December 13, 2021

Office of Regulations and Interpretations
ATTN: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via https://www.regulations.gov

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (EBSA-2021-0013-0001) (RIN 1210-AC03)

Dear Sir/Madam:

On behalf of the State of Utah, and the undersigned states, we respectfully submit the following comments in response to the proposed rule Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (EBSA-2021-0013-0001) ("Proposed Rule") that proposes that Employee Retirement Income Security Act (ERISA) fiduciaries "can make investment decisions that reflect climate change and other environmental, social, or governance ('ESG') considerations, including climate-related financial risk, and choose economically targeted investments ('ETIs') selected, in part, for benefits apart from the investment return." *See* Notice of Proposed Rulemaking, 86 Fed. Reg. 57272, 57272 (Oct. 14, 2021).

The Department of Labor's Employee Benefits Security Administration ("Department") should not adopt the Proposed Rule because it encourages, and may in fact require, a plan fiduciary to consider and prioritize non-pecuniary ESG factors when making investment decisions for retirement savings accounts. In other words, the Proposed Rule would allow employers and investment managers to invest employee retirement savings in a way that benefits social causes and corporate goals even if it adversely affects the return to the employee. The Proposed Rule would also allow employers and investment managers to set investment plan defaults and proxy voting in ways that support ESG investment goals contrary to shareholder interests. The Proposed Rule promotes a social activist agenda over the interests of employees, retirees, and other retirement fund beneficiaries.

It is our position that social and political issues should not be considered by fiduciaries in employee retirement savings investment decisions. We are not opposed to any person or entity

considering ESG or other social factors when investing their own money; individuals and companies may promote social causes through their investments to the extent they desire. But we are opposed to investment managers and employers being encouraged or mandated to consider ESG factors and protected from legal action when they do. Adopting this Proposed Rule and allowing employers and investment managers to consider ESG factors makes what should be a financial decision into a political one. The Department should protect employee retirement security by not adopting a rule that encourages or emboldens employers or investment managers to consider ESG factors when investing employees' retirement savings.

BACKGROUND

The Employee Retirement Income Security Act (ERISA) applies to "retirement plans in private industry," including defined benefit plans (e.g., pension) and defined contribution plans (e.g., 401(k)).[1] The law establishes guidelines and standards to protect private-sector employees invested in retirement and welfare benefit plans through their employers. ERISA, as well as its corresponding regulations, interpretive bulletins issued by the Employee Benefits Security Administration (EBSA), and advisory opinions of the Labor Department, establish the fiduciary's duties and reporting requirements. 29 CFR ch. XXV.

ERISA requires a plan fiduciary to exercise "care, skill, prudence, and diligence" in the exercise of its duties. 29 USC § 1104(a)(1)(B). It is a fundamental pillar of Section 404 of ERISA, as well as a longstanding position of the Labor Department under every administration, that ERISA fiduciaries cannot subordinate the interests of retirement plan participants and beneficiaries to unrelated or other objectives. *See* 29 USC § 1104. For more than 40 years, the administrative rules have limited the factors a fiduciary must consider including:

> (A) The composition of the portfolio with regard to diversification;
> (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
> (C) The projected return of the portfolio relative to the funding objectives of the plan.

29 CFR § 2550.404a-1(b)(2)(ii); *see* 44 Fed. Reg. 37221 (June 26, 1979). Financial risks and reward to the beneficiaries are the paramount guidelines imposed by stringent standards of prudence and loyalty under Section 404(a). *See* 29 USC § 1104.

A. Current Rules

An important debate regarding recent ERISA regulations, as issued back and forth by successive administrations, is whether plan fiduciaries may and in fact should consider Environmental, Social, and Governance factors in making investment decisions and exercising shareholder rights. ESG categories have been described to generally comprise the following: "Environmental criteria consider how a company performs as a steward of nature. Social criteria

[1] *FAQs about Retirement Plans and ERISA*, Department of Labor, Employee Benefits Security Administration, https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf.

examine how it manages relationships with employees, suppliers, customers and communities. Governance deals with a company's leadership, board composition, alignment with stakeholders and stakeholder rights."[2] There are various terms used to describe the consideration of ESG factors, including socially responsible investing (also referred to as SRI), social investing, or social investments. But social investing is an amorphous term, varying from "companies making a positive sustainable or social impact, such as a solar energy company"[3] or avoiding "companies that produce or sell addictive substances (like alcohol, gambling and tobacco)."[4] Social investing has also been described to include "a union retirement plan [that] directs the plan to invest in assets that support the union"[5] or community investing in "projects that boost local communities economically."[6]

In response to this debate, the Trump administration promulgated rules to clarify that the prudence and loyalty obligations required plan fiduciaries to select investments based "solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action." 85 Fed. Reg. 72846, 72846. In early 2021, the current rules addressing these concerns—"Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights"—went into effect. *See respectively*, 85 Fed. Reg. 81658 (December 16, 2020) (codified at 29 CFR §§ 2509, 2550); 85 Fed. Reg. 72846 (Nov. 13, 2020) (codified at 29 CFR §§ 2509, 2550).

Under the current rules, a plan fiduciary satisfies the duties of prudence and loyalty if the fiduciary selects investments or takes investment-related courses of action based "only on pecuniary factors" affecting the risk and return. 29 CFR § 2550.404a-1(c)(1). As the Department recognized, in some instances, ESG factors *can* be pecuniary: "environmental or social factors *may* present material and current business risks or opportunities for specific companies (and may be reflected in potential market risk and return)." 85 Fed. Reg. 72846, 72860 (emphasis added). But those factors are only pecuniary "if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories." *Id.* at 72849.

Otherwise, non-pecuniary ESG factors can be considered by fiduciaries as the deciding factor in investment selection *only* if the investment alternative is "economically indistinguishable." 85 Fed. Reg. 72846, 72861; 29 CFR § 2550.404a-1(c)(2). And, if the fiduciary chooses an "economically indistinguishable" investment for ESG reasons, she must document that the investment options are indeed economically indistinguishable, as well as the rationale for including the ESG investment based on the plan's purposes, diversification and the interests of the beneficiaries and participants. 29 CFR § 2550.404a-1(c)(2). Further, the current

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[2] Kenneth Squire, *The evolution of ESG investing. Here's what's next*, CNBC (November 6, 2021), https://www.cnbc.com/2021/11/06/the-evolution-of-esg-investing-heres-whats-next.html.
[3] Arielle O'Shea and Alana Benson, *What Is Socially Responsible Investing (SRI) and How to Get Started*, nerdwallet (November 5, 2021), https://www.nerdwallet.com/article/investing/socially-responsible-investing.
[4] *Socially responsible investing*, Sustainable Investing Glossary, Robeco-The Investment Engineers, https://www.robeco.com/en/key-strengths/sustainable-investing/glossary/socially-responsible-investing.html.
[5] Celia A. Soehner and Elizabeth S. Goldberg, *ERISA and the challenges of using ESG in retirement plan investing*, Reuters (September 20, 2021), https://www.reuters.com/legal/legalindustry/erisa-challenges-using-esg-retirement-plan-investing-2021-09-20/.
[6] *What is Socially Responsible Investment (SRI)?*, Corporate Finance Institute, https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/socially-responsible-investment-sri/.

rule prohibits an investment or product chosen for any non-pecuniary objective (e.g., ESG objectives), even if it meets Section 2550.404a-1(c)(2)'s criteria and documentation requirements, for investments part of a qualified default investment alternative (QDIA). 29 CFR § 2550.404a-1(d)(2)(ii). QDIAs are funds that plan sponsors can set the default investment option under automatic enrollment in a defined contribution plan. 29 CFR § 2550.404c–5.

Finally, the current rules do not require the fiduciary to vote every proxy or exercise shareholder rights in its investments or holdings. 29 CFR § 2550.404a-1(e)(ii). And if the fiduciary chooses to exercise such shareholder rights, then she must act in a manner consistent with the economic interests of plan participants and not subordinate their interests to any non-pecuniary objectives or promote unrelated goals. 29 CFR § 2550.404a-1(e)(ii)(C).

B. Proposed Rule

On May 20, 2021, President Biden issued the Executive Order on Climate-Related Financial Risk. 86 Fed. Reg. 27967. Section 4 of that Order, captioned Resilience of Life Savings and Pensions, directs the Secretary of Labor to "identify agency actions that can be taken [ ] to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk." 86 Fed. Reg. 27967, 27968. The Order further directs the Secretary to consider publishing administrative rules on ERISA that "suspend, revise, or rescind" rules adopted by the prior presidential administration regarding the fiduciary duties under ERISA, namely "Financial Factors in Selecting Plan Investments," 85 Fed. Reg. 72846 (November 13, 2020), and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," 85 Fed. Reg. 81658 (December 16, 2020). *Id.* at 27968-69.

On October 14, 2021, the current administration set forth proposed regulations for ERISA § 404 to make it easier for 401(k) plans to offer plans focused on such ESG objectives including climate change in: (1) selecting plan investments, (2) including such investment in a QDIA, and (3) exercising shareholder and proxy voting rights. 86 Fed. Reg. 57272.

The Proposed Rule eliminates the "pecuniary factors only" standard for assessing investment risk and reward. 86 Fed. Reg. 57272. While the current rules permit fiduciaries to *only* consider non-pecuniary factors if investment alternatives are "economically indistinguishable" and the fiduciary sufficiently documents such consideration, the Proposed Rule would instead require the competing investments simply to "equally serve the financial interest of the plan" with no documentation requirement of such decisions. 86 Fed. Reg. 57272, 57278.

Under the Proposed Rule, a fiduciary must base its evaluation of investment choices and courses of action based on risk and return factors she "prudently determines" are material to investment value. 86 Fed. Reg. 57272, 57278. Although the Department previously determined that ESG factors *could* present material risk, the Proposed Rule dramatically changes course. Now, the Department concludes that the "duty of prudence" may "*often* require an evaluation of the effect of climate change and/or government policy changes to address climate change on investments' risks and returns." *Id.* at 57276 (emphasis added). Indeed, the Proposed Rule specifies examples of material factors to include:

> (i) Climate change-related factors, such as a corporation's exposure to the 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;
>
> (ii) Governance factors, such as those involving board composition, executive compensation, and transparency and accountability in corporate decision-making, as well as a corporation's avoidance of criminal liability and compliance with labor, employment, environmental, tax, and other applicable laws and regulations; and
>
> (iii) Workforce practices, including the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention; its investment in training to develop its workforce's skill; equal employment opportunity; and labor relations.

Id. at 57302-303.

The Proposed Rule eliminates the prohibition in the current rule on including ESG funds in qualified default investment alternatives (QDIA). *Id.* at 57278. The Proposed Rule would eliminate from the current rule that the fiduciary need not vote every proxy or the exercise of every shareholder right. *Id.* at 57303. And, the Proposed Rule would remove both the proxy voting safe harbor when the fiduciary determines the decision will have a "material effect on the value of investment," as well as the existing documentation requirements when a fiduciary decides to exercise shareholder rights. *Compare* 29 CFR § 2550.404a-1(e)(2)(ii) & (3)(iii) *with* 86 Fed. Reg. 57272, 57303.

DISCUSSION

The Department should protect employee retirement savings by rejecting the Proposed Rule. Employer-sponsored 401(k), deferred compensation, pensions, and profit-sharing plans are structured to carry employees from the professional cradle to a secure retirement, which is why ERISA has built in the strict fiduciary guardrails of prudence and loyalty. The fiduciary's duties of prudence and loyalty make the economic and financial interests of participants and beneficiaries in their retirement savings the paramount objective of plan investments and fiduciaries' actions. Fiduciaries must be held to their duties of prudence and loyalty by considering only the financial or pecuniary factors of each potential investment. Fiduciaries should not be encouraged to consider (or protected from legal action for elevating) the social interests of the employer or social goals of an entity when investing or offering investment options for employee retirement savings. We respectfully request that the Department consider the following and reject the Proposed Rule.

I. Financial Risks

The Department must consider that the employees will bear the financial risk if social investing of employees' retirement savings is encouraged. The primary focus of employers and

investment managers when investing employee retirement savings must be protecting employees' economic and financial interests. The same is true when deciding on the default investment plan and proxy voting rules. The Proposed Rule inappropriately encourages a plan fiduciary to disproportionately consider and weigh ESG factors commensurate with pecuniary factors, and protects the fiduciary from the financial ramifications to employees of those considerations. Employees are already bearing the financial risk associated with choosing investment options. This rule would compound the financial risk participants already bear by adding an additional layer of risk that employees may not realize they are carrying. And, by introducing a safe harbor for such actions, plan sponsors will have an inherent agency problem because they will not bear financial costs or risks associated with non-pecuniary factors used to determine whether an investment was prudent as part of a default option.

This is not the time to make employee retirement investments riskier. This country is slowly recovering from the disastrous effects that COVID-19 has wreaked on the economy. Inflation already threatens the investments of all Americans' retirement savings. The Department argues that "a significant benefit of this proposal would be to ensure that plans do not overcautiously and improvidently avoid considering material climate change and other ESG factors when selecting investments or exercising shareholder rights, as they might otherwise be inclined to do under the current regulation" that required fiduciaries to base decisions solely on pecuniary factors. 86 Fed. Reg. 57272, 57296. On the contrary, to now allow employers and investment managers to put employee retirement savings at more risk would be a mistake by the Department.

Underfunded pension plans are problematic in both the public sector and among multiemployer pension plans run by unions.[7] By contrast, individual employer pension plans in the private sector remain in good shape precisely because of the stringent funding and fiduciary standards imposed by ERISA law. Would private sector defined benefit pension plans choose to invest in ESG strategies if they knew there was risk of not performing as well economically? The implications are companies may need to place more funding in retirement plans should investment results suffer. Yet this is precisely the risk this rule would require employees to bear. Ironically, encouraging social investing untethered to pecuniary factors is socially *irresponsible* because it is experimenting with a relatively stable private function that benefits so many of its most financially vulnerable members—older Americans in their retirement. Altering or relaxing ERISA's current investment standards is a folly when examining failed examples of underfunded public sector pensions and multiemployer pension plans which are now potentially bankrupt.

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[7] James Naughton and Dave Hendrick, *Underfunded Pensions: 5 Big Questions Revealing Why Everyone Should Care*, UVA Darden Ideas to Action (June 25, 2020), https://ideas.darden.virginia.edu/underfunded-pensions; Sarah Bryan Fask and Michael Romeo, *The crisis of multiemployer pension plans: Where do we go from here?,* Benefits Pro (September 10, 2020), https://www.benefitspro.com/2020/09/10/the-crisis-of-multiemployer-pension-plans-where-do-we-go-from-here/?slreturn=20211109213228; Heather Gillers, *Pension Cash Dwindles, Risking Liquidity Crunch*, Wall Street Journal (November 22, 2021), https://www.wsj.com/articles/pension-cash-dwindles-risking-liquidity-crunch-11637537168.
Further, while ERISA does not govern public sector plans, the Proposed Rule would undoubtedly impact those plans because they are invested in publicly traded companies. The Proposed Rule would lead to divestment from companies that are not deemed ESG "worthy" and would negatively impact the ability of these companies to raise capital and maintain liquidity.

Investments in retirement accounts are not adjusted for inflation, meaning inflation reduces the investments' real rate of return. Acknowledging the reality that retirement plans are realizing lower, inflation-adjusted returns, the Internal Revenue Service just announced higher contribution limits to 401(k) plans and the Social Security Administration recently announced the largest cost-of-living benefit adjustment in four decades.[8] Americans are concerned about their retirement future, both affected by COVID's economic impact on underlying investments and the rising rate of inflation.[9] The Consumer Price Index has experienced its highest year-over-year gain since 1991.[10] It is a particularly risky proposition to introduce relatively new and untested ESG investment measures and remove certain protections from ERISA's rules at a time when inflation outpaces return on investment.

Financial knowledge and independence are other reasons to scrutinize the Proposed Rule. Many Americans lack financial literacy and savvy, a serious issue when it comes to investing and saving for retirement.[11] The majority of Americans are invested in defined contribution plans through their employers.[12] And troublingly they are not saving as much as recommended for retirement, a concerning fact as 51% percent of Americans retire by age 61, a figure accelerated as many people near retirement age left the workforce during the recent pandemic and have not returned.[13] For these reasons, and others, the fiduciary's duty of prudence and loyalty in selecting, guiding and providing investment options for employees' retirement savings takes on an inordinate measure of care and importance.

Further, the Proposed Rule's promotion of ESG investments for use by plan fiduciaries is also reckless given both the lack of empirical support for these products' performance and a consensus as to what constitutes judicious ESG factors and investing. Social investments lack guidelines and safeguards aimed at protecting employee retirement savings. While ESG financial products are becoming increasingly available, ESG investing is currently a term open to much interpretation with little long-term evidence on how these funds perform over time or whether they are more than a marketing ploy.[14] What seems certain about ESG investment strategies is

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[8] Ashlea Ebeling, *IRS Announces Higher 2022 Retirement Account Contribution Limits for 401(k)s, Not IRAs*, Forbes (November 4, 2021), https://www.forbes.com/sites/ashleaebeling/2021/11/04/irs-announces-higher-retirement-plan-contribution-amounts-for-iras-401ks-and-more-for-2022/?sh=54bbf4c3b1ba; Amara Omeokwe, *Social Security Benefits to Increase 5.9% for 2022*, Wall Street Journal (October 13, 2021), https://www.wsj.com/articles/social-security-cola-increase-2022-11634067648.

[9] Lorie Konish, *71% of retirement age investors worry rising inflation will negatively affect their savings, survey finds*, CNBC (October 14, 2021), https://www.cnbc.com/2021/10/14/71percent-of-retirement-age-investors-worry-inflation-will-hurt-their-savings.html.

[10] Jeff Cox, *Consumer prices rise more than expected as energy prices surge*, CNBC (October 25, 2021), https://www.cnbc.com/2021/10/13/the-consumer-price-index-rose-5point4percent-year-over-year-in-september-vs-5point3percent-estimate.html.

[11] Greg Iacurci, *Financial literacy: An epic fail in America*, InvestmentNews (March 2, 2019), https://www.investmentnews.com/financial-literacy-an-epic-fail-in-america-78385; Olivia Mitchell, Professor at Wharton School, *Where Will ESG Investing Be in Five Years?*, Wall Street Journal (November 18, 2021), https://www.wsj.com/articles/esg-investing-in-five-years-11637161312.

[12] Jack Caporal, *Average retirement savings in the U.S.: $65,000*, The Motley Fool (July 20, 2021), https://www.fool.com/research/average-retirement-savings/.

[13] *Id.*

[14] Mitchell, *supra* note 11; Alicia H. Munnell, Director of the Center for Retirement Research at Boston College, *Where Will ESG Investing Be in Five Years? No future*, Wall Street Journal (November 18, 2021), https://www.wsj.com/articles/esg-investing-in-five-years-11637161312.

that the management fees and expense ratios for these types of investments are much higher than those of traditional strategies using index or exchange traded funds.[15] One common reason for the lack of adequate employee savings in retirement accounts is "account leakage" in the form of high management fees and expense ratios.[16] Additionally, there is evidence that ESG investment strategies have lower yields than index funds and that ESG strategies seem to outperform only when constituent companies comprising traditional investment strategies are re-labeled with the moniker of ESG.[17]

The Proposed Rule further allows relatively new and untested ESG investments to be included in private employer retirement offerings and to make such funds available as part of the plan's default investment option. Pension plans with automatic enrollment (that is, plans where the employee must opt out if they do not want to participate), increase the rate in which the employees select the default fund investment options.[18] Thus to include riskier and costlier ESG investment strategies as the default option in automatic enrollment exposes more employees to retirement risk. This course of action is neither prudent for nor loyal to the beneficiaries of such plans, nor does it hold a plan administrator to its traditional fiduciary duty of making the risk and return of an investment to plan participants the paramount obligation above any other ancillary considerations. There is simply not the accumulation of enough historical and empirically-robust investment data to support the Proposed Rule's claim that ESG options constitute competing investments which "equally serve" the plan's financial interests, much less that they are economically indistinguishable from traditional investment strategies. Background research on environmental, social, and governance issues should only be used as predictive factors to the extent they affect corporate and investment profitability.

Publicly traded companies—the targets of ESG investment activism—have proven susceptible to compromising fundamental principles when pursuing ESG ends. For example, Volkswagen purportedly developed a "clean diesel" engine that produced lower emissions and was advertised as environmentally superior to hybrid vehicle technology. Unfortunately, the company's technology was not real, and investors lost 50% of the value of their stock overnight. Five years later, in October 2020, the stock was still 35% below its pre-scandal price.[19]

No woman or man can serve two interests in equal measure. By lessening the protections of the current rules and softening the current documentation requirements of ESG investment selection and exercising proxy voting and shareholder rights, the proposals make it more likely

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[15] Mitchell, *supra* note 11.
[16] Caporal, *supra* note 12.
[17] Rowena Itchon, *A Custom ESG Portfolio Could Solve the Apples to Oranges Comparison*, Pacific Research Institute (July 6, 2021), https://www.pacificresearch.org/a-custom-esg-portfolio-could-solve-the-apples-to-oranges-comparison/; Bryan Bashur, *Emphasis On ESG Investing Will Compromise Future Returns*, RealClear Markets (November 19, 2021), https://www.realclearmarkets.com/articles/2021/11/19/emphasis_on_esg_investing_will_compromise_future_retirements_804118.html; Andy Puzder and Diane Black, *Who Really Pays for ESG Investing?*, Wall Street Journal (May 12, 2021), https://www.wsj.com/articles/who-really-pays-for-esg-investing-11620858462.
[18] *The Effect of Default Options on Retirement Savings*, National Bureau of Economic Research (NBER) Bulletin on Aging and Health (No.3, September 2006), https://www.nber.org/bah/summer06/effect-default-options-retirement-savings.
[19] Geoff Colvin, *5 years in, damages from the VW emissions cheating scandal are still rolling in*, Fortune (Oct. 6, 2020), https://fortune.com/2020/10/06/volkswagen-vw-emissions-scandal-damages/.

that plan fiduciaries will avoid scrutiny, reprimand, and potential penalty by serving the government's interests of encouraging ESG investing rather than those of the plans' beneficiaries.

II. Other Factors

A basic procedural tenet of administrative rulemaking is that an agency must provide adequate reasons for its decisions. In this case, the Department must examine the relevant historical rules and guidance regarding ERISA's fiduciary duty of prudence and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Id.* The Proposed Rule is deficient in multiple respects.

First, the Proposed Rule is a break from longstanding principles that economic returns to employee retirement investment is the primary duty of the fiduciary in selecting such investment by proposing that ESG factors—in and of themselves—provide a determinative reason to invest. Traditionally ETI ("economically targeted investment") or ESG considerations have served merely as important data points, among many other such points, in assessing investment risk and return. These considerations are neither excluded as relevant factors in the investment calculus nor seen as a beneficial social good warranting additional investment merit.

For example, decreasing investment exposure to an energy company because one notes that current developing drought patterns might affect or diminish that company's hydroelectric infrastructure and output is different from investing in a company that has a strong, pro-union culture in place among its workforce. In making ESG factors *determinative* rather than *informative*, the Proposed Rule breaks from the core, established, and essential fiduciary duty of prudence and loyalty to employees and beneficiaries under ERISA and confuses that clarity with competing duties of social policy engineering.[20]

Second, while the Department repeatedly refers to investor "confusion" as the reason for the rule change, nowhere does the Department identify *who* these confused investors are nor *what* was confusing about the objective "pecuniary factors" requirement in the current rule. Indeed, the "confusion" appears to be no more than pretext. The real purpose of the Proposed Rule is simply to encourage ESG investing: the proposed provisions are "intended to counteract negative perception of the use of climate change and other ESG factors in investment decisions." 86 Fed. Reg. 57272, 57276. The fact that the President directed the Department to rescind the current rules, 86 Fed. Reg. 27967, or that the Financial Factors in Selecting Retirement Plan Investments Act[21] is not progressing, is not a "reasoned explanation" for departure from the current rules. And the supplementary information regarding the Proposed Rule does not include data showing that returns will increase or be more sustainable if ESG factors are considered when investing employee retirement income.

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[20] Rupert Darwall, *The Biden Administration's ESG ERISA Mandate*, RealClear Energy (October 28, 2021), https://www.realclearenergy.org/articles/2021/10/28/the_biden_administrations_esg_erisa_mandate_801124.html.
[21] S.1762, 117th Cong. (2021-2022), https://www.congress.gov/bill/117th-congress/senate-bill/1762.

Third, the cost-benefit analysis is flawed. The "primary" benefit identified in the Proposed Rule is to "clearly redress any *lingering uncertainty*" regarding ESG factors. 86 Fed. Reg. 57272, 57288-89 (emphasis added). But as explained above, the Department fails to articulate what confusion is created by the current rules. Indeed, the only benefit of the revised rule redounds to the ESG investment product providers, companies deemed ESG worthy, investment managers and employers as plan sponsors. Under the Proposed Rule, plan fiduciaries will more often choose ESG investments, employers can serve their political agendas, and investment managers are protected from adverse consequences of their social investment decisions. Indeed, the government may also exert pressure on plan sponsors who do not offer ESG defaults as a way of driving capital to achieve desired social outcomes. But it is the employees and beneficiaries—whose retirement savings are affected—who will suffer. The Proposed Rule encourages fiduciaries to favor social causes to the potential detriment of employees' retirement savings. Moreover, retirement plans that consider ESG factors will incur higher investment costs. As a result, less of each employee's retirement savings is available for investment and the return may be much less. A fiduciary cannot sacrifice investment returns or assume greater investment risks as a means of promoting collateral social justice policy goals.

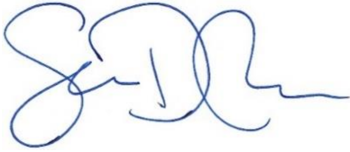
CONCLUSION

The Department has insufficient justification for adopting a new rule that breaks markedly away from the primary and sacrosanct duty of protecting employee interests in their retirement investments. The consensus background on sub-regulatory guidance in this area across the political spectrum highlights one critical point of agreement: the longstanding view that the fiduciary duty under ERISA requires an objective assessment of an investment's economic risk and return when evaluating whether it is appropriate for a plan. Fiduciaries remain bound by statute to manage investments with an ''eye single'' to maximizing the funds available to pay retirement benefits. Yet, the Proposed Rule promotes ERISA fiduciaries to subordinate those interests in favor of other objectives. The Proposed Rule does not protect employee retirement savings but increases the risk of loss and costs by encouraging investments that are often misleading, administratively costly, and historically untested. While it is never appropriate to encourage plan sponsors to take such risks, it is particularly indefensible in a time when Americans struggle with inflation and financial uncertainties. The Proposed Rule risks the economic security of retirees to further a political agenda. The Department should not adopt the Proposed Rule.

Additionally, neither the Federal Register website nor the Department of Labor website made the public comments to the Proposed Rule available for viewing. The Department should make all comments available and extend the comment period to allow interested parties time to review all input.

Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Utah Attorney General, the Utah Office of State Treasurer, or the Utah Office of State Auditor.

Respectfully submitted,



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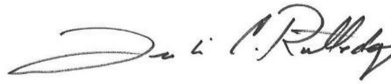

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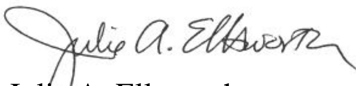

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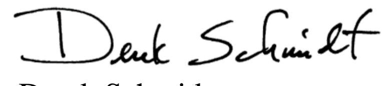
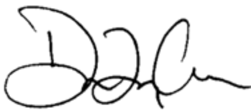


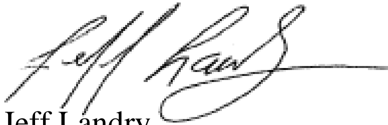
Derek Schmidt
Kansas Attorney General



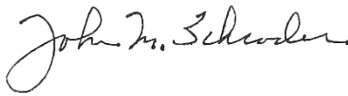
Daniel Cameron
Kentucky Attorney General

Allison Ball
Treasurer, State of Kentucky

Mike Harmon
Kentucky State Auditor



Jeff Landry
Louisiana Attorney General



John M. Schroder
Treasurer, State of Louisiana

Lynn Fitch
Mississippi Attorney General

David McRae
Treasurer, State of Mississippi

Eric Schmitt
Missouri Attorney General

Scott Fitzpatrick
Treasurer, State of Missouri

Austin Knudsen
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Douglas J. Peterson
Nebraska Attorney General

John Murante
Treasurer, State of Nebraska

Thomas Beadle
Treasurer, State of
North Dakota

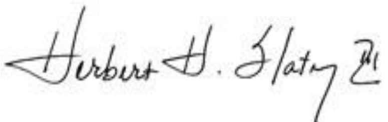
Dave Yost
Ohio Attorney General

John M. O'Connor
Oklahoma Attorney General

Randy McDaniel
Treasurer, State of Oklahoma

Alan Wilson
South Carolina
Attorney General

Curtis Loftis
Treasurer, State of
South Carolina



Herbert H. Slatery
Tennessee Attorney General

Ken Paxton
Texas Attorney General

Patrick Morrisey
West Virginia
Attorney General