May 16, 2022

Via Electronic Filing

Acting Assistant Secretary Ali Khawar
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW Room N-5655
Washington, DC 20210

Re: Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk (RIN 1210-ZA30)

Dear Acting Assistant Secretary Khawar:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the Department's request for public input on its future work relating to retirement savings and climate-related financial risk.[2] The Department's recent ESG Proposal[3] confirms that, under the appropriate circumstances, Employee Retirement Income Security Act of 1974 (**ERISA**) fiduciaries may make investment decisions that reflect climate change and other environmental, social, or governance (**ESG**) considerations, including climate-related financial risk.

An increasing number of investment advisers engage in sustainable investment strategies on behalf of their clients and consider ESG factors individually and collectively as an integral part of prudent investment and risk management processes, both to maximize return for their clients over the long term, and to respond to increased investor interest in this area. Many investors are looking to advance their values and goals on issues such as sustainability through their investment portfolios, including their retirement savings. We thus commend the Department for its efforts to solicit public input on actions that can be taken under ERISA, the Internal Revenue Code, and the Federal Employees' Retirement System Act of 1986 (FERSA) to facilitate investment advisers' ability to engage in ESG investing and consider ESG factors in

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[1] The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk*, 87 Fed. Reg. 8289 (Feb. 14, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-02-14/pdf/2022-02798.pdf (**Request**).

[3] *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57272 (Oct. 14, 2021), available at https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf (**ESG Proposal**).

voting proxies on behalf of their clients. In this letter we provide high-level recommendations regarding certain issues discussed in the Request. Specifically, we recommend that:

- Any potential rulemaking should be principles-based and allow fiduciaries the flexibility to make decisions in their clients' best interest.
- The Department should not explicitly or implicitly favor one type of investment strategy over another.
- The Department should assess the recent ESG Proposal before any further rulemaking.
- The Department should coordinate with the SEC prior to any potential rulemaking.
- The Department should encourage electronic delivery of retirement plan disclosures.

I. Any potential rulemaking should be principles-based and allow fiduciaries the flexibility to make decisions in their clients' best interest.

The IAA recommends that any potential rulemaking that arises from the Request be principles-based in its application to allow investment advisers to continue to have flexibility to fulfill their fiduciary obligations to act in their clients' best interest in their selection of investments and investment strategies and in voting their clients' proxies. The Department should not require investment advisers to consider – or limit their ability to consider – a particular set of factors when making investment decisions or voting proxies.

We therefore supported the Department's ESG Proposal, in which the Department recognized that "climate change and other ESG factors are often material" to fiduciary decisions but did not mandate consideration of specific factors.[4]

We are concerned, however, that some language in the Request may imply that consideration of certain climate-related risk factors is required in each instance. For example, the Department asks if it should use the Form 5500 Annual Return/Report (**Form 5500**) to collect data on climate-related financial risk to retirement plans.[5] In doing so, the Department could create the impression that consideration of climate-related risk factors is always required or expected when making investment decisions under ERISA. We do not believe that the Department should go down this path. All investments and investors have unique characteristics and risks, and investment advisers as fiduciaries understand their obligations under ERISA with respect to plan participants and beneficiaries and must use their expertise consistently with those obligations.

If the Department nevertheless decides to include specific information requests in the Form 5500, we urge it to amend the instructions to the form to make clear that fiduciaries are not

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[4] *Id.*

[5] Request at 8290.

required to consider climate-related risk factors and that disclosures are only required if climate-related risk factors are used.

II. The Department should not explicitly or implicitly favor one type of investment strategy over another.

The Department asks several questions about passive investing and indexes. We urge the Department to remain strategy-neutral and not favor one type of investment strategy over another, for example passive or active management. Both active and passive management, and indeed a wide range of investment strategies, have important roles to play in investment management and the markets. While ESG investing inherently involves active decision-making, there are both active approaches and index-based approaches to ESG investing.[6] Certain types of sustainable investing may be better executed through active management[7] and others may be more appropriate for passive management.

We strongly believe that the Department should not dictate the investment strategy that should be used by plan fiduciaries. Different investment approaches have different benefits and investors are ultimately disserved when policymakers limit the strategies that fiduciaries can follow in trying to maximize value for their clients. The Department – for good reason – has not historically prescribed what is a prudent investment process or a generally-accepted investment theory and it should not do so now.[8]

III. The Department should assess the impact of the recent ESG Proposal before any further rulemaking.

The IAA recommends that the Department consider any potential rulemaking arising from the Request after the recent ESG Proposal has been finalized and implemented and there is an opportunity for review and analysis. The ESG Proposal directly impacts the ability of plan fiduciaries to offer investments that reflect climate change and other ESG considerations, including climate-related financial risk.

As noted by the Department, a principal idea underlying the ESG Proposal is that "climate change and other ESG factors can be financially material and when they are, considering them will inevitably lead to better long-term risk-adjusted returns, protecting the

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[6] *See Sustainable Investing is an Active Process*, IAA Active Managers Council (2020), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/4d240ae3-bc9b-4155-8bd1-14cbac904146/UploadedImages/amc/docs/WP_Sustainable_Investing_v5.pdf.

[7] Active management is especially well suited to ESG investing since it adds value by helping meet investors' individualized and multifaceted risk, return, and other long-term goals.

[8] The Department requests information on whether any guaranteed lifetime income products (*e.g.*, annuities) help individuals efficiently mitigate the effects of at least some climate-related financial risk and, if so, should the Department take steps to facilitate the inclusion of these products in ERISA-covered defined contribution plans. We would oppose Department action that favors one type of an investment over another.

retirement savings of America's workers."[9] Indeed, the ESG Proposal is intended to counteract any negative perception of the use of climate change and other ESG factors in investment decisions caused by previous Department rulemakings.[10]

We believe that until the ESG Proposal has been finalized and implemented and plan fiduciaries have had time to review their plan investments and service providers, any information obtained by the Department would be of limited value.

IV. The Department should coordinate with the SEC prior to any potential rulemaking.

The IAA recommends that the Department coordinate with the Securities and Exchange Commission (**SEC**) prior to any potential rulemaking related to disclosure of climate-related financial risks. While the Department and the SEC administer different statutes and mandates, the agencies have previously consulted on regulatory requirements that affect SEC-registered investment advisers that are also ERISA fiduciaries.[11]

On March 21, 2022, the SEC proposed rules that would require public companies to disclose extensive climate-related information in their SEC filings.[12] Until those rules are finalized and companies begin providing consistent, comparable, and reliable climate-risk-related information to help inform fiduciaries' investment decision-making and proxy voting, we believe that it would be premature to require fiduciaries to provide information on their consideration of climate-related financial risk to the Department. The SEC also has noted other potential ESG-related rules on its Regulatory Flexibility Agenda,[13] including "Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors."[14]

We believe that the Department should coordinate with the SEC on any proposed rule addressing climate-related financial risks in retirement plans to avoid inconsistent or duplicative

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[9] Department of Labor, News Release, *US Department of Labor Proposes Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Management* (Oct. 13, 2021), available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20211013.

[10] ESG Proposal at 57277.

[11] *See* Memorandum of Understanding Concerning Cooperation Between the U.S. Securities and Exchange Commission and the U.S. Department of Labor, available at https://www.sec.gov/news/press/2008/sec-dol-mou-072913.pdf. The MOU establishes a process for the Department's Employee Benefits Security Administration and SEC staffs to share information and meet regularly to discuss matters of mutual interest.

[12] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (Apr. 11, 2022), available at https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf .

[13] SEC, Agency Rule List – Fall 2021, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode&showStage=active&agencyCd=3235.

[14] *Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors*, RIN 3235-AM96, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM96.

requirements. For example, the Department does not define climate-related financial risks in the Request.[15] It is thus unclear, for instance, whether the Department would only be requesting information for physical climate-related financial risks or also for transition risks and, if so, how those risks would be defined. The Department and the SEC should align, where appropriate, the taxonomy related to climate-related financial risks.

V. The Department should encourage electronic delivery of retirement plan disclosures.

The IAA recommends that the Department encourage greater use of electronic delivery for retirement plan disclosures. In May 2020, the Department finalized a rule that permitted default electronic delivery of retirement plan disclosures, which the IAA supported.[16] The rule provides a safe harbor for employers that want to make retirement plan disclosures accessible on a website, rather than sending volumes of paper documents through the mail.

The Department has found, based on empirical studies, that electronic delivery lines up with most plan participants' preferences. For example, in a study performed in 2019, almost half of 401(k) plan participants (49 percent) preferred reviewing 401(k) account information through their 401(k) provider's website, while 13 percent preferred a hard copy of account information.[17] Even the eldest group studied (70 and older) preferred a 401(k)-provider website (40 percent) to direct mail (31 percent). Similarly, other studies found that participants prefer to receive communications related to their benefits through electronic media such as personal emails or websites.[18] We believe that encouraging more electronic delivery will not only align with investor preferences but is a fairly simple step the Department can take to support climate-related efforts.[19]

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[15] It is important to note that the term is also not defined in the Executive Order on which the Request is based. *See* Executive Order on Climate-Related Financial Risk, Executive Order 14030 (May 20, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/.

[16] *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA*, 85 Fed. Reg. 31884 (May 27, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-05-27/pdf/2020-10951.pdf (**E-Delivery Rule**). *See* Letter from Gail Bernstein, General Counsel, IAA, regarding *Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA* (Nov. 22, 2019), available at https://investmentadviser.org/wp-content/uploads/2021/10/November_22__2019_-_DOL_E-Delivery_Comment_Letter_FINAL.pdf.

[17] E-Delivery Rule at 31916 (citing *U.S. Retirement End-Investor 2019, Driving Participant Outcomes with Financial Wellness Programs*, Cerulli Report, 2019, at 18.).

[18] *Id.* (citing Boosting the Effectiveness of Retirement Plan Communications, Empower Institute, Jan. 2019, at 9, available at *https://docs.empower-retirement.com/Empower/institute/Effective-Communication.pdf*. *See also* What Your Employees Think About Your Benefits Communication, The Jellyvision Lab (2016), at 12, available at *https://www.jellyvision.com/wp-content/uploads/Survey-Report_What-Your-Employees-Think-About-Your-Benefits-Communication.pdf*).

[19] The full costs and energy expended from printing and delivering documents are not completely visible, but, based on estimates, the process can equate to several tons of wood used, thousands of pounds of solid waste produced, and

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We appreciate your consideration of the IAA's comments and would be happy to provide any additional information that may be helpful. Please contact the undersigned or William Nelson, IAA Associate General Counsel, at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

cc: The Honorable Gary Gensler, SEC Chair
The Honorable Hester M. Peirce, SEC Commissioner
The Honorable Allison Herren Lee, SEC Commissioner
The Honorable Caroline A. Crenshaw, SEC Commissioner

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thousands of pounds of emissions released. *See* Standard Chartered, *Reducing and Eliminating Paper Consumption, A Best Practice Guide for Corporate Offices* (May 2010), available at https://www.sc.com/cn/maintenance/paper-reduction-en.pdf. The process not only includes the paper used for printing but also additional paper for covers and envelopes, as well as the energy expended when printing documents, use of printer toner, and the downstream emissions from delivery of the documents (*e.g.*, postal service equipment and vehicles).