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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attention: RIN 1210–AC03

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights; RIN 1210–AC03

To Whom It May Concern:

The Investment Company Institute[1] supports the Department of Labor's (the "Department") proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (the "Proposed Rule").[2] The Proposed Rule would amend the current regulation, finalized in 2020 (the "2020 Rule"), on fiduciaries' investment duties under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA).[3] We welcome the Proposed Rule and commend the Department for its efforts to clarify the manner in which ERISA fiduciaries may permissibly consider environmental, social, and governance (ESG) factors in their evaluation of ERISA plan investments.

While ICI supports the Proposed Rule (as more fully described in Section I below), we urge that the Department make certain modifications, described in Sections II through VI below. Our

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of $32.7 trillion in the United States, serving more than 100 million US shareholders, and $9.9 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

[2] 86 Fed. Reg. 57272 (October 14, 2021).

[3] The regulation was adopted in two parts, Financial Factors in Selecting Plan Investments, finalized at 85 Fed. Reg. 72883 (November 13, 2020) and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, finalized at 85 Fed. Reg. 81694 (December 16, 2020).

suggestions aim to assist the Department in achieving its goal of proposing a rule that is appropriately neutral toward ESG factors by treating them the same as other relevant investment factors, while not discouraging their consideration. We strongly believe that these modifications will add clarity for plan fiduciaries and better ensure the durability of this important rulemaking.

In summary, our comments are as follows:

- ICI supports the Proposed Rule and commends the Department for its efforts to correct the misperception that fiduciaries are at risk if they include ESG factors in the financial evaluation of plan investments.

- ICI urges the Department to remove the specific references to ESG factors from the text of the Proposed Rule because their inclusion unnecessarily differentiates ESG factors from investment factors more generally. Singling out ESG factors in such a manner is a departure from the long-standing neutral application of fiduciary principles. Such an approach risks drawing distinctions between ESG factors versus other investment factors, potentially creating confusion about definitions and inviting litigation.

- Absent changes, the Proposed Rule risks compromising the durability of the needed revisions. Rule text that is principles-based—as opposed to prescriptive—will increase the likelihood of a rule that will endure and maintain its relevance over time.

- While the Proposed Rule provides that ESG factors can be proper components of the fiduciary's primary analysis of the economic merits of competing investment choices, we urge the Department to clarify that an "ESG-themed fund"[4] can permissibly be selected based solely on risk and return (as opposed to collateral) factors (i.e., without the use of the tie-breaker rule).

- The requirement to prominently display the collateral-benefit characteristic of an investment when it has been selected using the tie-breaker rule should be eliminated because it singles out a particular investment strategy for heightened fiduciary disclosure requirements. However, if the Department decides to retain this requirement, it needs to provide clarifications.

- The language in the Proposed Rule requiring fiduciaries to compare investment options with reasonably available alternatives is unnecessary and should be deleted.

- The Department should extend the transition relief that applied to certain provisions of the proxy voting portion of the 2020 Rule. Certain provisions are scheduled to become

[4] The Department uses the terms "ESG-themed fund," "ESG-themed investment alternative," and "ESG-themed investment option" throughout the preamble to the Proposed Rule. In FAB 2018-01, where the Department first began using this terminology, it explained that ESG-themed funds should be distinguished from non-ESG-themed investment funds in which ESG factors may be incorporated in accordance with IB 2015-01 and IB 2016-01 as one of many factors in ordinary portfolio management and shareholder engagement decisions.

applicable in January 2022, but investment managers may have delayed implementation due to the Department's March 2021 announcement.

I. The Proposal Meaningfully Improves the 2020 Rule.

At the end of June 2021, more than 60 percent of private-sector 401(k) plan assets were invested in mutual funds.[5] As a trade association representing mutual funds, ICI is especially attuned to the needs of plan participants and the employers who sponsor retirement plans on their behalf. We share the Department's concern that language in the preamble of the 2020 Rule, together with its special disclosure rules and restrictions for ESG investments, creates a perception that fiduciaries are at risk if they include ESG factors in the financial evaluation of plan investments. ICI therefore appreciates the improvements the Department is proposing to the 2020 Rule.[6]

As we explained in our comment letter to the 2020 Proposal,[7] when it comes to the use of ESG considerations in mutual funds, ESG often simply represents one of the many considerations that go into the investment management process as part of the overall risk and return analysis. Mutual funds' portfolio managers and analysts—even those of funds that do not include ESG-related terms in their names or have an ESG-related principal investment strategy—generally include ESG considerations in their investment decision making much as they would consider macroeconomic or interest rate risks, idiosyncratic business risks, and investment exposures to particular companies, industries, or geographic regions.[8]

Fund managers consider ESG criteria to varying degrees, and these approaches coexist on a broad investing spectrum. Not every fund manager incorporates ESG considerations in the same manner; in fact, there is a range of qualitative and quantitative approaches for embedding ESG analysis across investing strategies, spanning asset classes and active-to-passive strategies. ESG-related investing strategies exist along a continuum. Some funds integrate analysis of ESG considerations, others use one or more sustainable investing strategies, and some integrate ESG considerations and use one or more sustainable investing strategies. The approaches used to incorporate ESG then can vary from the purely qualitative to the purely quantitative, and it is

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[5] At the end of June 2021, Americans had $7.3 trillion in 401(k) plans, with $4.8 trillion invested in mutual funds. See "The US Retirement Market, Second Quarter 2021" (September 2021), available at https://www.ici.org/research/stats/retirement.

[6] While the 2020 Rule was improved from what was originally proposed (the "2020 Proposal"), significant concerns remained. Throughout 2021, the Department has engaged in outreach on the 2020 Rule to hear views from interested stakeholders, including ICI. It is evident from the Proposed Rule that the Department listened to the stakeholders and considered the concerns raised. 86 Fed. Reg. at 57275.

[7] See pages 4 through 7 of letter from Paul Schott Stevens, President and CEO of the Investment Company Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated July 30, 2020, available at https://www.ici.org/system/files/attachments/pdf/32652a.pdf ("ICI's 2020 Comment Letter"), submitted in response to "Financial Factors in Selecting Plan Investments," published at 85 Fed. Reg. 39113 (June 30, 2020).

[8] Fund managers have a fiduciary duty to the funds they manage. Fund managers are required to make investment decisions consistent with the fund's investment objectives and principal investment strategies which are in the fund's best interests.

common for funds to use a mix of qualitative and quantitative approaches. Qualitative factors, while less concrete in nature, are no less relevant to a risk-return analysis.

The Department's proposed amendments to the 2020 Rule thus better reflect the realities of how fund managers incorporate ESG factors into their investment analysis and, most importantly, would correct the misperception that fiduciaries are at risk if they include ESG factors in the risk-return evaluation of plan investments. The Proposed Rule makes clear that, when considered as part of the risk-return analysis, ESG factors should be treated the same as any other economic factors.

We also appreciate that the Department proposes to remove the 2020 Rule's restrictions on qualified default investment alternatives (QDIA).[9] It is unclear how these restrictions would apply in practice,[10] and the restrictions are not necessary. We agree with the Department's conclusion that if a fiduciary selects an investment option in accordance with the duties of prudence and loyalty as described in the Proposed Rule, and the investment option meets the protective standards set out in the Department's QDIA regulation,[11] there is no reason to foreclose plan fiduciaries from considering the fund as a QDIA simply because it expressly considers climate change or other ESG factors.[12]

II. The Department Should Remove ESG References from the Rule Text; They are Unnecessary and Risk Differentiating ESG Factors from Other Equally Legitimate Investment Factors.

While ICI supports the proposed changes and generally agrees with the Department's position on how the consideration of ESG factors should be assessed under ERISA, we have concerns with the specific references to ESG factors in the text of the Proposed Rule.

The text of the Proposed Rule discusses ESG factors in two separate provisions. First, in the explanation of a fiduciary's "appropriate consideration" required to fulfill its investment duties, the Department states that fiduciaries should consider the projected return of the investment option "*which may often require* 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" (emphasis added).[13] Second, the Department includes a list of examples of factors that a fiduciary may consider, including climate change-related factors, governance

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[9] The Final Rule prohibits plans from adding or retaining any investment fund, product, or model portfolio as a QDIA, or as a component of a QDIA, if its objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.

[10] As the Department noted, "[m]any stakeholders expressed concern that funds could be excluded from treatment as QDIAs solely because they expressly considered climate change or other ESG factors, even though the funds were prudent based on a consideration of their financial attributes alone." 86 Fed. Reg. at 57279.

[11] 29 CFR 2550.404c–5 (Fiduciary Relief for Investments in Qualified Default Investment Alternatives).

[12] 86 Fed. Reg. at 57279-80.

[13] Proposed Rule section (b)(2)(ii)(C).

factors, and workforce practices.[14] The Department confirms that the sole purpose of this second reference to ESG factors "is to provide clarification through examples," not to introduce any new conditions under the prudence safe harbor.[15]

Singling out ESG factors and characterizing them as material risk-return factors, as indicated in Proposed Rule section (b)(2)(ii)(C), is a clear departure from the long-standing neutral application of fiduciary principles. Rather than providing only clarification, the Department risks drawing distinctions between ESG factors versus other investment factors, a definitional morass that will create uncertainty, invite litigation, and risks the durability of the needed amendments proposed by the Department.

A. The Identification of ESG in the Rule Text is Unnecessary and Risks Perpetuating Confusion Regarding the Incorporation of ESG Factors in Fiduciary Decision Making.

The duty of loyalty—a bedrock principle of ERISA— requires those serving as fiduciaries to act with a single-minded focus on the interests of participants and beneficiaries. And the duty of prudence, as applied to investment matters, is elaborated by the prudent investor rule and aligns with ordinary trust law.[16] As the Department appears to agree,[17] ERISA requires neutral application of the principles of loyalty and prudence to all investment decisions, whether implicating ESG factors or otherwise. Indeed, one of the key advantages of the prudent investor rule is the eschewing of presumptions for or against any particular type or kind of investment strategy or vehicle.[18] Neutral application of fiduciary principles also avoids the morass of defining with precision what activities fall within the rubric of ESG investing and accommodating the many changes to that rubric that will inevitably occur over time.

We are therefore concerned that the inclusion of commentary on ESG factors in the text of the Proposed Rule could be construed as differentiating ESG factors from other investment factors or strategies—for example, macroeconomic or interest rate risks, idiosyncratic business risks, and investment exposures to particular companies, industries, or geographic regions—in explicit conflict with the Department's intent and to the detriment of the clarity it seeks to provide through the proposed amendments.

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[14] Proposed Rule section (b)(4).

[15] 86 Fed. Reg. at 57277.

[16] See Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2468 (2014).

[17] We believe that the Department agrees that ERISA subjects all types or kinds of investment strategies or vehicles, whether ESG or otherwise, to the same principles of loyalty and prudence and that this explains its concern that the 2020 Rule could be read to suggest that all manner of ESG investing is inherently suspect and therefore subject to enhanced scrutiny that requires extra process relative to other types of kinds of investment strategies.

[18] See Unif. Prudent Inv'r Act § 2(e) & cmt. (Unif. Law Comm'n 1994) ("no particular kind of property or type of investment is inherently imprudent"); Restatement (Third) of Trusts § 90 cmt. f (Am. Law Inst. 2007) ("Specific investments or techniques are not per se prudent or imprudent.").

ICI expressed disagreement with the 2020 Proposal for effectively limiting fiduciaries' consideration of ESG factors and suggesting that ESG factors were not typically economically relevant.[19] The language of the new proposal seems to move to the opposite side of the same coin. ICI urges the Department not to dictate what specific factors are or are not relevant for a fiduciary's evaluation and analysis. These determinations must be left to the more general applicability of the prudent investor rule. The ESG references will create uncertainty. The clear statement in the Proposed Rule is fully adequate, sufficiently laying out the applicable standard—"[a] prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis."[20]

B. <u>The Proposed Language May Invite Second Guessing and Increase Litigation Risk</u>.

ICI appreciates that the Proposed Rule makes clear that a fiduciary may consider any factor, including any ESG factor, that is relevant to the risk-return analysis in an evaluation of an investment option. By referencing only ESG factors as examples in the rule text, however, the Departments risks differentiating ESG factors and implying an unintended level of relevance to ESG factors. We are particularly concerned that listing only ESG factors will invite second guessing of fiduciaries' analyses and expose them to litigation regarding their selection of investment options. Given the difficulty in quantifying the impact of an ESG factor as part of any investment analysis—as we explain in detail above—it will be challenging for plan fiduciaries to defend against claims that they did or did not sufficiently consider ESG factors.

We recommend that the Department eliminate these concerns by deleting from the rule text in section (b)(4) everything after "is material to the risk-return analysis," including the examples in (b)(4)(i) - (iii). In the text of section (b)(2)(ii)(C), everything after "the funding objectives of the plan" should be deleted. Examples can be discussed in the preamble to the final rule.

C. <u>The Plan Community Would Benefit from a Neutral Rule That Is Not Subject to Constant Change</u>.

Since 1994, when the first Interpretive Bulletin on the topic was issued,[21] the Department's guidance has vacillated, often reflecting changes in Administration even though the main substance of the guidance has remained constant—ERISA fiduciaries must discharge their duties with respect to the plan solely in the interests of the participants and for the exclusive purpose of providing benefits, and ERISA fiduciaries may not sacrifice investment returns or assume greater investment risks as a means of promoting collateral social policy goals. The changes over the

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[19] See ICI's 2020 Comment Letter.

[20] Proposed Rule section (b)(4).

[21] Interpretive Bulletin 94-1, 59 Fed. Reg. 32606 (June 23, 1994); Interpretive Bulletin 2008-01, 73 Fed. Reg. 61734 (October 17, 2008); Interpretive Bulletin 2015–01, 80 Fed. Reg. 65135 (October 26, 2015); and Field Assistance Bulletin 2018-01, available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01.

years have been around the edges of the rules, having more to do with tone and the degree of skepticism or receptivity to consideration of ESG factors. Even though these periodic changes may seem relatively modest in substance, they can have a major impact on the retirement market and on plan fiduciaries' willingness to consider ESG factors when selecting plan investments.[22]

Detailed descriptions of ESG factors, as included in the examples in section (b)(4), have the potential to cause the rule to become "stale." What is viewed as a critical ESG factor today may not be as relevant in the future. There are likely to be factors that are not routinely considered today that in the future are of great relevance. Therefore, keeping the rule text principles-based and not prescriptive is a more effective approach, increasing the likelihood that the rule ultimately adopted will endure and maintain its relevance.

The asset management industry, as well as the broader retirement plan community, would benefit greatly from a neutral rule that will have durability. Retaining the language in the text of the Proposed Rule regarding ESG factors (both the phrase "may often require" in section (b)(2)(ii)(C) and the detailed examples in section (b)(4)) will increase the risk that the rule will be amended once again in the near future or will simply become out-of-date.

We further note that this extra language is not needed to accomplish the Department's goals. The Department can provide certainty to fiduciaries to reverse the chilling effect of the 2020 Rule by simply adopting the other amendments.

At a minimum, if the Department feels that it must retain a reference to ESG in the operative text, it should replace the words "may often require" with "may include."

III. The Department Should Provide Clarity by Illustrating Application of the Rule in the Preamble.

The Department makes clear both in the preamble and the text of Proposed Rule that ESG issues can be proper components of the fiduciary's primary analysis of the economic merits of competing investment choices. The Department has removed any restriction for selecting a fund that incorporates ESG factors, provided that (i) the fiduciary has given appropriate consideration

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[22] The Department itself has observed these impacts. The Department notes that it has "heard from stakeholders that the current regulation, and investor confusion about it, including whether climate change and other ESG factors may be treated as 'pecuniary' factors under the regulation, has already had a chilling effect on appropriate integration of climate change and other ESG factors in investment decisions, which has continued through the current non-enforcement period, including in circumstances that the current regulation may in fact allow." 86 Fed. Reg. at 57275.

Similarly, in issuing IB 2015-01 the Department stated the following: "The Department believes that in the seven years since its publication, IB 2008–01 has unduly discouraged fiduciaries from considering ETIs and ESG factors. In particular, the Department is concerned that the 2008 guidance may be dissuading fiduciaries from (1) pursuing investment strategies that consider environmental, social, and governance factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior investments, and (2) investing in ETIs even where economically equivalent. Some fiduciaries believe the 2008 guidance sets a higher but unclear standard of compliance for fiduciaries when they are considering ESG factors or ETI investments." 80 Fed. Reg. 65135 (October 26, 2015).

to those facts and circumstances that the fiduciary knows or should know are relevant to the particular investment; (ii) the fiduciary's evaluation of the investment is based on risk and return factors that the fiduciary prudently determines are relevant to investment value; (iii) the fiduciary has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives; and (iv) the fiduciary has not sacrificed investment return or taken on additional investment risk to promote benefits or goals unrelated to the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.[23]

It is clear how this analysis is applied to funds that incorporate analysis of ESG considerations solely for their economic merits.[24] Concerns have been raised, however, that if a plan fiduciary selects an ESG-themed fund,[25] or a target date fund that includes an ESG-themed fund as a component, that the fiduciary's selection may be subjected to increased scrutiny or may become a target for lawsuits. It does not, however, appear that the Department intends this result.

Provided that the plan fiduciary has considered only economically relevant factors (i.e., not collateral benefits) and has otherwise met the rule's general requirements for investment selection, then the fact that the fund's investment objectives or goals or its principal investment strategies include, consider or indicate the use of one or more non-economic factors should not raise additional concerns. In other words, the fiduciary should not be required to justify its selection of such a fund to any greater extent than any non-ESG themed fund. Similarly, when a fiduciary selects a target-date fund based solely on its risk-return attributes, it should not have to decide whether any underlying component of the fund has used a sustainable investing strategy or would be considered an ESG-themed fund.

We understand that this is how the Department intends the rule to apply. It would be helpful if the Department could further clarify this intent to avoid any misperception by plan fiduciaries. In this regard, the Department could simply include in the preamble to the final rule an example in which a plan fiduciary selects an ESG-themed fund as a designated investment alternative (DIA) (or a target date fund which includes an ESG-themed fund as a component) for the lineup of a 401(k) plan, where the plan fiduciary has appropriately considered only risk-return factors in the selection process.

IV. The Department Should Remove (or at a Minimum Clarify) the Requirement to Prominently Display the Collateral-Benefit Characteristic of Investment.

The Proposed Rule modifies the "tie-breaker" standard from the 2020 Rule "with the proposal more closely aligning with the Department's original nonregulatory guidance in this area, and eliminates the current regulation's specific documentation requirements, which singled out and

[23] Proposed Rule sections (b) and (c).

[24] As discussed above, fund managers often integrate ESG considerations into their investment management process as part of the overall risk and return analysis.

[25] See note 4 supra.

created burdens specifically for investments providing collateral benefits, which many perceived as targeting ESG investing."[26]

The Proposed Rule would require plan fiduciaries who use the tie-breaker test in selecting an investment option as a designated investment alternative for an individual account plan, "to ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries."[27] The Department explains that it assumes that existing disclosures, such as the participant-level fee disclosure required under 29 CFR 2550.404a-5, are sufficient (or could be sufficient with minor modifications or clarifications) to satisfy this disclosure requirement.[28]

ICI appreciates that the Department has adopted a more broadly applicable formulation of the tie-breaker standard and that it has removed the special documentation requirement, which ICI previously indicated was unnecessary and created the perception that consideration of ESG factors was impermissible under ERISA.

To improve the overall utility of the provision and to make the tie-breaker test operational, ICI suggests removing the prominent disclosure requirement from the rule text. In our 2020 Comment Letter, we argued that the Department should not single out a particular investment strategy for heightened fiduciary disclosure requirements.[29] We explained that doing so raises troubling implications for future administrations to use regulatory authority to eventually narrow the field to a "legal list" of investments and investment strategies for which heightened standards of care apply. The Department appears to agree with this position, when it explains its reasons for removing the special documentation requirement from the 2020 Rule.[30] Yet the requirement for a prominent disclosure also seems to single out ESG consideration for additional documentation.[31] Therefore, we suggest that this requirement should be removed.

If the Department ultimately decides to retain the requirement for a prominent disclosure, however, two clarifications are needed.

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[26] 86 Fed. Reg. at 57278. As articulated in section (c)(3) of the Proposed Rule, if, after the analysis in paragraph (c)(2), a fiduciary prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns.

[27] Proposed Rule section (c)(3).

[28] See 86 Fed. Reg. at 57280.

[29] See pages 14 through 16 of ICI's 2020 Comment Letter.

[30] "The Department, however, is concerned that singling out this one category of investment actions for a special documentation requirement may, in practice, chill investments based on climate change or other ESG factors, even when those factors are directly relevant to the financial merits of the investment decision or they are legitimately applied as a tie-breaker." 86 Fed. Reg. at 57279.

[31] While the requirement arguably applies to the consideration of any collateral benefit other than investment returns, it is clear that ESG factors are the intended target.

First, it is not entirely clear what collateral benefits must be disclosed—the characteristic of the investment option or the reason the plan fiduciary has chosen it. We believe that the Department intended to require disclosure of the characteristic of the investment option, and we suggest that such disclosure would be more relevant to the participant or beneficiary; however, the discussion in the preamble regarding this requirement could be interpreted to require disclosure of the reason the plan sponsor has chosen the investment option. The Department provides the following example:

> For example, if the tiebreaking characteristic of a particular designated investment alternative were that it better aligns with the corporate ethos of the plan sponsor or that it improves the esprit de corps of the workforce, for instance, then such feature or features prompting the selection of the investment must be prominently disclosed by the plan fiduciary under paragraph (c)(3) of the proposal.[32]

To put the example in context, assume that the plan sponsor is an organization whose primary mission is to tackle climate change. The plan fiduciary may decide to use the tie-breaker test to select a fund that invests according to ESG criteria with an environmental focus to improve the morale of its employees.[33] In this case, it would appear that the fact that the fund has a sustainable investment strategy is most relevant to the fund selection and therefore should be prominently disclosed pursuant to the Proposed Rule. The plan fiduciary's desire to improve employee morale seems superfluous and irrelevant to the investment decision. The Department should confirm that its reference to the "feature or features prompting the selection" refers to the characteristic of the fund, and not to the fiduciary's reasoning in selecting the fund.

Second, while we appreciate that the Department has provided a degree of flexibility in how plan fiduciaries may fulfill this requirement, given the unknown spectrum of collateral benefits that might influence a plan fiduciary's selection,[34] additional clarification on the prominent disclosure would be helpful. For example, assume that the plan fiduciary in the example above has decided to offer an ESG-themed fund focused on climate action as an option in the investment lineup for its 401(k) plan, and the climate focus is disclosed in the fund materials (e.g., prospectus, fact sheet). We believe that the Department intends that this type of disclosure language would satisfy the prominent disclosure requirement. While the Department references the required disclosure under 29 CFR 2550.404a–5,[35] we do not believe that the Department intends that the prominent disclosure must appear in the comparative chart, whose primary purpose is the

[32] 86 Fed. Reg. at 57280.

[33] It is important to note that if the fiduciary were to consider only risk-return factors in selecting this fund, then the tie-breaker test would not be needed. Further, it is not clear that consideration of participant preferences would constitute a collateral benefit that requires use of the tie-breaker test.

[34] 86 Fed. Reg. at 57280.

[35] In the preamble, the Department states that "[o]ne likely way, however, is that the plan fiduciary could simply use the required disclosure under 29 CFR 2550.404a–5." 86 Fed. Reg. at 57280.

disclosure of fees and expenses and performance of the investments but does not typically describe the investment objectives of the plan's DIAs.

These clarifications would provide several benefits. They would allow plans to use the materials that the investment provider has already created, rather than require plans to modify the comparative chart. They would also remove some of the anxiety associated with ensuring compliance with the disclosure obligation that could prevent a fiduciary from selecting any fund where it might have to comply with the "tie-breaker" provision. We understand that there is a concern that the provision, as currently drafted, would invite litigation based on claims that the language in a fund's materials is (i) not sufficiently prominent or (ii) does not include the specific reason the plan fiduciary selected the fund. Therefore, clarification in the preamble that the Department considers the use of existing fund disclosure materials to meet the requirement would greatly improve the usefulness of this provision.

V. The Language Requiring Comparison to Reasonably Available Alternatives Should be Deleted.

Section (b)(2)(i) of the Proposed Rule retains the language from the 2020 Rule requiring a fiduciary to consider how each investment option compares to reasonably available alternatives with similar risks. The Department requested comments on whether it is necessary to restate this principle of general applicability as part of this prudence safe harbor.[36] It is not necessary, and we urge the Department to remove this language.

ICI's 2020 Comment Letter[37] expressed concerns regarding similar language in the 2020 Proposal.[38] We acknowledge that the Department improved the language in the 2020 Rule (for example, by limiting the required comparison to "the opportunity for gain (or other return)" and clarifying that the comparison must be made to *reasonably* available alternatives).[39] Nonetheless, we continue to have concerns.

The 1979 Investment Duties regulation did not include a requirement to compare investment options. In including this new requirement in the 2020 Proposal, the only reason the Department provided in support of the change was that it would provide an "important reminder that

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[36] 86 Fed. Reg. at 57277.

[37] See pages 17 to 18 of ICI's 2020 Comment Letter.

[38] Section (b)(2)(ii)(D) of the 2020 Proposal would have required that a fiduciary consider "[h]ow the investment or investment course of action compares to available alternative investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section."

[39] In 2020, the Department explained that it "used the phrase 'reasonably available alternatives' not only to confirm that the rule does not require fiduciaries to scour the market or to consider every possible alternative, but also to allow for the possibility that the characteristics and purposes served by a given investment or investment course of action may be sufficiently rare that a fiduciary could prudently determine, and document, that there were no other reasonably available alternatives for purpose of this comparison requirement." 85 Fed. Reg. 72846, at 72854 (November 13, 2020).

fiduciaries must not let non-pecuniary considerations draw them away from an alternative option that would provide better financial results."[40]

Whether it is appropriate to consider different alternatives, as well as the depth and rigor of that consideration, should be based on the facts and circumstances of the decision under review in accordance with the standards under sections 403 and 404 of ERISA. Selecting an investment option for a plan lineup naturally involves some comparison. Including such a prescriptive requirement in the rule text without additional clarification as to its intended application, however, risks subjecting fiduciaries to additional second-guessing regarding whether the fiduciary's comparison was sufficient. On the other hand, deleting the language from the rule text will not diminish the prudent process that ERISA already requires.

VI. The Department Should Provide Transition Relief for Changes to Proxy-Voting Requirements.

ICI supports the Department's efforts to correct any perception that fiduciaries may need to have special justifications for even ordinary exercises of shareholder rights, a correction the Proposed Rule would appropriately make. With regard to the section of the Proposed Rule regarding proxy voting and exercise of shareholder rights (subsection (d)), we have one suggestion. The 2020 Rule provides delayed compliance dates (to January 31, 2022) for certain requirements.[41] The Department should retain and extend this transition relief when it finalizes the rule.

In particular, our members would appreciate the restoration and an extension of a transition period to comply with section (d)(4)(ii) of the Proposed Rule. This provision applies when an investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan is subject to two plans' investment policy statements that conflict with one another. This provision is not yet applicable under the 2020 Rule, and investment managers likely delayed implementation, given the Department's March 2021 statement of enforcement policy, which indicated that it planned to revisit the rule.[42]

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Thank you for the opportunity to provide comments on this matter. ICI is available to provide additional information and clarification regarding these issues and would welcome the opportunity to meet with the Department to discuss our comments. Please do not hesitate to contact the undersigned at 202-326-5824 or eric.pan@ici.org; David Abbey, Deputy General

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[40] Id. at 39117.

[41] See section (g)(3) of the 2020 Rule.

[42] See the Department's Statement Regarding Enforcement of its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans, dated March 10, 2021, available at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf.

Counsel—Retirement Policy, at 202-326-5920 or david.abbey@ici.org; or Shannon Salinas, Associate General Counsel—Retirement Policy, at 202-326-5809 or shannon.salinas@ici.org.

Sincerely,

Eric J. Pan
President & CEO
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