



AMERICAN BENEFITS
COUNCIL

May 16, 2022

Submitted electronically via www.regulations.gov

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 on Climate-Related Financial Risk (Z-RIN 1210-ZA30)

Dear Sir or Madam:

On behalf of the American Benefits Council (the “Council”), we are writing in response to the Department of Labor’s (“DOL”) Request for Information (“RFI”) with respect to potential agency actions to protect retirement savings from threats of climate-related financial risk.¹ The Council very much appreciates the open manner in which DOL is conducting this effort as well as the opportunity to comment on this matter. As discussed in greater detail below, the Council has a number of concerns regarding the potential agency actions as described in the RFI. In general, our concerns relate to those potential agency actions and questions raised in the RFI that could lead to substantially increased burdens and uncertainty for plan sponsors, adversely affect markets in a way that is harmful to participants, and impose requirements and limitations that are not consistent with ERISA in our view.

The Council is a national nonprofit organization dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world’s largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly

¹ 87 Fed. Reg. 8,289 (Feb. 14, 2022).

sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

I. BACKGROUND

On May 20, 2021, President Biden signed Executive Order 14030 on Climate-Related Financial Risk,² which highlighted an approach to mitigating climate-related financial risk and protecting retirement savings from such risk. On October 15, 2021, the Biden administration released a document called “A Roadmap to Build a Climate-Resilient Economy,”³ which contained a government-wide strategy to measure, disclose, manage, and mitigate climate risks. DOL’s RFI is intended to further the goals outlined in the executive order and the roadmap.

II. COMMENTS ON QUESTIONS AND POSSIBLE AGENCY ACTIONS RAISED IN THE RFI

We appreciate the Biden administration’s commitment to evaluating whether additional action by DOL is needed to protect American workers’ retirement savings from a range of issues, including climate change. However, the Council is concerned that a number of the potential agency actions as described in the RFI would unduly burden and interfere with the administration of retirement plans and, in some cases, could even interfere with workers’ ability to achieve financial security in retirement. The Council urges DOL to carefully consider the challenges that both plans and participants would encounter as a result of the potential agency actions contemplated in the RFI.

A. Collecting Data on Climate-Related Financial Risk on the Form 5500 Would Inappropriately Elevate Fiduciaries’ Consideration of Climate Issues and Increase the Potential for Litigation (RFI Question #4).

The RFI asks whether DOL should collect data on climate-related financial risk to pension plans using the Form 5500 Annual Return/Report (“Form 5500”). The RFI suggests, for example, that DOL could add questions to the Form 5500 about whether and how plan investment policy statements address climate-related financial risk, whether service providers disclose or meet metrics related to such financial risks, and whether and how plans have factored climate-related financial risk into their analysis of individual investments or investment courses of action.

The Council believes strongly that the collection of this type of data on the Form 5500 would be inappropriate in several regards, including its inevitable influence on a

² Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

³ A Roadmap to Build a Climate-Resilient Economy (Oct. 14, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf>.

fiduciary's investment decisions in a manner that is inconsistent with ERISA. Countless factors are taken into account by plan fiduciaries in making investment decisions. Adding questions specifically about climate-related risk on the Form 5500 would effectively elevate the consideration of such risk above all other important factors that play a role in a plan fiduciary's ultimate investment decision. Fiduciaries should not feel pressured to evaluate climate risk with any greater scrutiny than they would give any of the other myriad important factors that go into making an investment decision. In addition, it would be difficult – if not impossible – to isolate and expose through a reporting requirement the role that a single factor such as climate-related financial risk played in such a decision.

Furthermore, the Form 5500 in its current form does not include any questions regarding how investment decisions are made. Adding new questions related to climate-related financial risk would set a concerning precedent for potentially adding even more questions to the Form 5500 on other topics related to how investment decisions are made. This would not only create additional burdens for retirement plans, but it could also increase the potential for litigation – possibly even retroactive litigation – against plans. Requiring that fiduciaries' investment rationales be publicly disclosed would aid plaintiffs' firms in suing plans based on allegations of a fiduciary's over-emphasis or under-emphasis on climate issues in investment decisions. This will only lead to more uncertainty with respect to how plans should make investment decisions. The collection of such data on the Form 5500 would ultimately serve only to unnecessarily complicate investment decision making and burden plans with new reporting requirements and costly litigation.

B. Collecting Data on Climate-Related Financial Risks Using Methods Other Than the Form 5500 Raises Similar Concerns (RFI Question #5).

The RFI asks whether, other than the Form 5500, there are other methods of collecting data on climate-related financial risks to plans that DOL should consider. For the same reasons stated above in section II.A, the Council is concerned that requiring reporting on climate-related financial risk, whether on the Form 5500 or through another method, would inappropriately elevate climate factors above other important factors taken into account by fiduciaries when making investment decisions, increase the potential for litigation against plans, and place an enormous additional reporting burden on plans.

C. Requiring Reporting on Climate-Related Financial Risk on a More Frequent Basis Than the Form 5500 Would be a Significant Burden on Plans (RFI Question #6).

The RFI asks whether plan administrators should be required to publicly report on the steps they take to manage climate-related financial risks in a form that is more

easily accessible to the public and timelier than the Form 5500. The Council is very concerned that requiring additional, more frequent reporting would place an enormous burden on retirement plans. Such a requirement is impractical and would require plans to shift limited resources, potentially away from benefits, in order to comply with the additional reporting requirements.

D. Index Investing Inherently Accounts for Climate Risk Because the Market Already Takes into Account Climate Change and Other Relevant Factors (RFI Question #15).

The RFI asks whether there is evidence that the indices relied on by the Thrift Savings Plan (“TSP”) underestimate or overestimate the risks associated with climate change, or that the market fails to appropriately factor in the risks associated with climate change in pricing publicly-traded assets. The indices used by the TSP’s investment options include the S&P 500 Index and the Dow Jones U.S. Completion Total Stock Market Index.

Indices by their very nature appropriately take into account climate-related issues because they reflect and automatically adjust for the market. For instance, if a company fails to consider climate change when it should be doing so, this fact is reflected in a lower stock price. Under efficient market theory, risks associated with climate change generally are already taken into account in the pricing of publicly-traded assets. This, in turn, is reflected in the indices on which the TSP and the vast majority of private plans rely for some of their investments and investment options. The Supreme Court itself has confirmed that fiduciaries may prudently rely on market price as an indicator of value. The Court in *Fifth Third Bancorp. v. Dudenhoeffer* noted that:

Many investors take the view that they have little hope of outperforming the market in the long run based solely on their analysis of publicly available information, and accordingly they rely on the security's market price as an unbiased assessment of the security's value in light of all public information. ERISA fiduciaries, who likewise could reasonably see little hope of outperforming the market . . . based solely on their analysis of publicly available information, *may, as a general matter, likewise prudently rely on the market price*. In other words, a fiduciary usually is *not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it that is available to him*” (emphasis added).⁴

DOL’s line of questioning within the RFI with respect to index investing is very concerning in that it casts doubt on whether DOL views or will continue to view index funds as an appropriate investment choice for all retirement plans to take into

⁴ 573 U.S. 409, 426-27 (2014) (internal citations and internal quotations omitted).

consideration, not just the TSP. If DOL were to state or imply that index investing may not sufficiently take climate change risks into account, such a message would cast a negative light on all indices and cause very significant disruptions in plan investment menus. Many fiduciaries are bound to interpret that message as a determination by DOL that index investing is no longer permissible, or at the very least implicates additional fiduciary risk, thus ultimately raising investment costs for participants as fiduciaries turn away from indexed investment options. The resulting increase in participant investment expenses could be significant, due to a sea change in the perceived appropriateness of utilizing relatively lower-fee index funds in favor of a shift to more actively managed (and typically higher-fee) investment options. Such a shift could, itself, implicate additional potential fiduciary risks, and lead to substantial uncertainty and a further uptick in litigation.

E. An Expansion of ERISA’s Fiduciary Duties to Non-ERISA Arrangements is a Decision for Congress (RFI Question #19).

The RFI asks whether there are 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. In particular, the RFI asks whether the absence of fiduciary duties such as prudence and loyalty with respect to these types of arrangements exposes them to climate-related financial risk. Whether ERISA’s fiduciary duties should apply to non-ERISA arrangements is an issue solely for Congress to decide. To date, Congress has explicitly decided not to apply ERISA’s fiduciary duties to arrangements such as IRAs. If and until Congress reconsiders this, this remains a question for Congress and not DOL.

F. Lifetime Income Should be Addressed Separately and Fully (RFI Question #8).

The RFI asks whether any guaranteed lifetime income products such as annuities help individuals efficiently mitigate the effects of climate-related financial risk. The RFI further asks whether there are “climate-focused annuities” that plans could offer. The Council is a strong believer in the importance of all forms of lifetime income and looks forward to a robust and broader discussion of these issues separate from this RFI.

G. The SEC Should Lead Any Investor Protection Efforts, if Needed (RFI Question #21).

The RFI asks what efforts, if any, DOL should make to coordinate with the Securities and Exchange Commission (“SEC”) on efforts to inform and protect investors from potentially misleading statements about fund adherence to policies that address climate-related financial risk. The Council believes that, to the extent such efforts are

viewed as necessary, the SEC should take the lead on this issue. The SEC is already working on this issue. For instance, the SEC recently proposed rules that would impose requirements on public companies to disclose certain climate-related information in registration statements and annual reports filed with the SEC, such as any climate-related risks that are likely to have a material impact on the company's business and information on greenhouse gas emissions associated with the company.⁵ The SEC also appears to be considering a proposed rule that would impose requirements on investment companies and investment advisers related to environmental, social, and governance ("ESG") factors, including ESG-related disclosures.⁶ To the extent coordination on an international level with respect to investor protection against climate-related risk may be necessary, we believe that the SEC is the logical leader of any such efforts. The SEC is therefore in a good position to lead investor protection efforts related to climate change, to the extent such efforts are necessary.

H. Plan Sponsors do not Have the Expertise or Resources to Provide Participant Education on Climate-Related Financial Risks (RFI Question #21).

The RFI asks whether there is a need to educate participants about climate-related financial risks. The Council's plan sponsor members have expressed concern that, although their plan fiduciaries may take climate-related financial risks into account in curating a menu of core plan investment options, they do not have the expertise or resources to provide investment assistance to participants regarding the risks of climate change. Council members have also indicated that the lack of clear and consistent definitions of certain climate-related issues and factors would make it more challenging for plan sponsors to provide consistent participant education on the risks of climate change. Moreover, leaving climate education efforts to individual plan sponsors risks creating an ad hoc system that varies from one plan sponsor to the next.

* * * * *

Thank you for your consideration of our concerns regarding the RFI with respect to potential agency actions to protect retirement savings from threats of climate-related

⁵ 87 Fed. Reg. 21,334 (Apr. 11, 2022).

⁶ *Rules Related to Investment Companies and Investment Advisers to Address Matters Relating to Environmental, Social and Governance Factors, Fall 2021*, Off. Mgmt. and Budget, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM96>.

financial risk. If you have any questions or we can be of further assistance, please contact me at 202-289-6700 or at ldudley@abcstaff.org.

Sincerely,

A handwritten signature in black ink that reads "Lynn Dudley". The signature is written in a cursive, flowing style.

Lynn Dudley

Senior Vice President, Global Retirement & Compensation Policy