

May 16, 2022

via Federal rulemaking portal: www.regulations.gov

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)

Dear Acting Assistant Secretary Khawar,

The American Retirement Association (ARA) appreciates the opportunity to respond to the Department of Labor's (Department's) *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk* (RFI).¹ In it, the Department solicits public input on steps that the Department should take under the Employee Retirement Income Savings Act of 1974 (ERISA) and other "applicable law to further protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk" in accordance with Executive Order 14030 on Climate-Related Financial Risks (the Executive Order).²

The questions posed in the RFI are squarely within the expertise and experience of ARA's members and we believe that we can provide meaningful assistance to the Department. We believe that:

- **The Department's efforts to comply with the Executive Order should focus on ensuring that ERISA plan fiduciaries have prudent processes in place for analyzing all financial risks, including climate-related financial risk, if relevant.**
- **The Department should not require ERISA plans to report information relating to climate-related financial risk because it has not explained its rationale or expectations for how doing so would support its mandate to supervise and enforce ERISA, and it will increase administrative burdens on plans and service providers.**

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has nearly 34,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. ARA and its underlying

¹ 87 Fed. Reg. 8289 (Feb. 14, 2022).

² 86 Fed. Reg. 27967 (May 25, 2022).

affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

Summary

The ARA recognizes that the Department issued the RFI to further the goals of the Executive Order, the central justification for which is “that intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies.” We believe that any action undertaken by the Department to comply with the Executive Order should focus on ensuring that ERISA plan fiduciaries have prudent processes in place for analyzing *all* relevant risks to the plan, not solely climate-related financial risk. Interposing a regulatory preference for consideration of climate-related financial risk does not comport with the Department's authority and it ultimately undermines the protections necessary to protect and preserve the retirement savings of American workers. If the Department concludes that agency action is warranted, the ARA recommends that the Department first issue an Advance Notice of Proposed Rulemaking to provide a full opportunity for public comment on the need for Department regulation of climate-related financial risk in ERISA plans. Our responses to select questions follow.

Responses to RFI Questions

- 1. Please provide your views on how EBSA should address and implement the action items set forth for EBSA in Executive Order 14030 on Climate Related Financial Risk. Specifically, what agency actions can be taken under ERISA, FERSA, and any other relevant laws to protect the lifesavings and pensions of U.S. workers and families from the threats of climate-related financial risk?**

Without defining “climate-related financial risk,” the Executive Order instructs the Department “to identify agency actions to protect retirement savings from the threats of [it].”³ The ARA has long shared the Department's objective of safeguarding the interests of participants and beneficiaries in retirement savings plans. We do not think, however, that agency action related to “climate-related financial risk” (as we understand the term) is appropriate under current circumstances.

The ARA believes existing ERISA requirements should continue to apply, as a plan fiduciary deems appropriate, to consideration of all risks, including climate-related financial risk. The Department should not deviate from requiring prudent fiduciary processes and deferring to fiduciaries' judgment of how any particular risk, including climate-related financial risk, factors into decisions. We strongly believe that a regulatory preference for investment theories that evaluate climate change contravenes ERISA's fundamental deference to fiduciaries' judgment. Longstanding ERISA principles require the Department to be neutral in administering and enforcing ERISA.

³ The Executive Order explains that “physical” and “transition” risks are sources of climate-related financial risk. “Physical risks” include the physical impacts of climate change, such as extreme weather events leading to drought, sea level rise as well as supply chain disruptions and “transition risks” include “the global shift away from carbon-intensive energy sources and industrial processes.” *Id.*

Additionally, requiring consideration and reporting of climate-related financial risk would inappropriately elevate this risk above others in fiduciary analysis. The ARA observes that just last year the Department itself asserted (in its proposed rulemaking, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* (ESG Proposal)) that “climate change and other ESG factors are no different than other ‘traditional’ material risk-return factors.”⁴

Further, unduly emphasizing climate-related financial risk relative to other investment risks may inadvertently lead a fiduciary to fail to appropriately consider and manage *all* relevant risks. The ARA does not support the Department influencing a fiduciary to focus on any particular factor when the fiduciary may independently assess other concerns as being more significant to their analysis. For example, geopolitical crises, the impact of inflation, heightened cyber risks, and uneven global recovery from the ongoing Covid pandemic each could have a more immediate impact on a retirement plan and its participants than climate-related factors. Fiduciaries must have flexibility to consider the risk-return factors that in their judgment, not the Department’s, are material.

Moreover, the ARA is concerned that undue emphasis on climate-related financial risk would expose the plan fiduciary to unwarranted liability and litigation risks. The Department should instead rely on existing ERISA principles and practices.

2. Executive Order 14030 uses the phrase “climate-related financial risk” to encompass a wide variety of risks under two broad categories: Physical risks and transition risks. What are the most significant climate-related financial risks to retirement savings and why?

Drawing conclusions about the relative significance of types of climate-related financial risks to retirement savings would be premature. Until data relating to climate-related financial risk become more available and understandable, the risk and its significance cannot be reliably identified or assessed by ERISA fiduciaries. Once a uniform system of providing sound information is available, plans will be better positioned to assess climate-related financial risk.

3. Should EBSA collect data on climate-related financial risk for plans? If so, please specify with as much precision as possible what information EBSA could and should collect, potential sources of such information, as well as how EBSA should collect it.

No. The ARA does not support EBSA’s collecting data on climate-related financial risks for retirement plans. First, the Department has not explained its rationale or expectations for how collecting the data would further its mandate to supervise and enforce ERISA legal and regulatory standards. Further, we believe that prioritizing collection of information on climate-related financial risks above other risks to plans is misguided and contravenes ERISA principles. The ARA does not support the Department singling out climate-related financial risks without clear justification.

Further, as the ARA wrote in our December 13, 2021, comment letter on the Department’s ESG Proposal,⁵ we believe that there is not yet a consensus about appropriate data sources for reporting on

⁴ 86 Fed. Reg. 57272, 57276 (Nov. 13, 2021).

⁵ <https://araadvocacy.org/ara-comments-on-dols-proposed-rule-on-esg-investing/>

climate-related financial risks. Consequently, EBSA should not attempt to collect information on such risks. As the Department also may be aware, the Securities and Exchange Commission (SEC) is developing a rule that would require additional climate-related disclosures in registration statements and annual reports of public companies,⁶ and also expects to propose requirements for funds and investment advisers related to ESG considerations.⁷ That is, EBSA's approach to collecting data on climate-related financial risks could be unnecessarily duplicative of or conflict with the approach taken by SEC or other government agencies. Considering the relative expertise of other Federal regulators with subject matter expertise, we believe the development of reporting standards for climate-related financial risk should begin with financial regulators. For example, if the SEC is successful in developing standards, and such standards are broadly adopted across the American economy, it may be possible for plans to them along with other relevant risk and return factors.

4. Should EBSA use Form 5500 Annual Return/Report to collect data on climate-related financial risk to pension plans?

No, the Department should not use Form 5500 to collect data on climate-related financial risk to pension plans. As discussed in the foregoing, required reporting of climate-related financial risk without similar collection of data about other types of risks could mislead and confuse fiduciaries and plan participants. Moreover, collecting this information on the Form 5500 arguably does not accord the purpose and functionality of this annual return. The content of the Form 5500 includes measurable data points such as the amount and type of the plan's assets and liabilities, participants, benefits, receipts, disbursements. The ARA is dubious that climate-related financial risk would yield measurable data points. Even assuming that such risk could be quantified in some way, it would seem to be highly dynamic and rapidly changeable. This would cast doubt on the accuracy, and thus, the value of reporting climate-related financial risk information on the Form 5500.

5. Other than the Form 5500, are there other methods of collecting data on climate-related financial risks to plans that EBSA should consider? For instance, should the Department conduct an information request/survey on plan sponsor or employee awareness of such risks, and if so, should that information request categorize the information based on plan size, e.g., large plans versus small plans, or segmented in another way?

For the reasons discussed, the ARA does not support collection of plan data on climate-related financial risks by EBSA. A data collection alternative that does not involve public reporting, such as an information request or survey, is preferable though the Department's purpose in collecting this information, including how it would be used, is not clear.

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? If so, what alternative to the Form 5500 could be used for such a report, how should

⁶ *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (April 11, 2022).

⁷ See SEC's Fall 2021 Regulatory Agenda, available at

<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM96>.

this report be compiled, what should be the contents, and how should it be made available to the public?

The timeliness of climate-related financial risk information is an important factor in how useful it may be to ERISA plans. Still, without a compelling policy objective that comports with the Department's mandate, we do not believe that retirement plans should be required to publicly report activities relating management of climate-related financial risks to plans. Highlighting management of climate-related financial risk and its results in a publicly available report risks distorting the relevance of climate-related financial risk relative to other types of risks, potentially creating confusion, unwarranted liability for fiduciaries, and litigation risks. Moreover, the Department has not explained how this requirement would support ERISA compliance and enforcement for employee benefit plans.

- 7. Changes in the financial markets, particularly an increased number of metrics and tools allowing for additional analyses of investments, give ERISA plan fiduciaries more information on which to make decisions on climate-related financial risk factors in evaluating the merits of competing investment choices. Some private sector sources are developing structured ESG research data for evaluating corporate performance. What are the best sources of information for plan fiduciaries to utilize in evaluating such risks with respect to plan investments? Are there difficulties or challenges in obtaining such information or comparing information from different sources? If so, what is the source or sources of those difficulties or challenges, and what are the solutions?**

While interest in ESG investment strategies and products reportedly continues to grow, ESG investing, including investing focused on climate-related financial risk, is still a relatively new concept as a data-driven strategy. Complicating this, at present, consensus is lacking on common concepts and nomenclature, and data on relevant topics is not widely available. Furthermore, the industry lacks consistency in how to measure risk. Against this backdrop, consistent, credible sources of information for plan fiduciaries to utilize in evaluating such risks with respect to plan investments are not readily available. As a result, ERISA fiduciaries' consideration of climate-related financial risk is fraught with difficulty.

The ARA believes that consistent use and application of common, agreed-upon terminology, assumptions, and methodologies regarding climate-related financial risk will be vital for plan fiduciaries if it is germane to their prudent process. We believe that Federal financial regulators are best situated to develop a single set of definitions and standards for these risk factors. For example, the SEC's wide-ranging climate disclosure proposal could serve as the baseline for a comprehensive disclosure regime.

- 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?**

The only limitation that might hinder managers of investments held in non-ERISA plans, such as IRAs, in this regard is the absence of reliable, impartial methods for evaluating climate-related financial risks. We

note however, as acknowledged by the Department in the RFI, that the Department and IRS have shared administrative responsibility for IRAs. We suggest, therefore, that the Department coordinate with IRS prior to taking any action in this area.

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?

The ARA believes Federal agencies other than the Department, such as the financial regulators which oversee financial institutions and markets are better positioned to provide data and analytics for the public's use in evaluating climate-related financial risk. While we recognize that EBSA supports and publishes research into some employee benefits issues and understanding financial risk is not inapposite to other topics researched by the Department, the topic of climate-related financial risk is more obviously within the expertise of other Federal agencies. The Department could consider making information developed by other agencies available to the public, as it does with reports and research papers it funds.

21. Is there a need to educate participants, especially those responsible for making their own investment decisions in participant-directed individual account plans, about climate-related financial risks? If yes, what role, if any, should EBSA play in sponsoring and providing such education? In 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")?

The ARA strongly believes that educating participants about financial health and retirement savings improves retirement security. We are in favor of educating participants in retirement plans about all financial risks, not just climate-related financial risk. In this regard, we believe that the Department should coordinate with other agencies within the Federal government as well as States to develop to material for this purpose. In particular, the Department should coordinate with the SEC to on initiatives to inform investors, retail and retirement investors alike, on climate-related and other financial risk.

22. Is there a need to educate owners of IRAs about climate-related financial risks? If yes, what role, if any, should EBSA play in assisting the IRS or States (for those having state automatic-IRA arrangements) in sponsoring and providing such education?

Financial education can help to improve retirement outcomes regardless of the type of retirement savings vehicle. If the Department concludes that IRA owners should be offered education about climate-related financial risk, we encourage the Department, together with the SEC, IRS, other Federal agencies and States, to coordinate efforts, with the SEC or IRS taking the lead.

* * * * *

The ARA very much appreciates the Department's commitment to safeguarding America's workers' interests in their workplace retirement savings plans. The ARA shares this goal and would welcome the

opportunity to discuss our comments on the RFI with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org or (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Allison Wielobob
General Counsel
American Retirement Association