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Via Electronic Delivery

May 16, 2022

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

Re: Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk [Docket No. EBSA-2022-0002]

To Whom It May Concern:

This letter is the U.S. Chamber of Commerce's (Chamber) response to the Employee Benefit Security Administration's (EBSA) Request for Information (RFI) related to the Executive Order on Climate-Related Financial Risk (Executive Order). In the RFI, EBSA seeks information relating to climate-related financial risks and pensions and retirement plans. Our comments are in response to the questions relating to plans covered by the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the miscellaneous questions. In crafting any agency level response to the Executive Order, EBSA must take into consideration its mission, authority, and expertise. It also must clearly define what and how climate related-financial risks impact retirement plans, if at all, and avoid burdening plan sponsors with additional disclosure requirements, which would add significant costs and discourage employers from establishing and maintaining plans.

RFI

The RFI was issued in response to the Executive Order, and Section 1 provides that:

> The failure of financial institutions to appropriately and adequately account for and measure these physical and transition risks threatens the competitiveness of U.S. companies and markets, the life savings and pensions of U.S. workers and families, and the ability of U.S. financial institutions to serve communities.

However, neither this section nor the remainder of the Executive Order explains how these "physical and transition risks" threaten workers' life savings and pension or what these are.

Section 4a of the Executive Order provides:

> Resilience of Life Savings and Pensions. In furtherance of the policy set forth in section 1 of this order and consistent with applicable law and subject to the availability of appropriations, the Secretary of Labor shall:
>
> > (a) identify agency actions that can be taken under the Employee Retirement Income Security Act of 1974 (Public Law 93-406), the Federal Employees' Retirement System Act of 1986 (Public Law 99-335), and any other relevant laws to protect the life savings and pensions of United States workers and families from the threats of climate-related financial risk.

However, Section 4a does not define the "threats of climate-related financial risk," explain how DOL is to protect against these undefined risks or differentiate between financial institutions and pension and retirement plans.

On February 14, 2022, EBSA issued the RFI pursuant to matters within the scope of Section 4(a), but the RFI does not define "climate related financial risk." However, the RFI requests comments on a series of what actions EBSA could take with respect to life savings and pensions and these undefined risks.

<u>Responses to the RFI</u>

According to the Centers for Climate and Energy Solutions:

> Climate-related risk encompasses several different types of risk. *Transition risks* involve changes in law, policy, technology and markets related to the transition to a lower-carbon energy supply. Those risks include regulatory risk, such as climate laws and policies that affect how companies operate, and liability risk, such as litigation that targets companies for contributing to climate change and affects a company's reputation. *Physical risks* from climate change include damage to fixed assets, like buildings and property, or supply chain disruptions. They can result from extreme weather events or changes in water availability.[1]

As noted above, climate-related financial risks are not just a single risk that can be applied across the board. These are individualized risks that businesses may face, not risks that pension or retirement plans face directly. EBSA should keep this in mind in identifying agency action

[1] Available at https://www.c2es.org/content/climate-related-financial-disclosures/.

that can be taken and what it should and should not do in response to the Executive Order. Furthermore, while many of our members from both the issuer and investor communities support some kind of climate-related disclosure, what may be considered to be an appropriate consideration for an individual company, financial institution or property and casualty insurer, may not be appropriate or even applicable to a pension or retirement plan fiduciary decision.

General

Question 1

In this question, EBSA asks a very broad question of what agency action can be taken under ERISA, FERSA and any other laws to protect the life savings and pensions of US workers and their families from the threat of climate-related financial risk.

With respect to ERISA-governed plans, EBSA's mission is to:

> ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families. We will accomplish this mission by developing effective regulations; assisting and educating workers, plan sponsors, fiduciaries and service providers; and vigorously enforcing the law.[2]

EBSA's mission is to educate fiduciaries, but not to dictate how fiduciaries do their jobs, including what factors they take into consideration in making investment decisions. As noted in previous Chamber comments, any investment advice guidance should be neutral with respect to the type of investment, and, instead, focus on a prudent process.[3] The extent to which a climate-related financial risk is taken into consideration in making an investment decision is based on the facts and circumstances of a particular investment and the plan. Furthermore, to the extent a fiduciary does not have the appropriate knowledge to make this determination, the fiduciary has a duty to hire a professional with that knowledge, including individuals with knowledge of how climate-related financial factors may or may not impact a particular investment. Plan fiduciaries routinely seek investment expertise in this way, including by hiring fiduciary asset managers or, indirectly, by selecting professionally managed investment options for their plans.

Given that determining what may or may not be a climate-related financial risk is beyond EBSA's area of expertise, plan fiduciaries are best served by employing financial experts.

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[2] Available at https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/mission-statement#:~:text=The%20mission%20of%20the%20Employee,America's%20workers%20and%20their%20familie.

[3] See Chamber Comments on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights available at https://www.uschamber.com/assets/documents/FInal-2021-Investment-Duty-and-Proxy-Voting-Regulation-Comments.pdf.

Similarly, with respect to educating workers, given the complexity of this issue, workers would be better served with information from agencies whose mission it is to focus on climate-related and other financial risks. However, if EBSA feels a need to act in this area, EBSA could consider acting as a clearinghouse for such information from company sustainability reports, non-profits, think tanks, third-party reporting agencies and investment managers; however, EBSA should be mindful of its limited staffing and budgetary resources and other pressing needs.

Question 2

This question asks what the most significant climate-related financial risks are to retirement savings and why. It appears that is an investment related question.[4] As noted above, the application of climate-related financial risks to a business or insurer is very different than to a defined benefit pension plan or a self-directed defined contribution plan. For example, a property and casualty insurer must directly look at climate-related factors and determine how those factors could implicate their business model.

Because pensions and retirement plans are concerned with investments, it is not possible to say what is the most significant climate-related financial risk because that depends on a particular investment. For some investments it may be transition related, such as litigation or regulatory and for others it could be physical. For still others, were a pension plan to invest in a real estate investment trust, as just one example, it could be both.

However, on a bigger picture model, most pension plans do not invest in a single investment or include individual security investments in a self-directed defined contribution plan lineup, (other than investment in employer securities or through a brokerage window). As such, a climate-related financial risks may not even be a relevant factor in selecting an investment, and instead, the most relevant factors are the rate of return, fees and services provided. For example, in selecting a mutual fund, plan fiduciaries do not (and cannot) look at the specific holdings of each underlying investment option within the fund, even if there may be an investment within that option that might be impacted by climate-related financial risks.

Data Collection regarding ERISA-covered Plans

Question 3

In this question, EBSA asks whether it should collect data on climate-related financial risks for

[4] Plan sponsors need to take administrative issues related to climate change into consideration, such as if a natural disaster caused by climate change disables a call center. However, this must be taken into consideration similar to other contingencies unrelated to climate change. There also is concern that policy makers will want to allow participants to take penalty free distributions because of natural disasters. Although laudable, allowing increased distributions could impact an individual's future retirement security.

plans. It is unclear what this question means. If the question is whether EBSA should collect resources for plans, such data base could be useful. However, the community is cognizant of EBSA's limited resources and increased workload over the years, and there are other resources for plan fiduciaries on this topic from individuals and entities that are experts in this field. For example, the Securities and Exchange Commission (SEC) is proposing a rule that includes consideration of climate-related risks.

Question 4

In this question EBSA asks whether it should use the Form 5500 (which is the form used to implement the annual financial reporting requirement under ERISA Section 103) to collect data on climate-related financial risks for pension plans, such as collecting information about how plan investment policy statements address climate-related financial risks, whether service providers discloses or meet metrics related to such risks, and whether and how plans have factored climate-related financial risk into their analysis of individual investments or investment courses of action. EBSA also asked whether it should collect data on whether and how plan fiduciaries voted on proxy proposals related to climate-related financial risks on the Form 5500.

ERISA Section 103 (29 U.S.C. § 1023) contains the annual report requirements, which focus on actual financials, such as the financial report under paragraph (b), including the plan's assets and liabilities, and the actuarial statement under paragraph (d). The plan administrator also is required to disclose certain information, such as the number of employees covered under a plan, the fiduciaries' names, the names and compensation of plan service providers, the reason for a change in certain providers, and any of the information provided in the financial statement or actuarial report. The annual report was not meant as a data collection tool for how fiduciaries act vis a vis their investment decisions or other actions unrelated to the financials or relationships with parties in interest.

The simple answer to all of the questions posed in question number 4 is no. Nothing in the ERISA's disclosure and reporting provisions requires a plan fiduciary to disclose how they make their fiduciary decisions or what factors they took into consideration in making these decisions. As such, EBSA does not have authority to require plan fiduciaries to make such disclosures with respect to climate-related financial factors (or any factors for that matter).

ERISA Section 404(a) requires that a fiduciary discharge the fiduciary's duty solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable administrative expenses. In carrying out these duties, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances" that a prudent person acting in a similar capacity and familiar with such matters would use.

Investment policies differ depending on the type of plan. For a defined benefit plan, the fiduciaries' investment decisions are based on the plan as a whole, including overall plan demographics, liabilities and assets. On the other hand, in a self-directed, defined contribution plan, the plan fiduciary is responsible for ensuring that there is a broad range of investment alternatives so that a participant is able to materially affect the potential return, through diversified investments with different risks and returns, which, in the aggregate, allow for a portfolio within the range appropriate for the participant, and when combined, tend to minimize risk through diversification.[5]

In selecting investments for a defined benefit plan or devising the lineup in a self-directed defined contribution plan, nothing in ERISA requires plan fiduciaries to pick any particular investment or employ any particular method for investment selection. Congress recognized that flexibility is "essential to achieve the basic objectives of private pension plans because of the variety of factors which structure and mold the plans to individual and collective needs of different workers, industries, and locations."[6]

In response to the specific questions in question 4, first, given that nothing in ERISA requires a plan to have an investment policy statement, it does not seem within EBSA's authority to require a plan to disclose how such a document addresses climate-related financial risks. Nothing in ERISA requires that service providers disclose or meet climate-related financial risks, so to require such disclosure would not be within EBSA's authority. Nothing in ERISA requires plan fiduciaries to disclose how they vote on proxy proposals, and to require such disclosure with respect to climate-related financial risks would not be within EBSA's authority.

Even if EBSA had authority to require plan fiduciaries to disclose the rationale behind each investment decision, the proposed disclosure would isolate one single investment factor for special treatment, perhaps inevitably signaling to plan fiduciaries that climate-related financial risk is the most important investment risk, even though such a narrow focus may in fact be imprudent.

Question 6

The DOL recently initiated a series of "roundtable discussions on how to build better retirement security for the nation's workers."[7] Employers are integral to this system, and the more difficult laws and regulations make it for employers to establish and maintain retirement plans for their workers, the less inclined, or even able, they will be to do so, or even able to do so. Adding additional disclosure requirements that do nothing to improve plans or protect benefits, and instead only add administrative burdens, is exactly what the proposal in question 6 would do.

[5] 29 C.F.R. § 2550.404c-1(b)(3).
[6] S. Rep. No. 92-634, at 16 (1972).
[7] https://www.dol.gov/newsroom/releases/osec/osec20220425-0.

In question 6, EBSA asks whether ERISA plan administrators should be required to publicly report on the steps they take to manage climate-related financial risks and the results and outcomes of any such steps.

In protecting workers' promised benefits, ERISA imposes a duty to disclose to participants and beneficiaries and to report to the Department of Labor (DOL).[8] ERISA Section 101(a) (29 U.S. Code § 1021(a)) requires a plan administrator to disclose to participants a summary plan description, defined benefit funding notice, summary annual report, pension benefit statement, and notice of deferred vested benefits. Section 101(b) (29 U.S.C. § 1021(b)) requires a plan administrator report to DOL the annual report and any terminal or supplemental report.

There is in ERISA Section 103 that requires any plan to provide any information to the general public, as would be required under question 6. Furthermore, there is nothing in this section or the underlying reporting and disclosure section that would give EBSA authority to mandate that any of the current notices or disclosures contain such information. As such, EBSA should not, and cannot, require plans to publicly report on the steps they take to manage climate-related financial risks and the results and outcomes of such steps.

Miscellaneous

Question 19

In question 19, EBSA asks whether the "absence of prudence and loyalty obligations with respect to [investment held in savings and retirement arrangements not covered by ERISA] leave them vulnerable to climate-related financial risks?" This question seems to imply that because these investments are not subject to ERISA's fiduciary standards, the holders are not protected by any other laws or regulated by any agencies. To the contrary, the tax provisions of IRAs are governed by the Internal Revenue Code, and the underlying investments are subject to The Securities Act of 1933 and The Investment Adviser Advisers Act of 1940. If regulation or education in this area is needed, it would be through the SEC, not through DOL.[9]

Question 20

In question 20, EBSA asks whether it should sponsor and publish research to improve data and analytics that ERISA plan fiduciaries could use to evaluate climate-related financial risks.

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[8] See 29 U.S.C. § 1021.

[9] DOL does not have authority to regulate IRAs. See Chamber of Commerce of the United States v. Acosta, 885 F.3d 360, 384 (5th Cir. 2018) ("Together, the Fiduciary Rule and the BIC Exemption circumvent Congress' withholding from DOL of regulatory authority over IRA plans. The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transaction penalties is unreasonable and arbitrary and capricious.")

Although a laudable goal, EBSA has limited financial and expert resources to do such research, and other agencies and the private sector have and continue to publish research in this area. Therefore, EBSA should focus instead in its areas of expertise.

Question 21

In question 21, EBSA asks whether there is a need to educate participants, especially those in self-directed plans, about climate-related financial risks, what role EBSA should play in this, and whether it should coordinate its efforts with the SEC. Financial education not only is a key to retirement security, but overall financial security. The Chamber believes educating participants about all types of investment risks is a part of this education. However, at this time, it would be premature for EBSA to start an educational campaign on climate-related financial risks, because, as noted above, few, if any plans invest in individual stocks. Most self-directed plans offer multiple diversified options, which often include mutual funds and/or collective investment funds. These pooled fund options hold multiple investments and offer diversified exposures to a variety of underlying companies. As such, it is unclear what exactly would be the basis for such educational campaign. Furthermore, for those plans that do offer environmentally or sustainability themed investments, those investments have been vetted by the fiduciaries who selected them because ERISA's fiduciary obligation remains regardless of the type of investment. With respect to individual investors outside of ERISA plans, it is within SEC's jurisdiction to address potentially misleading statements about fund adherence to policies that address climate-related financial risk (referred to in the RFI as greenwashing).

Question 22

In this question, EBSA asks whether there is a need to educate IRA owners about climate-related financial risks, and, if so, what EBSA's role would be, if any, in assisting the IRS or states (for state automatic-IRA arrangements). To reiterate, the Chamber believes that investor education is paramount to retirement and overall financial security. However, it is also important that those agencies with the jurisdiction and authority over certain investors provide such education. As noted in our response to question 19, although the IRS has authority over the tax provisions of IRAs, the underlying investments are governed by The Securities Act of 1933 and The Investment Adviser Advisers Act of 1940. If regulation or education in this area is needed, it would be through the SEC.

Conclusion

However well-intentioned the Executive Order was with respect to addressing climate-related financial risks, unfortunately, neither it nor the RFI recognizes the unique needs and obligations of pension and retirement plans and the fiduciaries who run them. As such, EBSA does not have authority to mandate additional reporting requirements on plans, the unique investment policies for ERISA plans do not implicate climate-related financial risk factors the same as other business models, ERISA fiduciary standards protect participants from "greenwashing," and education and regulation of non-ERISA investors should be left to the SEC and other appropriate regulators.

Sincerely,

Chantel Sheaks

Chantel Sheaks
Vice President, Retirement Policy
U.S. Chamber of Commerce