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OF THE  
UNITED STATES OF AMERICA

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*Via Electronic Delivery*

December 10, 2021 December 9, 2021

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

**Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights: RIN 1210-AC03**

To Whom It May Concern:

We appreciate the Department of Labor's (DOL) work on the proposed regulation "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (Proposed Regulation). For over 25 years, DOL issued subregulatory guidance in these areas. In 2020, the DOL issued a final regulation with respect to both investment duties and proxy voting, each under separate rulemaking (2020 Regulation). The Proposed Regulation amends the 2020 Regulation. Our comments contain two overarching goals: neutrality and longevity. The first goal focuses on changes to make the final regulation neutral with respect to a particular type of investment and instead only to focus on a prudent process. The second goal is to develop a final regulation that will stand the test of time and put an end to the change in positions that occurs with a change in control of the Executive Branch. Making investment decisions under plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) is a very difficult undertaking. To fulfill their duties, plan fiduciaries need certainty from the DOL, regardless of the party occupying the White House from both a regulatory and enforcement standard.

The Chamber makes the following recommendations regarding the Proposed Regulation:

- Throughout the Proposed Regulation, use the long-standing ERISA standard of "relevant" rather than "material."
- With respect to "appropriate consideration" in clause (b)(2)(i), delete the language "compared with the opportunity for gains associated with reasonably available alternatives with similar risk."
- With respect to the assessment of the projected return in subclause (b)(2)(ii)(C), delete the clause "which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action" (or, alternatively, clarify that this also may not be required depending on the facts and circumstances).

- Consider issuing separate regulations with respect to ERISA Section 404(c) plans, or at least clarify how the final regulation would apply to such plans.
- Delete the examples in subparagraph (b)(4) and the reference in paragraph (c).
- Clarify that each investment must be selected as part of a prudent process before application of the collateral benefit rule.
- Delete the disclosure requirement with respect to the collateral benefits rule.
- Clarify that collateral benefit rule does not apply in the context of the selection of investment line-ups in participant-directed plans where the investment selection may not be a zero-sum game.

### **Background**

Under ERISA, plan fiduciaries must

discharge [the fiduciary’s] ... duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent ...[person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.<sup>1</sup>

These provisions are known as the duty of loyalty and the duty of prudence. In 1979, the DOL issued the Investment Duty regulation with respect to the duty of loyalty.<sup>2</sup>

ERISA provides an exception for fiduciary liability for any loss under ERISA Section 404(c) (29 U.S.C. § 1114(c)) as to participants and beneficiaries who exercise investment control over their defined contribution plan accounts. Such a participant or beneficiary is not considered a fiduciary and no other fiduciary is liable for any loss that results from the exercise of control. This section was part of ERISA as enacted in 1974, but the DOL did not finalize regulations under this section until 1992.<sup>3</sup>

Starting in 1994, the DOL issued subregulatory guidance on ERISA’s fiduciaries duties with respect to investing in economically targeted investments and investments with environmental, social, or governance factors.<sup>4</sup> In June 2020, the DOL issued a proposed regulation (2020 Proposed Investment Duty Regulation) relating to the duty of prudence and loyalty with respect

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<sup>1</sup> ERISA § 404(a); 29 U.S.C. § 1104(a).

<sup>2</sup> 44 Fed. Reg. 37221, 37225 (June 26, 1979).

<sup>3</sup> See 57 Fed. Reg. 46932 (Oct. 13, 1992).

<sup>4</sup> See Interpretive Bulletin 1994-1; Interpretive Bulletin 2008-01; Interpretive Bulletin 2015-01; and Field Assistance Bulletin 2018-01.

to investments.<sup>5</sup> This regulation was finalized on November 13, 2020,<sup>6</sup> and it replaced the 1979 regulation.

It has been the DOL's long-held view that voting proxies is a fiduciary obligation. It also has been the Chamber's view that all entities voting proxies, including ERISA plan fiduciaries, need to operate on transparent, material, and accurate information. Without this, plan fiduciaries are unable to fulfill their fiduciary obligation on whether and how to vote proxies. Over the years, DOL issued guidance with respect to these obligations.<sup>7</sup> In September 2020, the DOL issued a proposed proxy voting regulation (2020 Proposed Proxy Voting Regulation) as paragraph (e) to the 2020 Proposed Investment Duty Regulation, and the regulation was finalized on December 16, 2020.<sup>8</sup>

The 2020 Regulation, including paragraph (e) that relates to proxy voting, was codified at 29 C.F.R. Section 2550.404a-1, and it became effective in January of 2021. However, subsequent Executive Orders and non-enforcement action by the DOL meant that the 2020 Regulation would be subject to further review and revised rulemaking. First, on January 20, 2021, President Biden signed Executive Order 13990,<sup>9</sup> which required the heads of all agencies to review all existing regulations promulgated, issued, or adopted between January 20, 2017 and January 20, 2021 that may be inconsistent with the policies listed in section 1 of the Order, including "bolster[ing] resilience to the impacts of climate change." A fact sheet issued in conjunction with the Executive Order listed the 2020 Regulation as one of the regulations subject to review.<sup>10</sup>

Second, in March of 2021, DOL issued an enforcement policy statement that it will not enforce the 2020 Regulation with respect to an investment, including a Qualified Default Investment Alternative (QDIA), or investment course of action or with respect to an exercise of shareholder rights.<sup>11</sup>

Third, on May 20, 2021, the White House issued Executive Order 14030 which, among other objectives, calls on the DOL to consider publishing a proposed rule to "suspend, revise, or rescind 'Financial Factors in Selecting Plan Investments,' 85 FR 72846 (November 13, 2020),

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<sup>5</sup> 85 Fed. Reg. 39113 (June 30, 2020).

<sup>6</sup> 85 Fed. Reg. 72846 (Nov. 13, 2020).

<sup>7</sup> See Interpretive Bulletin 2008-02, Interpretive Bulletin 2016-01, and Field Assistance Bulletin 2018-01.

<sup>8</sup> 85 Fed. Reg. 55219 (Sept. 4, 2020) and 85 Fed. Reg. 81658 (Dec. 16, 2020).

<sup>9</sup> See The White House Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/>.

<sup>10</sup> See Fact Sheet: List of Agency Actions for Review, January 20, 2021 available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

<sup>11</sup> See U.S. DEPARTMENT OF LABOR Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans, March 10, 2021 available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf>."

and ‘Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,’ 85 FR 81658 (December 16, 2020).”<sup>12</sup>

### **Analysis of the Proposed Regulation**

#### Paragraph (b): Prudence

Paragraph (b) provides a safe harbor for the duty of prudence. Under the safe harbor, a fiduciary must “give appropriate consideration to those facts and circumstances that the fiduciary knows are relevant....”<sup>13</sup>

Under the Proposed Regulation clause (b)(2)(i), appropriate consideration includes, but is not limited to:

A determination that the investment or investment course of action is reasonably designed to further the purpose of the plan, taking into consideration the risk of loss and the opportunity for gain associated with the investment or investment course of action **compared with the opportunity for gains associated with reasonably available alternatives with similar risk** (emphasis added).

The emphasized language was a carryover from the 2020 Regulation. In the preamble to the Proposed Regulation, the DOL states:

The Department expects that the provision should be commonly understood by plan fiduciaries and uncontroversial in nature. Comments are solicited on whether it is necessary to restate this principle of general applicability as part of this prudence safe harbor.<sup>14</sup>

Although we agree that it is commonly understood that a fiduciary should compare similar, available investments when making an investment decision, the bolded language quoted above does not need to be included in the final regulation because including the term “reasonably available” will have many second-guessing what is “reasonably available.” In response to concerns in the 2020 Proposed Investment Duty Regulation, in the preamble to the 2020 Regulation, DOL stated that “the rule does not require fiduciaries to scour the market or to consider every possible alternative.”<sup>15</sup> However, even with this attempted clarification, there remained concerns that this language could be used to challenge fiduciaries’ determination that the number of investments to which they compared the chosen investment was not “reasonable.” Given the ever-increasing litigation with respect to investment options in participant-directed defined contribution plans, we believe that the bolded language should be deleted.<sup>16</sup>

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<sup>12</sup> See The White House Executive Order on Climate-Related Financial Risk (May 20, 2021) available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>.

<sup>13</sup> 29 C.F.R. § 2550.404a-1(b)(1).

<sup>14</sup> 86 Fed. Reg. 57277 (Oct. 14, 2021).

<sup>15</sup> 85 Fed. Reg. 72846, 72854 (Nov. 13, 2020).

<sup>16</sup> See AIG, *Understanding the Rapid Rise in Excessive Fee Claims* (2021), <https://www.aig.com/content/dam/aig/america-canada/us/documents/business/management-liability/pension-trustee->

Under the Proposed Regulation clause (b)(2)(ii), appropriate consideration also includes “[c]onsideration of the following factors as they relate to such portion of the portfolio:

- (A) The composition of the portfolio with regard to diversification;
- (B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and
- (C) The projected return of the portfolio relative to the funding objectives of the plan, **which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action** (emphasis added).

The final regulation should provide stable, long-lasting guidance to fiduciaries in carrying out their duties. The constant back and forth over the years depending on the administration has done just the opposite. To ensure its longevity and stability, the final regulation should not single out any factor because investment factors change over time as investment theories evolve. Instead, the final regulation should, as ERISA requires, focus on the process and the “facts and circumstances” test. As such, the emphasized language above in subclause (C) should be deleted.

In the alternative, if the DOL does not delete this subclause, it should modify it to provide that “and, depending on the facts and circumstances and the actual investment, may or may not require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”<sup>17</sup>

There also is concern that the Proposed Regulation is not suited for the investment responsibilities for participant-directed defined contributions plans, and instead, it has a focus on defined benefit investing. Almost all the factors quoted above, such as funding objectives and portfolio diversification, current returns, and cash flow, primarily relate to defined benefit plans and are largely irrelevant to participant-directed defined contribution plans. This is not surprising because the prudence standard was drawn from the original 1979 regulation which was issued when participant-directed individual account plans were relatively uncommon. It was not until 1992 that the DOL issued its regulation under ERISA Section 404(c) that addresses the unique nature of ERISA Section 404(c).

The aim of Section 2550.404a-1 originally was at institutional investors in defined benefit plans and fiduciary-directed defined contribution plans and there is a separate ERISA Section 404(c) regulation that requires a broad range of investment alternatives be offered under an ERISA 404(c) plan.<sup>18</sup> Given this, we believe that the appropriate place to address investment alternatives

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excess-fees-fiduciary-whitepaper.pdf; Jacklyn Wille, *401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020*, Bloomberg Law (Aug. 31, 2020), <https://news.bloomberglaw.com/employee-benefits/401k-fee-suits-flood-courts-on-pace-for-fivefold-jump-in-2020>.

<sup>17</sup> For example, climate change would not be a consideration for an index mutual fund or exchange-traded fund because such funds track the performance of a specific market benchmark, such as the S&P 500 Index, and instead of actively selecting the fund’s investments, the manager buys all (or a representative sample) of the stocks or bonds in the index it tracks.

<sup>18</sup> 29 C.F.R. § 2550.404c-1(b)(3).

in an ERISA Section 404(c) plan would be under 29 C.F.R. Section 2550.404(c)-1 and 29 CFR Section 2550.404c-5 with respect to QDIAs.

Alternatively, the DOL may want to spell out how the “appropriate consideration” factors would apply to a participant-directed defined contribution plan. When devising an investment lineup for a participant-directed plan, fiduciaries need to select an array of funds that provide a meaningful opportunity for a diverse group of employees to meet their different retirement savings goals, considering various factors such as age, income, risk tolerance, education level, expected retirement date, etc. The investment needs of a 22-year-old new hire in an entry-level position will be much different than that of a 67-year-old supervisor nearing retirement. However, it is unclear exactly how the “appropriate consideration” factors would apply to a participant-directed plan. For example, the fiduciary would look at the current return of the portfolio and anticipated cash flow requirements of the plan in evaluating the overall lineup or each individual investment option, but the actual selection would be different for each participant depending on the participant’s needs. The same is true with respect to subclause (C) factors (“projected return of the portfolio relative to the funding objectives of the plan”). The DOL may want to provide examples of how each of the “appropriate consideration” factors would apply to the selection of investment options in participant-directed defined contribution plans.

#### Subparagraph (b)(4)

This subparagraph provides that “a prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis ...” It then lists factors “which might include, for example”:

- Climate change-related factors;
- Governance factors; and
- Workforce factors.

Although the examples are appreciated, they are not necessary within the text of the regulation. There are numerous factors that a fiduciary considers when selecting plan investments, and to list only a few within the text of the regulation may be misleading. It also potentially creates a perception that the DOL *expects* fiduciaries will take these specific issues into consideration, even where it might not be possible, practical, or prudent. Furthermore, as noted above, an important aspect of any final regulation is its longevity. By listing specific examples of factors that may be of particular importance now, but may be of less importance in the future, the regulation may become stale.

If the DOL believes the examples are needed, we do not see the need to add additional examples for the reasons stated above. However, if the DOL chooses to include examples, in any list, they should use the term “or” rather than “and” before “Workforce” factors to show that these are all merely examples, and a fiduciary is not required or expected to consider any or all the examples.

This section of the Proposed Regulation also requires that the fiduciary consider any factor that is material to the risk-return analysis. However, subparagraph (b)(1) requires that fiduciaries

“give appropriate consideration to those facts and circumstances that the fiduciary knows are **relevant** (emphasis added).” Furthermore, the original 1979 regulation also required a fiduciary to look at the relevant facts and circumstances, and other DOL guidance consistently has used this standard.<sup>19</sup> Given the long-standing ERISA standard is relevant, the final regulation should use the term “relevant” rather than “material” for consistency.

#### Paragraph (c): Loyalty

Subparagraph (c)(1) provides that to meet its duty of loyalty a “fiduciary’s evaluation of an investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are material to investment value, ....” For the reason stated above, we believe the term material should be relevant.

If the DOL removes the examples from paragraph (b), the reference to such examples in paragraph (c) also must be removed.

Subparagraph (c)(3) provides that if after performing the analysis required under subparagraph (c)(2), a fiduciary prudently determines that

competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns. However, if the plan fiduciary makes such a selection in the case of a designated investment alternative for an individual account plan, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries. A fiduciary may not, however, accept expected reduced returns or greater risks to secure such additional benefits.

As explained below, we suggest the following changes to this subparagraph:

(3) If after the analysis in paragraph (c)(2) of this section, a fiduciary prudently concludes that competing investments or investment courses of action each of which meets the requirements of paragraph (b) and each serves the financial objectives and interests of the plan, the fiduciary may select the investment, or investment course of action, based on collateral benefits other than investment returns. A fiduciary may not, however, accept expected reduced returns, greater risks, or other investment detriments to secure such additional benefits.

The addition of “each of which meets the requirements of paragraph (b)” is to make clear that each investment must have been selected through a prudent process before the collateral benefit

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<sup>19</sup> See 1979 Investment Duty Regulations 29 CFR 2550.404a-1(b)(1)(i) (stating that appropriate consideration requires a fiduciary, to look at those “facts and circumstances that, given the scope of such fiduciary’s investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved....” available at <https://www.govinfo.gov/content/pkg/CFR-2003-title29-vol9/pdf/CFR-2003-title29-vol9-sec2550-404a-1.pdf>; Interpretive Bulletin 94-1 (noting what other circumstances are relevant to an investment); Interpretive Bulletin 2008-1 (same).

rule can come into play under the duty of loyalty. We propose removing the word “equally” because it implies that the investments are similar in nature. However, investments may vary but serve the same plan purpose.

Although most agree that documenting the reasons for an investment selection would be part of a prudent process, ERISA generally does not require fiduciaries to describe and disclose their decision-making process to participants and beneficiaries as part of the duty of loyalty. For the DOL to require this only in the case of a selection based on collateral benefits is inconsistent with ERISA’s general requirements and with DOL’s previous sub-regulatory guidance on the collateral benefits rule. It is also inconsistent with the Proposed Regulation’s removal of the documentation requirement in paragraph (c)(2) of the 2020 Regulation.

The Proposed Regulation also fails to consider how this type of disclosure could have unintended consequences depending on how participants interpret the disclosure. For example, the disclosure could result in a chilling effect on participants considering investing in the fund, which may undermine the collateral benefit factors for which the fund was selected. Finally, the DOL should make clear that the collateral benefit rule only applies where there are competing investments, and a fiduciary may choose only one. This would not be the case in a participant-directed plan where adding additional options is not necessarily a zero-sum game. For example, if based on participants’ requests, a plan added a prudently selected investment option with a particular theme, the collateral benefit rule would be unnecessary because this option, although added based on collateral benefits, i.e., participants’ requests and satisfaction, was not necessarily “competing” with any other investment.

#### Paragraph (d): Proxy Voting

Subclauses (d)(2)(ii)(D) and (E) provide, in part, that when deciding whether to exercise shareholder rights, plan fiduciaries must:

- Evaluate material facts that form the basis of any particular proxy vote or another exercise of shareholder rights; and
- Exercise prudence and diligence in the selection and monitoring of a person selected to exercise shareholder rights or otherwise advise or assist with the exercise of shareholder rights.

As noted above, the standard for ERISA fiduciary determination is an evaluation of the relevant facts and circumstances. As such, material should be changed to relevant. With respect to subclause (E), ERISA requires that plan fiduciaries exercise prudence and diligence in the selection and monitoring of any service provider, not just those selected to exercise shareholder rights.<sup>20</sup> Given that this standard already exists under ERISA, it is unnecessary to include it in the final regulation.

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<sup>20</sup> See U.S. Department of Labor, ERISA Fiduciary Advisor, “Is hiring a service provider a fiduciary function, and if so, what do I need to do?” available at [elaws - ERISA Fiduciary Advisor \(dol.gov\)](https://www.dol.gov/eisalaws-ERISA-Fiduciary-Advisor)



### Qualified Default Investment Alternatives

The 2020 Regulation prohibited a plan from designating a fund as a QDIA under Section 2550.404c-5 if its investment objectives or goals or its principal investment strategies include, consider, or indicate the use of one or more non-pecuniary factors, regardless of the fiduciary's reasons for selecting the fund. As noted in our comment letter on the 2020 Proposed Investment Duty Regulation, if the DOL wishes to regulate QDIAs, we believe the appropriate venue is in the QDIA regulation under 29 CFR Section 2550.404c-5. Therefore, we support the deletion of this section in the Proposed Regulation, and it should not be included in the final regulation.

### Conclusion

We appreciate DOL's work on the Proposed Regulation. We look forward to working with DOL on a final regulation that focuses on process and that will stand the test of time.

Sincerely,

*Chantel Sheaks*

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U.S. Chamber of Commerce