

May 9, 2022

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

Re: Request for Information on Possible Agency Actions (Z-RIN 1210-ZA30)

Ladies and Gentlemen:

The American Bankers Association¹ (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on its *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk* (RFI).² The purpose of the RFI is to solicit public input on actions that can be taken by the Department under the Employee Retirement Income Savings Act of 1974 (ERISA) and any other relevant laws to safeguard the retirement assets of the nation’s workers and families “from the threat that climate change poses to their life savings.”³ The RFI includes a series of questions, asking among other things (i) how the Department should address and implement climate-related financial risk, (ii) whether and how data should be collected on climate-related financial risk for employee benefit plans, and (iii) whether ERISA plan administrators, which include our member banks acting as fiduciaries, should be required to publicly report on the steps taken to manage climate-related financial risk, and the results and outcomes of any such steps taken.

We believe that it is *not* necessary for the Department to take any regulatory action related to climate-related financial risk or other risks associated with climate change. ERISA’s requirements on investment decision-making and risk management processes (specifically, a plan fiduciary’s duty and obligation to identify and address all relevant risks, including climate-related financial risk) afford all the protections necessary to safeguard, preserve, and grow retirement savings. On the other hand, singling out climate-related financial risk for mandatory consideration and reporting, regardless of the actual presence or degree of its risk, (i) undercuts a plan fiduciary’s authority and duty under ERISA to appropriately consider and manage all relevant risks, (ii) imposes unnecessary costs to plans and their participants, and (iii) undermines ERISA standards and Department regulations on investment duties that require deference to the judgment of the plan fiduciary rather than the substitution of the Department’s judgment.

¹ The American Bankers Association is the voice of the nation’s \$23.7 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$19.7 trillion in deposits, and extend nearly \$11.2 trillion in loans. Learn more at www.aba.com.

² See RFI, 87 *Fed. Reg.* 8289 (2022).

³ *Id.*

Assuming the Department can overcome these legal obstacles and reasonably conclude that action is warranted, we recommend that prior to taking any such action, the Department (i) collect, analyze, and evaluate the data necessary to understand climate-related financial risk and how this risk interacts specifically with traditional financial risks and ERISA’s requirements, and (ii) consult and coordinate with staffs at the Securities and Exchange Commission (SEC), the Board of Governors of the Federal Reserve System (Federal Reserve), the Internal Revenue Service (IRS), and other relevant agencies on a joint action plan to achieve harmonized regulation of climate-related financial risk that is targeted, consistent, and purposeful. We recommend also that, after such action is completed, that the Department (i) issue an Advance Notice of Proposed Rulemaking (ANPR) to provide full opportunity for public comment and a subsequent public hearing that would assess the need for express regulation of climate-related financial risk, and (ii) after completion of the ANPR process, ensure that any subsequent proposed rulemaking adopt a principles-based, process-driven approach that is flexible and avoids prescriptive rules and requirements. We further encourage and support the Department’s work, individually and together with the other federal agencies, to sponsor and promote public awareness, education, and interaction on climate-related financial risk.

I. The RFI.

The Department issued the RFI in response to the Executive Order on Climate-Related Financial Risk (Executive Order).⁴ The Executive Order outlines the Administration’s general approach to identifying and mitigating climate-related financial risk. Section 4 of the Executive Order directs the Department to ensure the resilience of retirement savings by specifying discrete actions to be taken by the Department to protect retirement savings from the impacts of climate change. In order to assist the agency’s thinking on this subject, the Department will consider and assess the public’s responses to the RFI to gauge possible regulatory action that would safeguard retirement savings from the threats of climate-related financial risk.⁵

The RFI comprises a series of 22 questions designed to determine the extent and manner of the Department’s actions on climate-related financial risk. The questions are divided into the following sections: (i) General (Questions 1-2), (ii) Data Collection Regarding ERISA-Covered Plans (Questions 3-6), (iii) ERISA Fiduciary Issues (Questions 7-8), (iv) FERSA (Federal Employees’ Retirement System Act) (Questions 9-18), and (v) Miscellaneous (Questions 19-22).⁶ We have chosen to focus our responses to Questions 1-4, 6, and 19-22 (with the responses to Question 1 in Section II.A. and the remaining questions in Section II.B.) herein.

⁴ See Executive Order 14030 (May 20, 2021).

⁵ Throughout the RFI, the Department refers to the term “climate-related financial risk” both in the singular and plural forms. For consistency, our response herein will refer to the term in the singular form.

⁶ Question 5 asks whether there are methods (other than the Form 5500) for collecting data on climate-related financial risk. Question 7 asks about the best sources of information for plan fiduciaries to utilize in evaluating climate-related financial risk factors. Question 8 asks about whether the availability of guaranteed lifetime income products (*e.g.*, annuities) in a defined contribution plan would help mitigate climate-related financial risk.

II. ABA Recommendations and Responses to RFI.

Our response consists of (i) recommendations on the Department’s administrative and rulemaking processes, and (ii) responding to those RFI questions of particular interest and/or importance to our member banks.

A. Administrative and Rulemaking Processes.

Question 1 of the RFI asks for the public’s views on how the Department, acting through the Employee Benefit Security Administration (EBSA),⁷ should address and implement the action items set forth in the Executive Order. Our response in this Section II.A. is divided into four sequential parts as described below.

1. The Department Should Not Take any Regulatory Action on Climate-Related Financial Risk Since None Is Necessary. ERISA Requirements Already Obligate Plan Fiduciaries to Take into Account the Full Range of Relevant Factors, Including Climate-Related Financial Risk, into Their Investment Decision-Making and Risk Management Processes.

In response to Question 1, we believe that the Department should refrain from taking any regulatory action related to climate-related financial risk or other risks associated with climate change, since such action is unnecessary. The provisions of ERISA and implementing Department regulations already require plan fiduciaries to take into account the entire range of relevant factors in their investment decision-making process, including the weighing of risks relevant to making a particular investment and to the risk management process for managing such investment.⁸ This process obligates a plan fiduciary to factor in climate-related financial risk when and as appropriate, in order to satisfactorily discharge its duties of loyalty and prudence to the plan and its participants and beneficiaries under ERISA.⁹

On the other hand, we believe that *mandating* consideration and reporting of climate-related financial risk would needlessly elevate this risk above all other financial and other relevant risks. This may result in unmerited regulatory prominence conferred on climate-related financial risk, compelling a plan fiduciary to place undue emphasis on this risk to the detriment of factoring in other investment risks that the plan fiduciary might deem equally or potentially more significant

⁷ The RFI expressly identifies EBSA as the US government entity responsible for implementing the Executive Order and RFI. EBSA is an agency of the Department responsible for administering, regulating, and enforcing the provisions of Title I of ERISA, which would include jurisdiction over the subject matter of the RFI. For purposes of this letter, reference to the “Department” shall refer also to EBSA.

⁸ See ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1); 29 C.F.R. § 2550.404a-1(b) (Department’s investment duties regulation states that ERISA investment duties are satisfied if a fiduciary “[h]as given appropriate consideration to those *facts and circumstances* that . . . the fiduciary knows or should know *are relevant* to a particular investment”). [Emphasis added.]

⁹ See ERISA § 404(a), 29 U.S.C. § 1104(a)(1) (“a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries”) (loyalty); 29 U.S.C. § 1104(a)(1)(B) (“[a fiduciary shall discharge his duties] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”) (prudence).

depending on the particular facts and circumstances of the plan.¹⁰ Although there may be instances where it would be necessary or appropriate to factor in climate-related financial risk into a potential plan investment, there may be other instances where climate-related financial risk factors little into an investment, or may altogether be absent as a relevant risk factor. This would result further in additional and unnecessary costs to the plan.¹¹ Moreover, there may be other investment risk factors – such as inflationary risks and geopolitical risks – that may weigh heavily into investment decision-making, but which, when juxtaposed to a mandatory climate-factor regulatory scheme, may be subjected to diminished plan fiduciary consideration and oversight.¹²

Superimposing a new and untested regulatory scheme focused solely on climate-related financial risk, in other words, would unduly influence and distort the fiduciary investment decision-making and risk management processes.¹³ In its good-faith effort to achieve legal compliance of climate-related financial risk requirements, a plan fiduciary may inadvertently violate the ERISA-required standard to appropriately consider and manage *all* relevant risks.¹⁴ This needlessly exposes the plan fiduciary to unwarranted liability and litigation risks. The presence of express regulatory requirements to factor in climate-related financial risk further may undercut ERISA standards and Department regulations on investment duties that require deference to the judgment of the plan fiduciary rather than the substitution of the Department’s judgment.¹⁵

Consequently, the Department should continue to allow *existing* ERISA requirements to regulate the consideration and factoring of climate-related financial risk. Department staff can monitor plans and their fiduciaries through the normal supervision and examination process to ensure that all relevant risks are being duly considered in the investment decision-making and risk management processes, with the appropriate supervisory tools to enforce compliance with ERISA fiduciary requirements.

2. Should the Department Decide to Move Forward on Regulatory Action, and Provided the Legal Issues Described in Section II.A.1. Above Are Successfully Resolved, then the Department, Prior to Moving Forward, Should (i) Collect, Analyze, and Evaluate the Data Necessary to Understand Climate-Related Financial Risk and How This Risk Interacts with Traditional Financial Risks and ERISA Requirements, and (ii) Consult and Coordinate with Staffs at the

¹⁰ The Department’s undertaking to define and quantify climate-related financial risk vis-à-vis traditional financial and other investment risks would be a novel and complex process, involving and dependent upon multiple policy choices and outcomes, over timeframes that would extend far beyond those used to assess traditional risks.

¹¹ See ERISA § 404(a)(1)(A)(ii) (part of fiduciary duty to plan consists of “defraying reasonable expenses of administering the plan”).

¹² See n.10, *supra*.

¹³ See Department, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 52,272, 57,303 (2021) (ESG Investing Proposal), Section 404a-1(c)(2) (“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”). [Emphasis added.]

¹⁴ See 29 C.F.R. § 2550.404a-1(b)(1); 29 C.F.R § 2550.404a-1(c)(2) (proposed).

¹⁵ See Dechert LLP, *ERISA’s Social Goals? ESG Considerations Under ERISA* (May 15, 2020) (“Once the [ERISA] fiduciary has given appropriate consideration to all applicable facts and circumstances, ERISA tends to encourage deference to the judgment of that fiduciary, *and tends to discourage regulators and judges from substituting their judgment,*” citing 29 C.F.R. § 2550.404a-1(b)(1) & (2)). [Emphasis added.]

SEC, Federal Reserve, IRS, and other Federal Agencies on a Joint Action Plan to Harmonize Regulation on Climate-Related Financial Risk that Is Targeted, Consistent, and Purposeful.

As described above, we believe that before the Department considers moving forward with the rulemaking process, it first must overcome three significant legal obstacles:

- (i) distorting the fiduciary investment decision-making and risk management processes by mandating consideration of climate-related financial risk, whether or not it is, or should be, present as an investment consideration based on the facts and circumstances of the particular plan;
- (ii) imposing unnecessary costs to the plan as a result of a fiduciary’ obligation to consider and factor in climate-related financial risk, even where the facts and circumstances of the particular plan do not warrant such consideration; and
- (iii) resolving how to mandate a plan fiduciary’s consideration of climate-related financial risk, without such mandate resulting in substitution of the Department’s judgment for that of the plan fiduciary in investment decision-making and management.

If these structural inconsistencies cannot be squared with ERISA’s fiduciary requirements, then the Department should continue to rely on the current regulatory framework as providing sufficient assurance that plan fiduciaries are accounting for all relevant risks, including climate-related financial risk, in discharging their fiduciary duties to the plan and its participants and beneficiaries.

If on the other hand the Department believes it is able to surmount these obstacles, then prior to any proposed rulemaking, the agency should collect, analyze, and evaluation the data necessary to understand climate-related financial risk. While the public comments gathered from this RFI will provide useful material, the Department should continue to collect data from all available sources in order to determine the appropriate parameters and substance of a possible regulation focused solely on climate-related financial risk. Critical to this effort will be to discover and understand how climate-related financial risk intersects and interacts with other relevant risks a plan fiduciary considers in managing ERISA assets.

The Department further should consult and coordinate with staffs at the SEC, Federal Reserve, IRS, and other federal agencies while working toward harmonization of federal regulatory action that (i) targets matters specifically concerning climate-related financial risk while avoiding regulatory “creep” that could envelop unrelated areas of concern and/or extends beyond the jurisdiction of the agency, (ii) provides consistency of federal regulations across the board and that avoids conflicting or duplicative requirements, and (iii) is purposeful in its substance and implementation.¹⁶ This regulatory strategy would include developing a common taxonomy that

¹⁶ See *ABA Principles on Climate Change and Banking* (2022) (“US financial regulators must work together closely, and with international bodies, to ensure consistent definitions, standards and avoid conflicting or overlapping

would be used universally to identify, describe, and assess climate-related financial risk. The consistent use and application of common, agreed-upon terminology would be crucial for plan fiduciaries and their service providers that often operate within multiple regulatory schemes.

3. Assuming that the Department Completes the Actions Described in Section II.A.2., Above, and Prior to Issuing a Proposed Rule, the Department Should Draft and Issue an ANPR, with Full Opportunity for Public Comment and Subsequent Dialogue with Stakeholders, on Climate-Related Financial Risk.

If, after completing the above-described actions, the Department decides that further regulatory action would be warranted, it should proceed next by issuing an ANPR. Unlike a proposed rule, a federal agency will issue an ANPR when it needs information or data on what regulation to develop and the alternative options available.¹⁷ An ANPR further is used as a regulatory vehicle for providing direct public participation in the development of agency policy objectives and the formulation of a new regulation.¹⁸

The Department has successfully employed this administrative procedure for lifetime income regulation. The Department first published an RFI requesting input regarding lifetime income options for those covered in retirement plans.¹⁹ Over 700 comments were provided in response to the RFI. The Department subsequently held public hearings to flesh out specific issues.²⁰ The Department next issued an ANPR, focusing on lifetime income illustrations that would be provided to participants in defined contribution retirement plans.²¹ Following federal legislation on the subject, the Department published an interim final rule on lifetime income illustrations that became effective last year, providing plan participants annually with valuable lifetime income information and disclosures regarding their retirement savings.²²

In this instance, an ANPR on climate-related financial risk would:

- (i) describe the Department’s policy objectives with respect to a regulation on climate-related financial risk,

requirements”). Among other things, regulators should work to close data gaps and apply a consistent set of definitions, assumptions, and methodologies.

¹⁷ See, e.g., Mine Safety and Health Administration, *What’s the difference between an Advance Notice of Proposed Rulemaking (ANPRM), a Notice of Proposed Rulemaking (NPRM or proposal), a Final Rule, a Direct Final Rule, and an Emergency Temporary Standard?*, available at <https://www.msha.gov/training-education/frequently-asked-questions/whats-difference-between-advance-notice-proposed>.

¹⁸ The ANPR “is a formal invitation to participate in shaping the proposed rule and starts the notice-and-comment process in motion.” Office of the Federal Register, *A Guide to the Rulemaking Process*, available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

¹⁹ See Department and Department of the Treasury, *Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans*, 75 Fed. Reg. 5253 (2010).

²⁰ See Department and Department of the Treasury, *Hearing on Certain Issues Relating to Lifetime Income Options for Participants and Beneficiaries in Retirement Plans*, 75 Fed. Reg. 48,367 (2010).

²¹ See Department, *Advance Notice of Proposed Rulemaking, Pension Benefit Statements*, 78 Fed. Reg. 26,727 (2013).

²² See Department, *Interim Final Rule with Request for Comments, Pension Benefit Statements – Lifetime Income Illustrations*, 85 Fed. Reg. 59,132 (2020).

- (ii) provide the scope and parameters of a possible regulation, and
- (iii) seek public input, not only on the Department’s ANPR but also on the range of other possible approaches to a regulation, as well as alternative regulatory language and/or provisions that would address climate-related financial risk.

After receiving public input, the Department should consider meeting with interested parties and stakeholders on a proposed regulation, which may include a public hearing designed to elicit a wide range of statements and positions on climate-related financial risk. These actions collectively would ensure that the Department becomes fully equipped to determine whether a rule is at all necessary, and if so, to draft a proposed rule whose substance has been thoroughly vetted beforehand in a public forum.

4. After Completion of the ANPR Process, Any Proposed Rule Should Follow a Principles-Based, Process-Driven Approach that Is Flexible and Avoids Prescriptive Rules and Requirements.

After the Department has completed the ANPR process (including the holding of public hearings, as appropriate), it may decide to draft and propose a new rule on climate-related financial risk. We iterate our concern over a Department regulation that would expressly set apart and highlight climate-related financial risk from the multitude of relevant risks that plan fiduciaries consider for investment decision-making and management, particularly where such risk, in any given investment decision, may not be material or may not at all be considered a relevant risk by the plan fiduciary.²³ Nevertheless, should the Department proceed with a proposed regulation on climate-related financial risk, we recommend that such proposal take a principles-based, process-driven approach (*i.e.*, that focuses on the risk management process) and avoid prescriptive rules and requirements.²⁴ This approach, which is consistent with the objectives of the investment duties regulation, would allow plan fiduciaries involved in investment decision-making and management the flexibility to consider the relevancy and degree of climate-related financial risk on a case-by-case basis.

B. Responses to RFI Questions.

- 1. *RFI Question 2: What are the most significant climate-related financial risks to retirement savings and why?*

ABA Response: Although the Executive Order Refers to “Physical” Risks and “Transition” Risks, the Most Immediate and Consequential Risks Are from Potentially Misaligned Public Policies and Directives that May Threaten the Preservation and Growth of Retirement Savings.

²³ Such a regulation may also contravene the Department’s forthcoming amendments to the investment duties regulation. *See* ESG Investing Proposal, *supra*, Section 404a-1(c)(2) (“A fiduciary’s evaluation of an investment . . . must be based on risk and return factors that the fiduciary prudently determines are material to investment value”). [Emphasis added.]

²⁴ *See also* ABA Comment Letter (Dec. 13, 2021) (recommending a principles-based approach to the ESG Investing Proposal).

The Executive Order tasks the Department to identify agency actions to protect retirement savings from the threats of climate-related financial risk.²⁵ Neither the Executive Order nor the RFI, however, defines the term “climate-related financial risk.” Rather, the Executive Order refers to “physical” and “transition” risks as the two elements that comprise climate-related financial risk. “Physical” risks refer to the physical impacts of climate change, such as extreme weather events leading to drought, sea level rise or (as the Executive Order cites) to “supply chain disruptions.”²⁶ “Transition” risks refer to “the global shift away from carbon-intensive energy sources and industrial processes,” which may include such events as changing market demand and carbon pricing.²⁷ We assume, therefore, that the Department is asking which physical and transition risks are most relevant and important for the protection of the nation’s retirement savings.

We are not aware of employee benefit plans or plan fiduciaries expressing concern that physical or transition risks pose significant threats to retirement savings. We believe, however, that the most immediate and consequential risks to retirement savings are potentially misaligned public policies and directives. Inconsistent and incompatible public policies make it difficult to assess and evaluate the prudence of investments for retirement portfolios. Maine law, for example, directs the state’s public employee retirement system to divest itself from fossil fuel investments.²⁸ In contrast, Texas law requires the state’s pension funds to stop investing in firms that plan to divest from fossil fuel companies.²⁹ This counsels for the Department to undertake a deliberative, thorough, sober, and measured review, assessment, and evaluation of climate-related financial risk prior to taking any regulatory action that could negatively impact the present and future security of the nation’s retirement savings. The Department will need to factor in the possibility of inconsistent and conflicting public policies, directives, and other actions into climate-related financial risk that unintentionally may work at cross-purposes with the protection of retirement plan assets.

2. RFI Question 3: Should the Department’s EBSA Collect Data on Climate-Related Financial Risk for Plans?

ABA Response: The Department Should Not Collect Data on Climate-Related Financial Risk for Plans Since it Is Unclear What the Department Would Do With the Data or How Such Collection Would Further Its Regulatory Mandate under ERISA (i.e., How Data Collection Would Assist the Department in Supervising and Enforcing ERISA Legal and Regulatory Standards).

The Department asks whether it should collect data on climate-related financial risk for plans, and if so, requests what specific information it should collect, the potential sources of such information, and how such information should be collected.³⁰ The Department, however, does

²⁵ See Executive Order § 4(a).

²⁶ *Id.* § 1.

²⁷ *Id.*

²⁸ See ME LD 99 (2021). A number of US cities also have committed to divesting their municipal funds, including pension assets, from fossil fuel investments. See, e.g., Chicago Municipal Code 2-32-515 (amended to prohibit investments in coal-, oil-, and gas reserve-owning companies) (March 23, 2022).

²⁹ See TX SB13 (Texas 87th Leg.) (2021).

³⁰ See RFI, 87 *Fed. Reg.* at 8290.

not explain its rationale or expectations or otherwise indicate why it is necessary to collect data from plans on climate-related financial risk. Moreover, the Department does not make clear how such data collection would further its mandate to supervise and enforce ERISA legal and regulatory standards.³¹

Consequently, before pursuing proposed rulemaking, the Department first should issue an ANPR that would include (i) Department policy objectives in collecting data on climate-related financial risk, (ii) the intended agency use of such data, and (iii) how data collection would further the Department’s regulatory mandate under ERISA. The public then would be able to provide informed input on the nature and usefulness of data collection on climate-related financial risk.³²

3. RFI Question 4: Should EBSA Use Form 5500 Annual Return/Report (“Form 5500”) to Collect Data on Climate-Related Financial Risk to Pension Plans?

ABA Response: The Department Should Not Use Form 5500 to Collect Data on Climate-Related Financial Risk to Pension Plans Since (i) Form 5500 Is Heavily Dependent on Measurable Data Points Which Climate-Related Financial Risk Does Not Provide, and (ii) it Is Unclear What the Department Would Do with this Information and How This Would Further Plan and Plan Sponsor Compliance under ERISA.

The RFI asks whether the Department should use the employee benefit plan annual reporting Form 5500 to collect retirement plan data on climate-related financial risk.³³ Form 5500 serves as the primary source of information and data available concerning the operations, funding, and investments of employee benefit plans. The Department considers the Form 5500 as “essential to [its] enforcement, research, and policy formulation programs.”³⁴

Form 5500’s purpose and functionality, however, is heavily dependent on specific, concrete, measurable data points to assist the Department in enforcing regulatory compliance and to analyze retirement industry patterns and trends.³⁵ It is not clear how climate-related financial risk lends itself to measurable data points.³⁶ Specifically, the nature, level, and reporting of

³¹ See ERISA § 505, 29 U.S.C. § 1135 (“[T]he [DOL] may prescribe such regulations as [it] finds necessary or appropriate to carry out the provisions of [ERISA].”)

³² Question 5 of the RFI asks whether the Department should consider other methods of collecting data on climate-related financial risk from plans (other than using Form 5500). See RFI, 87 Fed. Reg. at 8291. For the same reasons, and in the absence of a stated policy objective, we recommend that the Department employ the ANPR process to collect data on climate-related financial risk prior to determining whether to rely on other collection methods.

³³ See RFI, 87 Fed. Reg. at 8290-91.

³⁴ Department, Proposed Revision of Annual Information Return/Reports (Form 5500), 86 Fed. Reg. 51,488, 51,489.

³⁵ See, e.g., Form 5500, Schedule C (Service Provider Information), Schedule G (Financial Transaction Schedules), Schedule H (Financial Information), and Schedule R (Retirement Plan Information).

³⁶ Moreover, most ERISA plan fiduciaries diversify their overall portfolios in order to minimize investment risks, such as through the use of broad index strategies and/or funds (e.g., mutual funds, collective investment funds) that give them indirect exposure to a number of issuers, markets, and/or geographic areas. Exposure to climate-related financial risk of the underlying holdings of these strategies/funds might not be readily apparent upon review of Form 5500 data.

climate-related financial risk is dynamic, not static, and may change considerably within a short period of time. It would be challenging, therefore, to conceive the utility and reliability of climate-related financial information on Form 5500. Indeed, the changing and uncertain nature, degree, assessments, and projections of climate change risks might result in a plan providing Form 5500 information on climate-related financial risk that is incomplete, dated, or erroneous, thereby exposing such plan to possible monetary fines and penalties.³⁷

Moreover, the inclusion of information on climate-related financial risk, coupled with the absence of information of all other risks, might confuse or mislead plan participants reviewing the form by overstating the importance of climate-related financial risk while understating other financial risks. It is further unclear how such data on Form 5500 would comport with the Department's mandate to supervise and enforce ERISA legal and regulatory standards. The Department, therefore, should refrain from requiring that climate-related financial risk be included on Form 5500.³⁸

4. RFI Question 6: Should Administrators of ERISA Plans Be Required to Publicly Report on the Steps They Take to Manage Climate-Related Financial Risk and the Results and Outcomes of Any Such Steps Taken, in a Form that is More Easily Accessible to the Public, and Timelier, than the Form 5500?

ABA Response: Plan Administrators Should Not Publicly Report on the Steps Taken to Manage Climate-Related Financial Risk Since this Requirement Would Artificially Segment and Elevate Climate-Related Risk from Other Equally or More Important and/or More Immediate Financial Risks that May Be Present, Possibly Confusing or Misleading Plan Participants and the Public on the Magnitude and Importance of Climate-Related Financial Risk over Other Relevant Risks.

The RFI asks whether plan administrators should be required to publicly report the steps they take to manage climate-related financial risk and the results and outcomes of these steps.³⁹ It further asks whether this information should be made available on a report other than the Form

³⁷ See Department, *Instructions for Form 5500* Section 3, Penalties at 7 (“Plan administrators and plan sponsors must provide complete and accurate information and must otherwise comply fully with the filing requirements. ERISA and the Code provide for the [Department] and the IRS, respectively, to assess or impose penalties for not giving complete and accurate information and for not filing complete and accurate statements and returns/reports”). A substantially noncompliant Form 5500 filing could result in a Department or IRS audit or investigation that could result in sizeable monetary penalties. See ERISA § 504, 29 § 1134.

³⁸ The SEC has proposed comprehensive rule changes (SEC Proposal) that would require issuers to include certain climate-related disclosures in their registration statements and periodic reports, including information on climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements. See SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 *Fed. Reg.* 21,334 (2022). Such disclosures in SEC filings can assist plan fiduciaries and plan participants in their investment decision-making but any similar disclosures or reporting for plans in the audit statement, Form 5500, or other stand-alone report would not enhance participant protections or help to safeguard the assets of a plan.

³⁹ See RFI, 87 *Fed. Reg.* at 8291.

5500, and if so, (i) how the report should be compiled, (ii) what should included in the contents, and (iii) how should it be made available to the public.⁴⁰

We believe that plan administrators should not publicly report on their management of climate-related financial risk. The Department has not stated how this requirement would promote ERISA compliance or benefit employee benefit plans. We reiterate that segmenting and highlighting climate-related financial risk in a publicly available report, while providing no information at all on other financial risks, would confuse and mislead the public on the magnitude and importance of climate-related financial risk over other relevant risks.⁴¹ Moreover, where climate-related financial risk is minimal or absent, this requirement would involve the use of plan assets to pay for the costs of generating such report with no discernible benefit to the plan itself, possibly in violation of ERISA’s requirement that the plan fiduciary defray only reasonable expenses to the plan.⁴² In the absence of a compelling Department policy objective – which has not been stated – there should be no public reporting requirement.

5. *RFI Question 19: Are There Any Legal or Regulatory Impediments that Hinder Managers of Investments Held in Savings and Retirement Arrangements Not Covered by ERISA, such as IRAs, from Taking Steps to Mitigate Against Climate-Related Financial Risks to Those Investments? Does the Absence of Prudence and Loyalty Obligations with Respect to these Arrangements Leave Them Vulnerable to Climate-Related Financial Risks?*

ABA Response: We Are Aware of No Legal or Regulatory Impediments that Hinder Managers of Investments Held in IRAs from Taking Steps to Mitigate Against Climate-Related Financial Risk with Respect to Those Investments.

The RFI asks whether investment managers of individual retirement accounts (IRAs) and other non-ERISA retirement accounts encounter any legal or regulatory impediments that would hinder them from taking steps to mitigate against climate-related financial risk with respect to those investments.⁴³ The RFI further asks whether the absence of prudence and loyalty obligations with respect to these arrangements leave the manager “vulnerable” to climate-related financial risk.⁴⁴ We are not aware of any legal or regulatory impediments that hinder managers of investments held in IRAs from taking steps to mitigate against climate-related financial risk with respect to those investments. Presumably, these managers retain investment discretion on behalf of the IRA owner over the IRA investment portfolio, and therefore, would be subject to the prudent investor requirements under applicable state fiduciary laws or federal law.⁴⁵ These requirements obligate the party with investment discretion to invest assets as a prudent investor would, which would involve taking account of all relevant risks, including climate-related financial risk, where applicable.⁴⁶

⁴⁰ See *id.*

⁴¹ See Section II.B.3., *supra*.

⁴² See ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

⁴³ See RFI, 87 *Fed. Reg.* at 8292.

⁴⁴ See *id.*

⁴⁵ See, e.g., Uniform Prudent Investor Act (UPIA) (adopted by most states), 12 C.F.R. Part 9 (fiduciary regulation for national banks).

⁴⁶ See UPIA § 2 (Standard of Care).

IRA accounts also may be IRA owner-directed, in which instance the IRA manager, acting in a non-discretionary capacity, may execute securities transaction orders as directed and on behalf of the IRA owner. In this scenario, the IRA owner would be responsible for weighing the risks of an investment. It is unclear why the Department is asking whether the absence of prudence and loyalty obligations leave managers vulnerable to climate-related financial risk. The duty to prudently invest IRA assets remains with managers with investment discretion over the IRA assets; such duty does not exist in a directed client arrangement. However, a manager's duty of loyalty to the IRA customer applies regardless of the investment management arrangement.⁴⁷ It is thus unclear what the Department means by asking whether a manager is "vulnerable" to climate-related financial risk. We note also, as acknowledged by the Department in the RFI, that the Department and IRS have overlapping responsibility for the administration of IRAs. We recommend, therefore, that Department staff consult and coordinate with IRS staff prior to taking any further action in this area.

6. RFI Question 20: Should EBSA Sponsor and Publish Research to Improve Data and Analytics that ERISA Plan Fiduciaries Could Use to Evaluate Climate-Related Financial Risks? If So, What Research Subjects Should EBSA Sponsor?

ABA Response: EBSA Should Sponsor and Publish Research on the Department's Website to Improve Data and Analytics Accessible to ERISA Fiduciaries that Would Allow Them to Assess and Evaluate Climate-Related Financial Risk. The Research Should Parallel and Span the Subjects Being Studied by Other Federal Agencies, International Standard Setting Bodies, and Nationally Recognized, Nonpartisan Organizations so that There Is Data Comprehensiveness and Consistency.

The Department asks whether sponsoring and publishing research (presumably specific to the retirement industry) would assist plan fiduciaries in evaluating climate-related financial risks.⁴⁸ We would support the Department's establishment on its website of one or more links to published research that would allow plan fiduciaries and the public to access and evaluate climate-related financial risk.⁴⁹ The site could include additional links to other research sites and possibly a small-scale multiuser social networking platform, which would allow users to ask questions and engage in online discussions concerning the research.

Rather than having us specify possible research subjects (which are constantly evolving and expanding), we recommend that the Department's research parallel and span the subjects being

⁴⁷ See *id* § 5 (Loyalty) ("[a] trustee shall invest and manage the trust assets solely in the interest of the beneficiaries.").

⁴⁸ See RFI, 87 *Fed. Reg.* at 8292.

⁴⁹ The Department could accomplish this through EBSA's Office of Outreach Education and Assistance (OEA), which among other things is "responsible for developing publications and other educational materials for participants and plan sponsors and for the content and design of EBSA's website." OEA also formulates the Department's strategic plan for outreach and education. See Department, *Fact Sheet: EBSA's Participant Assistance and Outreach Program* (Jan. 2020), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/fact-sheets/participant-assistance-and-outreach-program.pdf>.

studied by other federal agencies.⁵⁰ We further would encourage the Department to include a global reach by incorporating the research being performed and published by international standard setting bodies, such as the Financial Stability Board and the International Organization of Securities Commissions (IOSCO).⁵¹ Gathering and synthesizing this collective information on the Department website would ensure that there is data comprehensiveness and consistency (or, where there are possible inconsistencies, the source(s) of the research at variance). The Department should also consider including research from nationally recognized, nonpartisan, professional organizations dedicated to climate study in order to strengthen the availability and range of research, data, and analytics.

7. DOL RFI Questions 21 and 22: Is There a Need to Educate (i) Participants, Especially Those Responsible for Making Their Own Investment Decisions in Participant-Directed Individual Account Plans, and (ii) Owners of IRAs, About Climate-Related Financial Risk? If so, What Role, if any, Should EBSA Play in Sponsoring and Providing Such Education?

ABA Response: EBSA Should Sponsor and Provide on the Department’s Website Education on Climate-Related Financial Risk, which Would Benefit from Public and Stakeholder Review and Input. The Department Further Should Coordinate with the Other Federal Regulatory Agencies to Ensure that Education Efforts Are Current, Consistent, and Comprehensive.

The RFI’s final two questions ask whether there is a need to educate pension plan participants (Question 21) or IRA owners (Question 22) about climate-related financial risk and the role, if any, the Department should play in providing such education.⁵² Polling and research suggests that much of the American public often is confused by climate change information and information sources.”⁵³ We would support, therefore, the Department’s efforts to educate persons who own all types of retirement arrangements about climate-related financial risk, in language that can be understood by retail retirement investors. The Department could place educational materials on its website to inform retail retirement investors of the nature, types, and examples of climate-related financial risk, which could be updated periodically to account for new climate-related developments and research. The Department further could issue frequently asked questions (FAQs) or other guidance to assist retail retirement investors with issues of public concern or education regarding climate-related financial risk.⁵⁴

⁵⁰ See, e.g., Department of the Treasury, Office of the Comptroller of the Currency, OCC Bulletin 2021-62, *Principles for Climate-Related Financial Risk Management for Large Banks* (Dec. 16, 2021); Federal Reserve Bank of New York, *Climate Stress Testing* (Sept. 2021).

⁵¹ See, e.g., Financial Stability Board, *FSB Roadmap for Addressing Climate-Related Financial Risks* (July 7, 2021); IOSCO, *Report on Sustainability-related Issuer Disclosures* (June 2021).

⁵² See RFI, 87 Fed. Reg. at 8292.

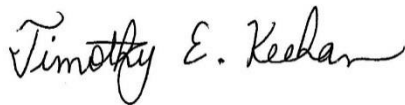
⁵³ See, e.g., “Americans broadly accept climate science, but many are fuzzy on the details,” *The Washington Post* (Dec. 9, 2019), available at https://www.washingtonpost.com/science/americans-broadly-accept-climate-science-but-many-are-fuzzy-on-the-details/2019/12/08/465a9d5e-0d6a-11ea-8397-a955cd542d00_story.html.

⁵⁴ The Department has issued consumer education-oriented, retirement-related FAQs in other areas. See, e.g., Department, *FAQs on Retirement Plans and ERISA*, available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>; *FAQs on Disclosures to Help Employees Understand Their Retirement Plan Fees*, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/disclosures-to-help-employees-understand-their-retirement-plan-fees.pdf>.

Question 21 also asks whether the Department should coordinate with the SEC in its efforts to inform and protect plan participants from potentially misleading statements about company or fund adherence to climate policies (*i.e.*, “greenwashing”). Question 22 asks whether the Department similarly should assist the IRS and those states with auto-IRA arrangements with investor education. We would support the Department’s efforts to coordinate with the federal agencies as well as the states to promote public awareness and education on climate-related financial risk. The Department, together with the SEC, IRS, other federal agencies, and the states, should ensure that the multiple regulatory approaches on climate-related financial risk are targeted, consistent, and not duplicative.

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

Sincerely,

A handwritten signature in black ink that reads "Timothy E. Keehan". The signature is written in a cursive, flowing style.

Timothy E. Keehan
Vice President & Senior Counsel