined. Natural gas has delivered 61% of the reduction in greenhouse gases resulting from fuel switching in the electricity sector, removing 3,351 million metric tons of carbon dioxide equivalents (MMT CO_2e) since 2005. In contrast, wind and solar have reduced GHG emissions by 2,125 MMT CO_2e or 39% of the total reduction.[6] The federal government should recognize that the benefits of oil and natural gas heavily outweigh the impacts.

Likewise, the industry has long been a leader in advancing the “S” in ESG. Oil and natural gas companies and philanthropists have supported the arts, hospitals, schools, universities, civic associations,

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[4] “Oil and gas impacts on Wyoming’s sage-grouse”*, Human-Wildlife Interactions,* David H. Applegate, Nicholas Owens, October 2014.

[5] *Global CO2 Emissions in 2019*, IEA, Paris, February 2020; U.S. Energy-Related Carbon Dioxide Emissions, 2019, U.S. Energy Information Administration (EIA), September 2020.

[6] EIA, September 2020, p. 14.

conservation, homeless shelters, and many other charities since the days of Rockefeller and Getty. Companies regularly give significantly to the communities in which they operate. Employees are integrated into these communities and volunteer their time meeting a diversity of needs.

One of the best ways to provide meaningful environmental justice is by providing decent, well-paying job opportunities available to all, no matter race, religion, or gender. The oil and natural gas industry supports 10.3 million jobs nationwide. These are not just direct jobs in the industry, but indirect and induced jobs that support the livelihoods of millions of people outside the industry and provide $1.7 trillion in GDP, or 7.9% of the national total.[7]

The oil and natural gas industry is the largest source of funding for conservation as the sole contributor to the Land and Water Conservation Fund, having provided $18.9 billion since 1965. Since President Trump signed the Great American Outdoors Act in August of 2020, up to $1.9 billion annually from the royalties we return to the federal government are directed into conservation and infrastructure in national parks, wildlife refuges, and other public lands. Besides funding conservation, companies routinely go above and beyond regulation to protect wildlife and the land, implementing voluntary best management practices and making voluntary contributions to conservation groups and projects.

We're proud of the commitment companies and employees have for communities, the environment, and society.

Time Horizon

The preamble to the proposed rule cites EO 14030 as the justification for:

> "advancing acts to mitigate climate-related financial risk and actions to help safeguard the financial security of America's families, businesses, and workers from climate-related financial risk that may threaten the life savings and pensions of U.S. workers and families."

Further, it cites to E.O. 13990 to "bolster resilience to climate change" as a basis for embarking on this rulemaking. However, Title 1 of ERISA has nothing to do with climate change but everything to do with fiduciary responsibilities.

Besides being outside the purview of ERISA, the time horizons of climate change simply do not match up with the time horizons of today's workers and pensioners. While it is widely recognized that a company or investment plan is more financially healthy when it does not sacrifice long-term performance for short-term gain, the time horizon invoked by the IPCC for which climate policy should be directed to ensure the temperature does not exceed 2 degrees Celsius of warming is 2100, while some government analyses looks to 2300. The year 2100 is so far into the future that it will not affect today's workers, including those just now embarking on their careers. Net-zero carbon by 2050 is a recent policy "innovation" on that long-term time horizon that is still too far into the future to justify sacrificing returns for today's workers. Financial regulation simply "cannot pretend to look past five years or so,

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[7] *Impacts of the Oil and Natural Gas Industry on the US Economy in 2019*, PriceWaterhouseCoopers LLP for the American Petroleum Institute, 2021.

and there is just no climate risk to the financial system at this horizon" except that introduced into the system by financial regulators themselves.[8]

The justification for the rule regarding the impacts of climate change today is simply overstated:[9]

> "For example, climate change is already imposing significant economic consequences on a wide variety of businesses as more extreme weather damages physical assets, disrupts productivity and supply chains, and forces adjustments to operations. Climate change is particularly pertinent to the projected returns of pension plan portfolios that, because of the nature of their obligations to their participants and beneficiaries, typically have long-term investment horizons. The effects of climate change such as sea level rise, changing rainfall patterns, and more severe droughts, wildfires, and flooding are expected to continue to pose a threat to investments far into the future." (p. 57276)

Data on natural disasters show steadily decreasing deaths over more than a century,[10] and economic impacts as a percentage of GDP are also on a long-term decline.[11] The above statement on impacts to pension portfolios is not supported and speculative at best.[12] Wildfires are well within historic norms and where they have been more extreme, such as in California, they have been shown to be affected much more by the proximate cause of poor forest management than climate change.[13] Effects of sea level rise have been low and projections that claim our coastal cities will be flooded completely ignore basic mitigation strategies that have been employed by the Dutch for over a millennium. In short, climate risks are projected so far into the future that they are not appropriate to be considered paramount for ERISA plans over pecuniary factors. The "appropriate investment horizons" for today's plans simply do not correspond to the time horizons for which climate change risks are expected to occur.

Further, objective quantification and measurement of such risks are usually impossible. Climate risk assessments typically depend on multiple assumptions fraught with uncertainties, and are of little financial value to investors. Boston University professor Madison Condon's paper *Market Myopia's Climate Bubble* has been influential.[14] Even though she is advocating for mandatory disclosure and quantification of climate change risks, Condon is honest about the myriad challenges:

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[8] *Testimony to the U.S. Senate Committee on Banking, Housing and Urban Affairs*, Dr. John H. Cochrane, Senior Fellow, Stanford Institute for Economic Policy Research, March 18, 2021.
[9] *Testimony to the U.S. Senate Committee on Banking, Housing and Urban Affairs*, Dr. Benjamin Zycher, Senior Fellow, American Enterprise Institute, March 18, 2021 contains extensive information demonstrating why the assumption of climate risks in the proposed rule is overstated and unsupported by evidence.
[10] Our World in Data, see chart Decadal average: Number of deaths from natural disasters.
[11] *Testimony to the Committee on Banking, House and Urban Affairs*, Dr. Roger Pielke, Jr., University of Colorado, Boulder, July 20, 2021.
[12] *How Bad Are Weather Disasters for Banks*, Federal Reserve Bank of New York Staff Report, Nov. 16, 2021.
[13] "Global Trends in Wildfire and Its Impacts: Perceptions Versus Realities in a Changing World," Stefan H. Doerr and Cristina Santin, *Philosophical Transactions of the Royal Society of London*, Series B, Biological Sciences 371, no. 1696, 2016.
[14] "Market Myopia's Climate Bubble," Madison Condon, *SSRN*, May 15, 2021.

> Evaluating climate risk involves forecasting macroeconomic energy demand, guessing on the success of carbon regulation and future technologies, modeling the relationship between atmospheric gas concentrations and global temperatures, predicting how temperature rise will change the earth's climate systems, and calculating how those changes impact physical economic assets. The task requires skills beyond that of a typical financial analyst, colossal amounts of data, and models that have only begun to be built. Each step of estimation adds layers of uncertainty to risk projections. In some cases, particularly those longer-term and macroeconomic, the estimation of the economic impact of climate change may be dwarfed by this uncertainty.

In short, the complexity and uncertainty of assessing climate risk and the misalignment of climate change time horizons with those of ERISA pension plan beneficiaries' lifespans renders the elevation of climate change to a materiality factor on par with traditional risk-return inappropriate and overtly political.

Documentation of Non-Pecuniary Factors

We support the requirement in the current rule at paragraph (c)(2) that fiduciaries must "document why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries in receiving benefits from the plan," when investments are determined to be "economically indistinguishable" under generally accepted investment theories and an ESG plan is chosen under the "tie breaker" principle. We support requiring plan managers to document the basis for determining that the chosen plan was indistinguishable in terms of risk-return parameters and hence, the selection of an ESG plan is appropriate. The documentation requirement is not an undue paperwork burden, as such information is normally documented by prudent investment managers. Further, this guards against subjective policy preferences predominating over the fiduciary responsibility to beneficiaries. To the extent that the documentation is a burden, it is a reasonable burden to guard against ERISA plan selections based on the policy preferences of managers that may not be shared by the beneficiaries.

DOL asserts that paragraph (c)(1) in the proposed rule:

> "provides that a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan." (p. 57293)

And that paragraph (c)(2):

> "provides that a fiduciary's evaluation of an investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are material to investment value, using appropriate investment horizons" (p. 57278)

The current rule's documentation requirement is but a small step toward helping ensure that pension plans are not skewing toward the political and away from material market-based factors. Likely much more scrutiny and justification is necessary, but at least it provided some protection at a limited burden to ERISA plan managers. We strongly support retaining the documentation requirement of the current rule.

To the extent that this statement from Interpretive Bulletin 2015-01 excerpted in the proposed rule is correct, that:

> "there could be instances when ESG issues present material business risk or opportunities…environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices.''

should such a situation be interpreted to exist, it should be clear what the material business risk is and documentation of it is therefore straightforward. Hence, DOL should retain paragraphs (c)(2)(1) through (iii) of the 2020 rule requiring documentation. Otherwise, ESG becomes a magic wand that can simply be waved without justification to claim a factor is material, whether or not it meets ERISA's standards for fiduciary responsibility.

We appreciate that paragraph (c)(1):

> "clarifies in no uncertain terms that a plan fiduciary may not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to the interests of participants and beneficiaries in their retirement income or financial benefits under the plan."

But then the rule goes on to erode the fiduciary responsibility to beneficiaries in the elevation of subjective climate change and ESG factors on par with traditional risk-return metrics. While it is not acknowledged in the proposed rule, it is well established that ESG remains ill-defined and subject to value judgements. The essential problem with many measurements of climate impact and other ESG topics is a disagreement about what is good, valuable, reasonable, and just, and what is too much, too little, overly intensive, or even meaningful. The value judgments involved are those on which reasonable people can and do differ, not to mention the technical problems of how to actually measure and quantify those value judgements.

However, the proposed rule overstates that materiality, going beyond to assume climate change and ESG factors are *often* material. This vastly overstates the certainties of climate risk and the maturity of ESG as a knowable and quantifiable set of factors on par with assessments of financial return and risk. As such, the proposed rule tips too far to the balance of putting its thumb on the scale in favor of ESG and climate factors that are very much subjective and political in nature.

> "Accordingly, the proposal makes clear that climate change and other ESG factors are often material and that in many instances fiduciaries to [sic] should consider climate change and other ESG factors in the assessment of investment risks and returns." (p. 57276)

It is neither clear nor settled that ESG factors are often material. Therefore, the 2020 rule's requirements for documentation are a fair and prudent way of ensuring this subjectivity is addressed by requiring plan managers to document specifically how they came to determine that ESG and climate factors are material to the specific fund. The proposed rule should keep the current documentation requirements.

One circumstance where what DOL is considering an "ESG factor" in the proposed rule but is actually a violation of law is when a company does not comply with environmental or other regulations. Clearly such behavior increases risk, directly affects the value of an investment, and is therefore, a legitimate, pecuniary consideration. In such cases, the documentation would not be required or if interpreted as necessary, easy to document.

In a further example of how the proposed rule goes far beyond legitimate issues that are material to fund beneficiaries and instead into the political realm is in the assertion that assessing risk of *potential* political change or *future* regulation should be the purview of an ERISA plan manager.

> "Additionally, imminent or proposed regulations, for example, to reduce greenhouse gas emissions in the power sector, and other policies incentivizing a shift from carbon-intensive investments to low-carbon investments, could significantly lower the value of carbon-intensive investments while raising the value of other investments." (p. 57277)

By this circular logic, the government is directing pension funds to account for the vicissitudes of the government itself and the often messy democratic process in an attempt to anticipate the whims of the voters, the vacillations as politicians change power, and the outcomes of rulemakings that have yet to be made. Certainly such uncertainties cannot be considered material.

Dr. Condon again provides some words of wisdom on just this subject:

> "No amount of regulatory or corporate governance intervention can give shareholders and managers the ability to foresee the future—the outcomes of national elections, for example, are both largely uncertain and hugely influential in determining the strength of future climate policy."[15]

Even if we knew the outcome of a future election, the policy outcomes that might ensue are perhaps even more difficult to foresee subject as they are to regulatory and legislative processes and litigation.

Further, the current administration has itself made it clear that it is using its myriad regulatory levers to upend the current financial system and put fossil fuel and other politically disfavored industries at

[15] Condon, p. 6.

substantial disadvantage or even out of business.[16] In this regard, it is the government itself that is the source of the risk, not anything inherent in a sober assessment of ESG or climate risks. By advancing policies, however unrealistic or costly, to eliminate fossil fuels or to increase the regulatory burden on them, the government is the very source of the risk to investments that DOL purports to address on behalf of pensioners with this rule. Such political heavy handedness could render DOL legally vulnerable with this rule. To guard against ERISA plans becoming reoriented from maximizing returns to serving as a tool to advance policy, the bare minimum is to retain the documentation provisions of the 2020 rule.

In fact in a study cited in the proposed rule, the government itself, by advancing climate-change energy transition policies, will cause U.S. public pension plans to be 6% lower in 2050 than without those policies.[17] The government itself is causing huge risk to and lower returns to pension plans with these policies. Surely DOL would want to guard against realizing that 6% decline via this rule. Ironically, the proposed rule also cites to another study showing 6% of the assets ($970 billion out of $16.95 trillion) of the world's 500 largest companies are at risk due to climate change.[18] So is that 6% at risk really due to climate change or to climate change *policies*? DOL needs to seriously ask itself if this rule is increasing the risk from climate change policies by failing to preserve the common-sense protections afforded by the existing rule.

Further the intent of paragraph (b)(4) in the proposed rule is to assert that material climate change and other ESG factors are no different than other 'traditional' material risk-return factors." However, that assertion doesn't make it so. ERISA itself as passed and amended by Congress is peppered throughout with standards of those "traditional" material risk-return factors and is silent on ESG and climate change. DOL is asserting a policy preference that is simply not in the plain language or intent of the law. To change that, the current administration needs to convince a majority of Congress to change the law, not simply write a regulation lacking basis in ERISA. DOL should be wary about letting subjective ESG factors crowd out truly material factors that affect ERISA pension funds.

ESG As Value Judgement

The proposed rule simply goes too far in tipping the balance in favor of elective ESG factors over traditional risk-return factors. One example on page 57278 is board composition. While indeed some investors may choose to examine the composition of the Board of a company before making an investment decision, it is virtually a certainty that even those investors will join all other investors in looking at rates of return and market fundamentals before investing. Of course, those investors motivated by ESG can choose to examine other factors based on their personal preferences, but when it comes to ERISA pension plan managers, their subjective policy preferences should not control. Again, when fundamentals of a company are awry, including those lumped under "ESG" such as bad

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[16] For example, President Biden's original nominee as Comptroller of the Currency has said of oil, gas and coal companies, "We want them to go bankrupt if we want to tackle climate change." While she has since withdrawn, her very nomination indicates the Biden Administration's preference.

[17] '*Retirement Savings: Federal Workers' Portfolios Should Be Evaluated For Possible Financial Risks Related to Climate Change*', U.S. Government Accountability Office, GAO-21-327, 2021, page 11, citing to a Mercer and Center for International Environmental Law study in footnote 19.

[18] *Id.* citing to a 2019 Climate Disclosure Project study, p. 12.

management and noncompliance with regulation, then indeed those factors become material to the decision to invest or not.

Factors such as board composition are unlikely to be material. Even if the selected literature cited on better financial performance from diverse boards is correct, which is a generous assumption given the countervailing studies,[19] then the better management that results would be reflected in stock market valuations in any event. Asserting that because a board is more diverse than another that *ipso facto* the company is a better investment option without an analysis of market fundamentals would be a fallacious basis for investment decisions. As such, these secondary ESG factors are inherently different and less material than traditional risk-return factors and the rule should treat them accordingly.

Plans that do choose to focus on such secondary factors should not be defined as qualified default investment alternatives (QDIA). They must be an active choice for those who share the value judgements expressed for the plan. DOL should not assert them to be material and on par with traditional risk-return factors as they are not supported in the plain language of ERISA as it relates to the fiduciary responsibility to plan beneficiaries nor by a simple logical understanding of the subjective nature of such secondary factors. Indeed, ESG is simply too broad of a term that means many different things to many different people. As such, ESG plans do deserve "special scrutiny". DOL goes too far by assuming they are on par with plans that focus predominantly on risk-return factors.

We agree with FAB 2018–01 and its:

> "expressed concern that the decision to favor the fiduciary's own policy preferences in selecting an ESG-themed investment option as a QDIA for a 401(k)-type plan without regard to possibly

[19] See for example, "Does Gender Matter? Female Representation on Corporate Boards and Firm Financial Performance: A Meta-Analysis," Jan Luca Pletzer et al., *PLoS ONE,* Vol. 10, No. 6, 2015 (their 2015 systematic literature search involving data from 20 studies on 3,097 companies published in peer-reviewed academic journals found that "the mere representation of females on corporate boards is not related to firm financial performance if other factors are not considered."); "When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?", Alice H. Eagly, *Journal of Social Issues*, Vol. 72, No. 2, 2016, pp. 199–222 ("Despite advocates' insistence that women on boards enhance corporate performance and that diversity of task groups enhances their performance, research findings are mixed, and repeated meta-analyses have yielded average correlational findings that are null or extremely small."); "The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance," David A. Carter, Frank P. D'Souza, Betty J. Simkins, and W. Gary Simpson, *Corporate Governance: An International Review*, Vol. 18, No. 5, September 2010, pp. 396-414 (did not find "a significant relationship between the gender or ethnic diversity of the board, or important board committees, and financial performance for a sample of major US corporations."); "Gender Diversity on Boards of Directors and Business Success," Nuria Reguera Alvarado, Joaquina Laffarga Briones, and Pilar de Fuentes Ruiz, *Investment Management and Financial Innovations*, Vol. 8, No. 1, April 15, 2011, pp. 199–209 ("Gender diversity and business success are not related."; "Women in the Boardroom and Their Impact on Governance and Performance," Renée B. Adams and Daniel Ferreira, *European Corporate Governance Institute Finance Working Paper* No. 57/2004, October 22, 2008; "The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation," Kenneth Robinson Ahern and Amy Dittmar, *Quarterly Journal of Economics*, Vol. 127, No. 1 (2012), pp. 137–197; See other studies cited in "The Shaky Case for Mandating Gender Diversity on Corporate Boards," Richard Morrison and Siri Terjesen, *Newsweek,* November 9, 2021.

> different or competing views of plan participants and beneficiaries would raise questions about the fiduciary's compliance with ERISA's duty of loyalty." (cited on p. 57274)

Therefore, DOL should carry forward paragraph (d)(2)(ii) of the existing rule regarding QDIA. The justification that the existing rule "could" exclude plans that expressly considered climate change or ESG factors even when pecuniary factors control is not sound. If those plans do indeed meet the pecuniary test, then the plan manager should be required to simply document why those pecuniary factors control and why the ESG factors are enhancements. The much greater risk from removing the protections in the existing rule is that individuals are defaulted into a plan that does not meet ERISA's standards for maximizing return or does not align with beneficiaries' policy preferences. Were ESG factors so rigorous that one can draw a direct line from their presence to higher returns and lower risk, then the QDIA provisions of the current rule would not be necessary. If and when it can be shown that ESG factors pass that threshold from value judgement into being a determinant of better risk-return results, they must undergo stricter scrutiny and require an active decision by a plan participant who shares their values.

In fact, research cited in the 2020 proposed rule shows that individual investors expect socially responsible mutual funds to have lower returns and higher fees than conventional ones, and that social signaling is often the goal of such investors (p. 39120). While that is the prerogative of individual investors seeking plans aligned with their beliefs, such plan options should never be a default. When treated as QDIA, the burden is shifted onto individual investors to actively recognize that the option is misaligned with their own desire for higher returns, political views or policy preferences first, and then they must take the added step of opting out. Of course, it would be antithetical, by definition, for a fiduciary to choose reduced returns for a large group of beneficiaries based on his/her own individual political preferences. Therefore, that active choice step is necessary and ESG/climate plan options should not be QDIA. DOL should retain paragraph (d) of the current rule.

Literature Cited is Biased

The selection of literature has included as well as neglected is biased. DOL has indicated its bias by oversampling studies that show better returns from ESG investing while selecting only a few studies that show lower returns. Further exposing this bias, DOL dismisses the few studies that call into question the assumptions DOL is making in the proposed rule about ESG investment mentioned by dismissing on page 57291 those showing lower returns or lower market valuation because "The studies generally do not limit their focus to investments by ERISA plan fiduciaries." That exact same statement could be made about the studies DOL cites as favorable to ESG investments. This biased statement should be removed from the final rule.

Further, the proposed rule ignores the literature cited in the 2020 rule. As a minimum, DOL should include all the references already identified from the 2020 rule, which we have listed here.[20] DOL should

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[20] *OECD Business and Finance Outlook 2020*, September 2020, p 29. (''The review of academic and industry literature reveals a wide range of approaches and results, which are largely inconsistent with one another. The research highlights the difficulty of identifying the real impact of ESG on investment performance.''); *Scarlet Letters: Remarks of SEC Commissioner Hester M. Peirce before the American Enterprise Institute*, June 18, 2019; "How Investors Can (and Can't) Create Social Value, European Corporate Governance Institute," *Law Working*

also keep the references to the vagaries of how ESG investments are defined, again, listed here.[21]

Faulty Regulatory Impact Analysis

The only benefits articulated in the RIA contain are those cost savings of $19.35 million derived from removing certain aspects of the current rule. All benefits are simply asserted and not quantified, whereas the total cost to society is identified as $85.6 million. Further, many of the subjective benefits asserted in the proposed rule are those that derive from well-managed companies. Good governance is a long-standing concept not unique to ESG-focused companies, and certainly precedes this proposed rule. Well run companies are the ones that have survived over decades or even centuries.

The most egregious unsubstantiated benefit claimed is that "this proposal would lead to increased investment returns over the long run." (p. 57296) The RIA cannot quantify any benefits to society and finds a net cost to society of $66.25 million. The only information in the RIA with any relevant backup citation to the effect of government regulation on investment return shows a 6% reduction by 2050. (see above discussion with citations to the GAO study.)

We appreciate the opportunity to comment. With the proposed rule, DOL has tipped the balance too far toward elevating the subjective over the market fundamentals of reducing risk and maximizing return. As such, the proposed rule risks distorting the loyalty of fiduciaries to their beneficiaries' true market interests when selecting plan investments. We urge the department to fundamentally reconsider this rule.

Sincerely,

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Western Energy Alliance

Timothy Stewart
President
U.S. Oil & Gas Association

Paper No. 394, March 29, 2018, p. 5; *Environmental, Social, and Governance (ESG) Investment Tools: A Review of the Current Field*, Dec 2017, pp. 11–13.

[21] *OECD Business and Finance Outlook 2020*, Sept. 2020, pp. 26–33, 47–58; *What a Difference an ESG Ratings Provider Makes!*, Feifei Li & Ari Polychronopoulos, January 2020; *Aggregate Confusion: The Divergence of ESG Ratings*, MIT Sloan Research Paper No. 5822–19, Florian Berg, Julian Koelbel, & Roberto Rigobon, August 2019; *2018 Annual Sustainable Investment Report*, Schroders, March 2019, pp 22–23 (majority of passive ESG funds rely on a single third party ESG rating provider that "typically emphasize tick-the-box policies and disclosure levels, data points unrelated to investment performance and/or backward looking negative events with little predictive power'').