Good for the Economy.
Good for the Environment.

Via Regulations.gov
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: RIN 1210-AC03 – Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

E2 urges the Department of Labor to finalize its proposed rulemaking, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." We support the rulemaking's withdrawal of two rules, "Financial Factors in Selecting Plan Investments"[1] and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,"[2] that discouraged fiduciaries from incorporating environmental, social, and governance ("ESG") factors, including the risk and opportunities of climate change, into their risk-return analyses for selecting plan investments or exercising shareholder rights.

E2 (Environmental Entrepreneurs) is a national, nonpartisan, group of more than 10,000 businesspeople from every state and every sector of the US economy. E2 members have founded or funded more than 2,500 companies, created more than 600,000 jobs, and manage more than $100 billion in venture and private equity capital. Among E2 members are individuals who have retirement plans, business leaders who rely on fiduciaries to run their employee retirement plans as well as investment advisors.

Given the existing and growing economic impact of climate change and climate change policy across the entire economy, ERISA rules should clearly enable, if not directly encourage, retirement fiduciaries to consider climate-related risk as they assess investment risk and opportunity for their client portfolios and to use proxy voting authority to mitigate climate risk to the plans they manage. That is why E2 supports the proposed rule including specific reforms as detailed below.

As you move to finalize your decision, we urge you to consider:

CLIMATE IS A SIGNIFICANT DRIVER OF INVESTMENT RISK

Today climate risks have direct and significant implications for the fiscal health and viability of companies and entire economic sectors. As a consequence of foreseeable climate-related events major assets can be stranded, flooded or burned; supply chains, disrupted and product demand upended. Unfortunately, events such as extreme drought, hurricanes, wildfires and melting permafrost are increasing in frequency. As the corporate consequences of climate-risk grow, so too can investor exposure to those risks.

E2 members have seen the economic impacts of climate across sectors directly. This past year, one member, a CEO of a food producer located in the Pacific Northwest had to shut down production for three

[1] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020), *codified at* 29 C.F.R. § 2550.404a-1.
[2] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,694 (Dec. 16, 2020), *codified at* 29 C.F.R. § 2550.404a-1.

days because of a heatwave that made it unsafe for workers in their factory; the same company was impacted by supply chain disruptions from the Texas freeze and the hurricane that hit farms in the East Coast. Another E2 member in the hotel industry in North Carolina has spoken about having to redesign a multi-million-dollar hotel at the beach to address sea-level rise and extreme weather events. A restaurant in Louisiana shut down for months due to flooding followed by labor shortages as workers had to address damage to their homes and vehicles. These illustrative examples are by no means outliers. In fact, last year alone, the cost of climate-related disasters in the United States nearly doubled to $95 billion, **according to Munich RE**.

The breadth and depth of the economic implications of climate change are substantial today and likely to grow, so too are the investment implications. The U.S. Department of Labor (Department) must make it abundantly clear that retirement fiduciaries can consider climate and remove any policy that would discourage them or provide uncertainty as to whether climate can be considered in assessing investment portfolios.

POLICY HAS INVESTMENT RISK IMPLICATIONS

Local, state, federal and global governance of emissions and investment in climate-related technologies and projects is expanding with corporate value and sector-health implications. All of which plan fiduciaries should be allowed to consider.

Discouraging a financial advisor from considering key factors that impact financial risk is contrary to the very purpose of the act. And yet current ERISA policy's confusing introduction of "pecuniary" and "non-pecuniary" factors may well have a chilling effect on advisors who are uncertain as to which category such policy falls. Again, there needs to be clarity that plan fiduciaries can consider the very real implications of climate policy.

Investing in new technologies, for example, can be a high risk, high reward endeavor. That is certainly true in the context of new climate technologies from direct air capture to battery innovations. Consideration of whether such new technology has domestic or international government support (in the form of incentives or policy) can be essential to determining whether the technology is a viable investment. Similarly, if federal or state policy provides funding to companies to offset stranded climate assets, a financial advisor should be able to consider that in determining whether it is a sector to invest in. Objectively, a company or sector that could add great returns to a portfolio and which has mitigated risks due to government support has different portfolio implications than one that shows the same potential for returns but has no such mitigated risk. Fiduciaries should be allowed to take that into consideration for the health of retirement investments.

This is not just about risk reduction, but also about accurately identifying investment opportunity. It would be contrary to ERISA's purpose to discourage plan advisors from considering large federal contracts or foreign government purchases of planes in their evaluation of the airline manufacturing sector relative to other investments. And it would be just as contrary to ERISA's purpose to discourage them from considering similar information just because it has climate or ESG implications. When the federal government focuses its immense procurement power on the purchase of clean vehicles and clean electricity; when the US Congress is funds hundreds of billions of dollars of investment in support of specific technologies; and the foreign governments collectively pledge trillions of dollars in emissions reduction which will benefit specific technologies and economic sectors, fiduciaries should be able to consider these things. Policy can have substantial climate or other ESG ramifications and still be relevant to investment outcomes. Fiduciaries should be able to consider such information. The current ERISA policy is not clear enough on that point.

ERISA REFORM PROMOTES INVESTMENT SECURITY AND INVESTOR CONFIDENCE

As proponents of a strong economy, E2 would be remiss in not highlighting that allowing retirement-plan advisors to consider climate risk also benefits broader economic and investment resilience, as well as investor confidence. Collectively, retirement asset fiduciaries have significant influence given the scale of the assets they manage. Clarifying that they can consider and mitigate climate-driven investment risk in plan portfolios, as they would other financial risks, will allow fiduciaries to collectively reduce the likelihood that climate-related events will result in major investment losses or undermine broader economic resilience, which also impacts retirement investors. Reforms that clarify that fiduciaries can engage in proxy voting will also help in this regard. There is no reason why fiduciaries should not try to influence a company's climate or other ESG-related actions through proxy voting if it will improve the value of the investment for retirees.

For all these reasons, E2 supports the Department's revocation of "Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," to remove barriers to consideration of climate and climate policy by financial advisors. In particular, we urge the Department to:

- Adopt revisions to paragraph (b)(2)(ii)(C) and (b)(4) in section 2550.404a-1 to clarify that fiduciaries can consider climate change in the same way that they can consider any other material risk-return factor.
- Reformulate the "tie-breaker" standard in paragraph (c) of the 2020 regulation. Provided that the fiduciary has identified multiple prudent options, then there should be no need for extensive additional documentation requirements explaining why the fiduciary used any factor – including ESG – to select among prudent alternatives.
- The Department should remove the existing regulation's restrictions on including ESG funds as qualified default investment alternatives.[3]
- Finally, the Department should adopt the proposed changes on proxy voting in paragraph (d) of the regulation. As the Department correctly notes in the proposed rule, the 2020 regulation, and in particular the statement in current paragraph (e)(2)(ii) could be read as discouraging proxy voting by fiduciaries.[4]

The current ERISA language sews confusion and doubt and discourages fiduciaries from using important sources of information about key drivers of investment risk and opportunity. In short, it undermines their ability to confidently meet their ERISA obligation to "act prudently and diversify the plan's investments in order to minimize the risk of large losses."[5] The suggested reforms will make it clear that fiduciaries can consider climate change, climate change policy and other important investment-impacting information as they work to best manage retirement assets.

E2 urges the Department to adopt and finalize these reforms. Thank you for your time and consideration of these comments.

Sincerely,

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[3] *See* 29 C.F.R. § 2550.404a-1(d)(2)(ii) (excluding an investment option as a qualified default investment alternative "if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors.").
[4] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. at 57,281.
[5] ERISA fiduciary responsibilities as described by Department of Labor: https://www.dol.gov/general/topic/health-plans/erisa