THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

May 16, 2022

Mr. Ali Khawar
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Z-RIN 1210-ZA30 – Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risks

Dear Acting Assistant Secretary Khawar:

The ERISA Industry Committee (ERIC) appreciates the opportunity to respond to Request for Information Z-RIN 1210-ZA30 (RFI) published in the Federal Register on February 14, 2022. We write to offer the views of our members, sponsors of retirement plans subject to the *Employee Retirement Income Security Act of 1974* (ERISA).

Most relevantly for ERIC and our member companies, the RFI asks for information in response to questions about whether the Department of Labor (DOL or Department) should take actions or impose requirements on private-sector retirement plans in the context of climate-related financial risk. In our view, new requirements are simply not warranted in this context. Reporting obligations ought to be streamlined, not made more complex. Additionally, ERISA's general fiduciary duties already protect participants, and new requirements emphasizing climate-related risks have the potential to confuse plan fiduciaries. Finally, imposing specific new obligations in this context could spiral in the future, presenting costly new burdens.

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans and to lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws, in addition to federal law.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC's member companies provide world class benefits and sponsor retirement plans benefitting tens of millions of Americans. Therefore, ERIC has a significant interest in ensuring that disclosures required by ERISA and associated regulations are targeted to provide useful information to plan participants and are not unduly burdensome. We limit our comments in this response to those questions asking for information about private sector plans governed by ERISA.

Comments

ERIC Broadly Supports Streamlining Reporting Obligations and Is Concerned with New, Burdensome Requirements.

The private-sector retirement system depends on employers voluntarily providing these valuable benefits to employees. Plan sponsors frequently point to administrative cost and complexity as a barrier to plan formation. And so, policymakers are increasingly recognizing the importance of reducing unnecessary barriers to providing and administering plans. One such barrier is the myriad of complicated and technical disclosure requirements that are already provided by statute and regulation.

ERIC has long supported simplifying these reporting and disclosure requirements.[1] The Tax Code, ERISA, and the regulations thereunder include many rules requiring and governing the reports, disclosures, and notices that employers and qualified plans must provide to regulators, employees, and participants. These communications are complex, burdensome, and costly. Moreover, the helpfulness to employees and retirees of these disclosures is not always evident. In congressional testimony, ERIC provided a number of specific suggestions to streamline these requirements.[2]

We are pleased that the bipartisan *Securing a Strong Retirement Act* includes a requirement that the Secretaries of Labor and Treasury and the Director of the Pension Benefit Guaranty Corporation consult with stakeholder groups on this topic and formulate recommendations to consolidate, simplify, and standardize reporting and disclosure requirements.[3] The bill has passed the U.S. House of Representatives by a vote of 414-5. Similar language was included in the bipartisan Senate bill, *Retirement Security and Savings Act* (S. 1770).

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[1] *E.g.*, THE ERISA INDUSTRY COMMITTEE, MODERNIZING THE DC/401(K) SYSTEM, *available at* https://www.eric.org/wp-content/uploads/2019/11/Modernizing-the-401k-Plan-System.pdf (2019).
[2] *Building on Bipartisan Retirement Legislation: How Can Congress Help?: Hearing before the Sen. Comm. on Finance*, (statement of Aliya Robinson, Senior Vice President, The ERISA Industry Committee) (July 28, 2021), *available at* https://www.finance.senate.gov/hearings/building-on-bipartisan-retirement-legislation-how-can-congress-help.
[3] Sec. 304 of H.R. 2954, 117th Cong.

Several of the questions posed by the RFI unfortunately indicate a shift away from this broad bipartisan consensus that administrative simplification is worth pursuing. For example, the RFI inquires generally whether the Department's Employee Benefits Security Administration (EBSA) should collect data on climate-related financial risk for plans. The RFI then, more specifically, asks whether the Form 5500 should collect data on climate-related financial risk for plans or whether some other method of collecting data should be considered. The RFI then asks whether EBSA should consider conducting information requests or surveys on "plan sponsor or employee awareness" of these risks. It is unclear why EBSA would single out this specific type of financial risk as deserving of its own reporting campaign, as plan sponsors and employee participants confront a multitude of other financial risks as well.

ERIC is similarly skeptical that EBSA should attempt a participant-facing educational campaign on specific types of financial risks confronting plan fiduciaries. Instead, EBSA's participant educational efforts should be directed at promoting the broad importance of saving for retirement and ensuring that participants and fiduciaries understand their rights and obligations under the law.[4]

The RFI also asks whether plan administrators should publicly report the steps taken to "manage climate-related financial risk and the results and outcomes of any such steps taken" on some new form, other than the Form 5500. It is unclear how a standardized metric could be developed to explain how plan administrators are managing climate-related financial risk, why such reporting is necessary given the generally applicable fiduciary standard of prudence, the intended purpose of requiring this information, and even whether DOL would have the statutory authority to impose certain new requirements. Representatives of our member companies have expressed concern that these standardized metrics do not currently exist and plan sponsors would be reliant on the representations of external firms to provide this information to the Department, whether on the Form 5500 or otherwise.[5]

Rather than inventing a climate-specific reporting regime, the Department should instead evaluate the information already provided by plan sponsors and administrators and attempt to streamline and simplify requirements.

[4] The RFI also asks "[i]n addition, what efforts, if any, should EBSA make to coordinate with the Securities and Exchange Commission on its efforts to inform and protect investors, especially individual investors such as plan participants, from potentially misleading statements about fund adherence to policies that address climate-related financial risk (often referred to as "greenwashing")?" ERIC supports coordination on any such rule or activity between the Securities and Exchange Commission and DOL. In fact, DOL ought to go to great lengths to ensure that any regulation or guidance offered in this area is consistent with securities rules.

[5] The RFI also asked whether annuities might be used as a strategy to mitigate climate-related financial risk. To the extent there is a transfer of this risk to an annuity provider, one would expect the pricing of the annuity to reflect this assumption of risk.

There Is No Basis under ERISA for Treating Climate-related Financial Risk Differently than Other Financial Risks.

It is impossible to separate this RFI from the Department's Notice of Proposed Rulemaking (Proposed Rule or NPRM) entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."[6] That NPRM, among other things, proposed refining the regulations governing the fiduciary duties attendant to selecting plan investments. Specifically, the Proposed Rule highlighted that a fiduciary may consider any factor material to risk and return when evaluating an investment or investment course of action, specifically including environmental, social, and governance (ESG) factors like climate-related risk.

As explained in our letter of December 13, 2021, we are concerned that, as drafted, that Proposed Rule risks misleading plan fiduciaries about the nature of their obligations under ERISA because of the way specific factors were highlighted. That danger would be exacerbated if coupled with new reporting or disclosure requirements that emphasize one particular type of financial threat (in this case, climate-related risks). As we wrote:

> *Many factors affect risk and return, and it would be impossible for the Department to codify every single potentially relevant factor. ERIC is very concerned that by going to such length, especially in the operative text, to emphasize climate change and certain other social and governance factors, the Department is inadvertently setting up a new "over and above" standard beyond the generally applicable duty of prudence. Due to this emphasis, some plan fiduciaries may believe they are required to consider these factors in a way that could override normal and proportionate consideration of these factors, contrary to ERISA's general fiduciary duties…*

In short, ERIC is concerned the NPRM unnecessarily emphasizes ESG factors in the text in a way that could confuse otherwise prudent fiduciaries. If the RFI is a prelude to regulations requiring extensive new climate-specific disclosures, it presents the same problem – emphasizing one potential type of risk. The format, legal authority, and necessity for dedicated and new additional reporting is unclear at this point.

New Reporting Based on Specific Types of Risks Could Spiral into Additional Burdensome Requirements in the Future.

ERISA charges pension plan fiduciaries with twin duties of prudence and loyalty. The prudence obligation requires that fiduciaries act "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of providing benefits and defraying reasonable expenses of administering the plan.[7] In the context of decisions that fiduciaries make when considering investments, the Department has, time and again, acknowledged that the relevant consideration is financial risk and return; that "ERISA fiduciaries may not sacrifice investment

[6] 86 Fed. Reg. 57272 (proposed Oct. 14, 2021) ("Proposed Rule" or "NPRM").
[7] 29 U.S.C. §1104(a)(1)(A).

returns or assume greater investment risks as a means of promoting collateral social policy goals."[8]

Despite this consistency, there had been varying pronouncements on the topic of ESG investing. A litany of sub-regulatory guidance issued over the past decades, despite consistency on fundamental rules, has raised questions from plan fiduciaries about their obligations under ERISA with respect to ESG factors in making plan investment decisions. Further, this serial re-issuance of sub-regulatory guidance created uncertainty because plan fiduciaries could not be sure how long sub-regulatory guidance would be in effect or what new guidance would say. Therefore, ERIC has consistently recognized the need to end this back-and-forth to finally provide plan fiduciaries certainty.

We believe the path to ending that whipsaw is for the Department to rely on the fundamental principle that fiduciaries must focus on risk and return. When the 2021 NPRM proposed including significant language in the operative text of the governing regulation emphasizing consideration of ESG factors, ERIC was concerned that picking and choosing to emphasize certain risk and return factors will lead to future instability as the salience of particular topics ebb and flow.

That same concern applies with respect to new reporting requirements such as relating to climate change. Introduction of risk-specific disclosure or reporting obligations could easily spiral as different factors become the subject of public interest. For example, there are myriad other risk and return factors that conceivably could be added to some future EBSA disclosure regime, such as information and analysis relating to:

- The speculative costs of current and future regulation
- The potential susceptibility to frivolous litigation
- The costs of mandates relating to wages and benefits imposed by states, localities, and foreign jurisdictions
- The costs of mandates relating to operating conditions imposed by states, localities, and foreign jurisdictions

As described above, plan fiduciaries have an obligation to take into account relevant risk and return factors when making investment-related decisions. However, plan administration and reporting would be even more unwieldy if the Department demanded information regarding specific types of risk analysis from all plans. In ERIC's view, the Department ought not go down this path. Instead, reporting requirements should be streamlined and provided in a standardized format useful for plan participants. If the Department is determined to further investigate climate-related investments in the context of retirement plans, ERIC strongly recommends reviewing publicly-available data without those plans or plan sponsors incurring expense.

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[8] Proposed Rule, *supra* note 6, at 57273.

Conclusion

ERIC appreciates the Department solicitating information from stakeholders about whether additional EBSA actions are warranted. We recommend the Department not adopt burdensome new requirements such as those contemplated by the RFI, or any reporting targeted at one particular type of financial risk. This approach would confuse plan fiduciaries about the nature of their obligations and initiate a pattern of imposing new reporting obligations. Thank you for your consideration of our recommendations. We look forward to the opportunity to discuss them in greater detail or to answer any questions.

Sincerely,

Andrew Banducci