INVESTMENT COMPANY INSTITUTE®

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May 12, 2022

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
US Department of Labor
200 Constitution Avenue NW
Washington, DC 20210
Attn: Request for Information on Possible Agency Action

Re: Climate-Related Financial Risk (Z–RIN 1210–ZA30)

Dear Acting Assistant Secretary Ali Khawar:

The Investment Company Institute (ICI)[1] appreciates the opportunity to provide its views on the Department of Labor's (the "Department") Request for Information (RFI) on possible agency actions to protect life savings and pensions from threats of climate-related financial risk.[2] The RFI was issued in furtherance of the Executive Order on Climate-Related Financial Risk,[3] to

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[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $31.3 trillion in the United States, serving more than 100 million investors, and an additional $10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] 87 Fed. Reg. 8289 (February 14, 2022).

[3] Executive Order 14030, dated May 20, 2021, is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/. Sections 4(a) and 4(c) of the Executive Order directed the Department to:

> (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; [and]
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> (c) assess — consistent with the Secretary of Labor's oversight responsibilities under the Federal Employees' Retirement System Act of 1986 and in consultation with the Director of the National Economic Council and the National Climate Advisor — how the Federal Retirement Thrift Investment Board has taken environmental, social, and governance factors, including climate-related financial risk, into account[.]

solicit public input on agency actions that can be taken under the Employee Retirement Income Security Act of 1974 (ERISA), the Federal Employees' Retirement System Act of 1986 (FERSA), and any other relevant laws.

ICI strongly supports efforts to promote retirement security for US workers and appreciates the Department's interest in examining the impact of climate-related financial risk on retirement security. As a trade association representing regulated investment funds, ICI is especially attuned to the needs of retirement savers because regulated funds play a significant role in US retirement saving through defined contribution (DC) plans and individual retirement accounts (IRAs). At year-end 2021, more than 60 percent of private-sector 401(k) plan assets were invested in regulated funds.

As the Department is also aware, the Securities and Exchange Commission (SEC) recently issued a proposal that would require enhanced climate-related information in the registration statements and annual reports of public companies,[4] and is expected to propose requirements for funds and investment advisers related to environmental, social and governance (ESG) factors, including ESG claims and related disclosures.[5] ICI and its members have a significant interest in how climate change-related disclosure evolves.[6] This disclosure is important to the investment decisions fund managers make on behalf of the millions of retail investors choosing funds to save for retirement, education, and other important financial goals.

While we support efforts to educate plan fiduciaries and plan participants about climate-related financial risk, we urge caution in the manner and scope in which such efforts proceed. As discussed in greater detail below, we are concerned that the potential courses of action the Department is suggesting in the RFI will lead to an overemphasis of climate-related risks relative to other legitimate and vital investment risk considerations grounded in traditional ERISA principles of prudence. Moreover, to the extent the Department ultimately determines to mandate climate-related disclosures by plan fiduciaries, we urge that such a step be considered only after the SEC has finalized its proposals on disclosures from corporate issuers and any new requirements for funds and investment managers, and the regulated community has had sufficient time to assess the new requirements. Proceeding in a different order would create confusion and would lead to either highly qualitative disclosures or reporting based on inconsistent data, which would not be helpful to either plan fiduciaries or the plan participants they serve.

For these reasons, when it comes to the role of ERISA in protecting life savings and pensions from threats of climate-related financial risk, the most effective action the Department can take is

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

[5] See SEC's Fall 2021 regulatory agenda, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM96.

[6] See e.g., letter from Eric J. Pan to Vanessa Countryman, dated June 4, 2021, available at https://www.ici.org/system/files/2021-06/21_ltr_rfi.pdf. ICI will also submit comments in response to the SEC's proposal.

to finalize its October 2021 proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (the "Proposed Rule").[7] The Proposed Rule would clarify the manner in which ERISA fiduciaries may permissibly consider ESG factors in their evaluation of ERISA plan investments. Most significantly, the Proposed Rule would correct the misperception that fiduciaries are at risk if they include ESG factors—including climate-related risk considerations—in the financial evaluation of plan investments.

EXECUTIVE SUMMARY

Our comments and recommendations include the following:

- The most effective action the Department can take is to finalize its Proposed Rule to clarify the way ERISA fiduciaries may consider ESG factors—such as climate-related risk factors—in evaluating plan investments.

- The SEC has proposed new climate risk disclosures from corporate issuers and is expected to propose new requirements for funds and investment advisers, which may also include new climate risk disclosure requirements. Once finalized, we expect these initiatives to produce additional information that would be available to all investors, including plan fiduciaries.

- In general, we have the following three overarching concerns with the potential courses of action that the Department suggests in the RFI:

    - that the potential courses of action will lead to an overemphasis of climate risk considerations over other legitimate and critical investment risk considerations in a manner that could confuse and mislead plan participants and cause ERISA fiduciaries to place undue focus on climate risk relative to other important investment risks;

    - that the RFI questions wrongly imply that there is an agreed-upon approach or metrics for assessing climate risks, and an agreed upon hierarchy of their importance; and

    - that the potential courses of action, including requiring plan reporting, would be premature and unhelpful and would result in the same sequencing problems experienced by the European Union.

- We strongly urge the Department not to collect additional information from ERISA plans on climate-related financial risk at this time. Doing so will increase the administrative burdens on plans and plan service providers and increase the threat of litigation against plans. Ultimately, it will harm the ability of US workers to save for retirement, by increasing plan participants' costs and discouraging plan adoption.

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[7] The proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, published at 86 Fed. Reg. 57272 (October 14, 2021), would amend the current regulation, finalized in 2020, on fiduciaries' investment duties under Title I of ERISA. The RFI does not solicit comments on the Proposed Rule.

- Non-ERISA savings arrangements, such as IRAs, are not more vulnerable to climate risk. Investment managers generally consider climate risk, where relevant from an investment perspective, for the assets they manage, whether ERISA or non-ERISA. The fact that ERISA's prudence and loyalty obligations do not apply to IRAs should have no impact on whether investment decision-making involving IRAs incorporate climate risk as part of its investment analysis.

- The Department should consider the efficiency of sponsoring and publishing its own climate risk research to be used by plan fiduciaries when other more uniformly used sources are available.

- Regarding potential education on climate-related financial risk, the Department should not overemphasize climate risk to the detriment of participant understanding of other risks. This has the potential to confuse and mislead, rather than help, plan participants as they pursue their retirement savings goals.

BACKGROUND/INTRODUCTION

ICI agrees that climate risk is a relevant consideration in investment analysis. For this reason, we strongly voiced our support[8] for the Department's October 2021 Proposed Rule, which would amend the Department's Investment Duties regulation to clarify the way ERISA fiduciaries may permissibly consider ESG factors in their evaluation of ERISA plan investments. Most significantly, the Proposed Rule would correct the misperception that fiduciaries are at risk if they include ESG factors—including climate-related risk considerations—alongside other investment considerations, in the financial evaluation of plan investments.

As we explained in ICI's 2021 Letter to the Department, when it comes to the use of ESG considerations in mutual funds, ESG factors are among many considerations that go into the investment management process as part of the overall risk and return analysis. Mutual funds' portfolio managers and analysts—even those of funds that do not include ESG-related terms in their names or have an ESG-related principal investment strategy—generally include ESG considerations in their investment decision making much as they would consider macroeconomic or interest rate risks, idiosyncratic business risks, and investment exposure to particular companies, industries, or geographic regions. In fact, professional investment managers increasingly analyze ESG criteria precisely because of risk, return, and fiduciary considerations.

Fund managers consider ESG criteria to varying degrees, and these approaches coexist on a broad investing spectrum. Not every fund manager incorporates ESG considerations in the same manner; in fact, there is a range of qualitative and quantitative approaches for embedding ESG analysis across investing strategies, spanning asset classes and active-to-passive strategies. ESG-related investing strategies exist along a continuum. Some funds integrate analysis of ESG considerations, others use one or more sustainable investing strategies, and some integrate ESG

[8] See letter from Eric J. Pan to the Office of Regulations and Interpretations, Employee Benefits Security Administration, dated December 13, 2021, available at https://www.ici.org/system/files/2021-12/33954a.pdf ("ICI's 2021 Letter to the Department").

considerations and use one or more sustainable investing strategies. The approaches used to incorporate ESG factors then can vary from the purely qualitative to the purely quantitative, and it is common for funds to use a mix of qualitative and quantitative approaches. Qualitative factors, while less concrete in nature, are no less relevant to a risk-return analysis.

The Proposed Rule makes clear that, when considered as part of the risk-return analysis, ESG factors should be treated the same as any other economic factors. ICI strongly believes that in doing so the Proposed Rule better reflects the realities of how professional fund managers incorporate ESG factors into their investment analysis and, most importantly, corrects the misperception that fiduciaries are at risk if they include ESG factors in the risk-return evaluation of plan investments.

Of course, our consideration of the questions raised by the RFI is also informed by the work of other relevant agencies currently analyzing issues relating to ESG. The SEC has multiple projects on its regulatory agenda that relate to ESG and climate risk. Two SEC projects are relevant to the Department's inquiry on climate risk.

In March, the SEC voted in favor of issuing for comment a proposal that would require certain public companies to provide certain climate-related information in their registration statements and annual reports. ICI supports the requirement to disclose scope 1 and 2 emissions and is pleased that the SEC's proposal leverages elements of the Task Force on Climate-Related Financial Disclosures (TCFD).[9] The proposed rules would require information about a registrant's climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition. The required information about climate-related risks would also include disclosure of a registrant's greenhouse gas (GHG) emissions.[10]

SEC staff is also working on a proposal for new requirements for funds and investment advisers related to ESG factors, including ESG claims and related disclosures.[11] SEC Chair Gensler has explained that the SEC staff will consider the use of marketing terms such as "green," "sustainable," and "low-carbon." The Chair has asked SEC staff to consider recommendations

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[9] The Financial Stability Board (FSB) created the TCFD to develop recommendations on the types of information that companies should disclose to support investors, lenders, and insurance underwriters in appropriately assessing and pricing risks related to climate change. In 2017, the TCFD released climate-related financial disclosure recommendations designed to help companies provide better information to support informed capital allocation. TCFD's final report, *Recommendations of the Task Force on Climate-related Financial Disclosures* (June 2017) is available at https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf. In the preamble to its proposal, the SEC explains that the proposed rules incorporate some of the TCFD's concepts and vocabulary. 87 Fed. Reg. 21334, at 21343-4.

[10] The proposed rules would require a registrant to disclose information about its direct GHG emissions (Scope 1) and indirect emissions from purchased electricity or other forms of energy (Scope 2). In addition, a registrant would be required to disclose GHG emissions from upstream and downstream activities in its value chain (Scope 3) if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions.

[11] See SEC's Fall 2021 regulatory agenda, available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3235-AM96.

about whether fund managers should disclose the criteria and underlying data they use.[12] SEC staff will also consider whether it might take a holistic look at the Names Rule, which governs a fund's investment in the types of investments suggested by its name.[13]

RFI QUESTIONS

The RFI questions are divided among five categories: (1) general, (2) data collection regarding ERISA-covered plans, (3) ERISA fiduciary issues, (4) FERSA, and (5) miscellaneous. Our responses to the questions are set forth below in the order they appear in the RFI.[14]

1. General Questions (Questions 1-2)

The first two questions of the RFI reflect the Department's general request for input on how it should address the questions in the Executive Order (i.e., what agency actions can be taken under ERISA, FERSA), and what the most significant climate-related financial risks to retirement savings are.

As an initial matter, we agree that climate change can manifest itself in both physical risks and transaction risks, as discussed in the Executive Order.[15] For purposes of the RFI, because we are addressing the Department's role in protecting lifesavings and pensions, we are solely addressing these risks as investment risks.

Throughout the RFI, the Department suggests various agency actions it could take to address climate risk. It suggests collecting data from ERISA plans on climate-related financial risks to retirement plans and their service providers, collecting this information through the Form 5500

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[12] See *Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar* (July 28, 2021), available at https://www.sec.gov/news/speech/gensler-pri-2021-07-28. Also see Gary Gensler, *Prepared Remarks Before the Asset Management Advisory Committee* (July 7, 2021), available at https://www.sec.gov/news/public-statement/gensler-amac-2021-07-07.

[13] Congress established laws about fund naming conventions through the Investment Company Act of 1940. One aspect of the Names Rule provides that if a fund's name suggests a particular investment type, the fund must invest at least 80 percent of the value of its assets in that investment type. See Rule 35d-1 under the Investment Company Act of 1940.

[14] The ERISA fiduciary category includes a question (question 7) regarding the sources of information for plan fiduciaries in evaluating climate risk. ICI is better able to respond to how asset managers use data on climate risk than how plan fiduciaries do. While we are not addressing question 7 directly, our response regarding data in question 20 is relevant to question 7 as well.

[15] The Executive Order cites two categories of risks: physical risks and transition risks. Section 1 of the Executive Order describes these as follows:

> The intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies — such as increased extreme weather risk leading to supply chain disruptions. In addition, the global shift away from carbon-intensive energy sources and industrial processes presents transition risk to many companies, communities, and workers. At the same time, this global shift presents generational opportunities to enhance U.S. competitiveness and economic growth, while also creating well-paying job opportunities for workers. 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.

or otherwise. The Department suggests that it could publish its own data on climate-related financial risks for use by plan fiduciaries. The Department also suggests that it could have a role in providing education to plan participants or IRA owners regarding climate-related financial risks, including warnings about greenwashing.

While we support efforts to educate plan fiduciaries and plan participants about climate-related financial risk (alongside other important investment risks), we urge caution in the manner and scope in which such efforts proceed. As discussed in greater detail below, we are concerned that the potential courses of action the Department is suggesting will lead to an overemphasis of climate risk considerations over other legitimate and critical investment risk considerations.

1.1 The Department must not overemphasize climate-related investment risk over other legitimate and critical risk considerations.

The centerpiece of the law of fiduciary investment, both under ERISA and under trust law, is the prudent investor rule. The prudent investor rule codifies the learning from modern portfolio theory about the distinction between market risk and idiosyncratic risk.[16] As elaborated by the Department and the Supreme Court,[17] the ERISA fiduciary duty of prudence requires portfolio-level attention to risk and return objectives reasonably suited to the purpose of the account, diversification, cost-sensitivity, documentation, and ongoing monitoring. These principles are understood to apply neutrally to any investment decision by a fiduciary, whether in the context of a direct investment, shareholder engagement (including proxy voting), or menu construction. Assessing the proper amount of market risk and proper diversification strategies for a given portfolio is therefore understood to require a highly individualized and qualitative process. Given the multiplicity of relevant considerations, the law recognizes that "no objective, general legal standard can be set for a degree of risk that is or is not prudent."[18]

Accordingly, although we understand that the Department crafted the RFI to focus solely on climate-related financial risk because that is what the Executive Order directed the Department to assess, we are troubled by language in the RFI's commentary and questions that could be construed as requiring application of differing or more rigorous focus on climate risk relative to other kinds of investment risks.

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[16] See Restatement (Third) of Trusts § 90 (Am. Law Inst. 2007).

[17]As interpreted by the DOL and the U.S. Supreme Court, an ERISA fiduciary must adhere to the prudent investor rule. Under a 1979 DOL regulation, ERISA § 404(a) requires an ERISA fiduciary to consider each investment "as part of the portfolio" and "with regard to diversification." See 29 U.S.C. § 1104(a) (2013), as interpreted in 29 C.F.R. § 2550.404a-1(b) (2014). See also *Tibble v. Edison International,* 575 U. S. 523 (2015).

[18] Under the prudent investor rule, no type or kind of investment is categorically *permissible or impermissible*. Instead, the question is the reasonableness of the overall portfolio in light of the investor's risk and return objectives. The prudent investor rule, in other words, is principles-based rather than prescriptive. Statement (Third) of Trusts § 90 cut. e (1).

In meeting their investment duties, plan fiduciaries must consider a range of risks consistent with the prudent investor rule. Risk is a multi-faceted concept, and investment analysis incorporates a variety of risks (for example, inflation, market volatility, geopolitical, interest rate) as relevant to the purpose of the portfolio. We are concerned that agency dictates that place an overemphasis on climate-related financial risk could mislead and confuse plan fiduciaries. For example, the Department should consider whether a requirement to require the collection of data on how plans are addressing climate risk—and not how plans address any other risk—would send an implicit message to plan fiduciaries that climate risk is in some way unique and might cause them to place undue focus on climate risk relative to other important risks. In some cases, climate risk is not the most relevant or material consideration for a prudent investment fiduciary in the context of a particular investment decision or strategy; in these cases, an investment fiduciary that focuses solely on this risk, or "overweights" its importance in a manner that is imprudent in context, could in fact violate the bedrock ERISA principle of prudence—and reduce returns for the ERISA plans it serves.

We are similarly concerned that the RFI's suggestion that the Department (in coordination with SEC and IRS) consider educating plan participants and IRA owners regarding climate-related financial risks do not lead to an educational campaign that centers exclusively on climate risk. Without any reference to other types of risk that are relevant to investment decision making, the Department would send the message, albeit unintentionally, that climate risk is somehow more consequential relative to other risks. This could confuse and mislead plan participants and cause them to de-value other important investment considerations, such as diversification, longevity and inflation risk and return potential.

1.2 The Department must not suggest that there is an agreed-upon hierarchy of climate risk metrics.

The RFI questions imply that there is an agreed upon approach or metrics for assessing climate risks, and an agreed upon hierarchy of their importance. Question 2, for example, asks commenters to opine on what the most significant climate-related risks are.[19] Climate-related risks can affect a company's business and its financial performance and position in a wide variety of ways,[20] and we caution against adoption of an approach for considering climate-related risks that attempts to identify a hierarchical set of metrics for considering such risks.

There is, in fact, no singular way that fund managers take these risks into account. As we explained above,[21] fund managers' approaches for considering ESG criteria coexist on a broad investing spectrum, and there is a range of qualitative and quantitative approaches for embedding ESG analysis across investing strategies. This is consistent with modern portfolio theory on which, as discussed above, the prudent investor rule is derived. Simply put, different climate-related risks can affect different companies and different industries in extremely diverse ways.

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[19] 87 Fed. Reg. 8289, at 8290.

[20] The SEC cited this fact in explaining its reasoning behind its proposed action. 87 Fed. Reg. 21334, at 21336.

[21] See discussion under "Background/Introduction" at page 4 above.

Each investment must be assessed individually based on the specific risks and opportunities particular to that company or investment, and then each portfolio manager may approach the assessment of climate risks differently among her consideration of a variety of risks (not only climate risks). The relative significance that attaches to the analysis also necessarily depends on the nature of the investments (e.g., bonds versus real estate, large cap stocks versus small cap stocks), the geography and time horizon, as well as a fund's investment objectives and strategies. It is exceedingly difficult, and not useful, to generalize regarding which climate-related risks are the most significant.

We are also concerned that an approach that attempts to identify a hierarchical set of metrics for considering such climate-related investment risks could have a detrimental impact on the ability of plan fiduciaries to innovate and improve methods for considering climate risk and their incorporation into prudent investment analysis. SEC Commissioner Hester Peirce voiced similar concerns regarding the impact of global ESG metrics on asset management last year.

> Hampering the ability of the markets to collect, process, disseminate, and respond to price signals by boxing them in with preset, government-articulated metrics will stifle the people's innovation that otherwise would address the many challenges of our age. Moreover, converging standards would be antithetical to our existing disclosure framework, which is rooted in investor-oriented financial materiality and principles-based requirements to accommodate the wide variety of issuers.[22]

It is instructive also that the widely supported TCFD framework,[23] whose goal was to develop voluntary, consistent climate-related financial disclosures that would be useful to investors, did not specify specific metrics that should be used.[24] Similarly the SEC's proposal does not require the methodology that must be used for the proposed disclosures of scopes 1 and 2 emissions.[25]

The Department has for years generally declined to opine on the specifics of plan investment decisions, for good reason. Prudence under ERISA is context-specific and focuses on the process for making fiduciary decisions. What is important, therefore, is that fiduciaries follow a prudent process and select plan investments with the appropriate level of care. Within this framework, it is understood that there is room for a wide variety of decision-making. When the Department has

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[22] *Rethinking Global ESG Metrics*, April 14, 2021, available at https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics.

[23] See footnote 9, supra.

[24] See page 6 of TCFD's *Proposed Guidance on Climate-related Metrics, Targets, and Transition Plans*, June 2021, available at https://assets.bbhub.io/company/sites/60/2021/05/2021-TCFD-Metrics_Targets_Guidance.pdf ("The TCFD believes these differences in unit of measure help provide organizations with flexibility and do not impact comparability as long as units are clearly stated.")

[25] See footnote 10, supra.

provided guidance regarding investment selection, it focuses on the process under which the fiduciary should engage in the decision making—not the decision itself.[26]

1.3 Requiring plan reporting without agency agreement on data elements and relevance would be premature and unhelpful (i.e., proper sequencing is important).

As the Department considers whether to take any actions discussed in the RFI, the experience of the European Union, which has moved ahead on many sustainability standards, provides apt lessons. One of the most important lessons from the EU experience is the need to properly sequence disclosure requirements. The European Union required certain asset managers and other market participants (including occupational pension schemes) to disclose sustainability-related information about their investments before requiring companies in which the managers invest to provide sustainability-related disclosure. This approach has put asset managers and pension schemes in the position of having to provide information to which they did not have access through public disclosures (and even if they were to obtain it in other ways, methodologies on evaluating and reporting the data are inconsistent).

It would be similarly premature for the Department to act (such as by requiring reporting or disclosures on climate-related risk from plan fiduciaries) because the SEC's work on climate disclosure is only just beginning. As discussed above, the SEC recently voted in favor of issuing for comment a proposal that would require certain public companies to provide certain climate-related information in their registration statements and annual reports. The enhanced disclosure that the SEC's proposal calls for would provide investors with more comparable and consistent, qualitative and quantitative information. We expect the SEC to issue a proposal this year for new requirements for funds and investment advisers, which may also include new climate risk disclosure requirements.

If it were ultimately determined to be beneficial for retirement plans to make any climate-related disclosures, this step should only be considered after the SEC has finalized its proposals on disclosures from corporate issuers, funds and investment managers, and the investment and plan communities have had sufficient time to assess the effectiveness of the disclosures. Proceeding in a different order would create confusion and would lead to either highly qualitative disclosures or reporting based on inconsistent data, which would not be helpful to either plan fiduciaries or the plan participants they serve.

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[26] For example, the Department issued Information Letter 06-03-2020, in which it laid out considerations for a fiduciary who is considering including a private equity investment component to a 401(k) plan. See DOL Information Letter 06-03-2020, issued to Jon W. Breyfogle from Louis J. Campagna, June 3, 2020, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020.

2. Questions on data collection regarding ERISA-covered plans (Questions 3-6).

The RFI asks a series of questions about collecting data from ERISA plans on climate-related financial risk,[27] using the Form 5500 or other methods[28] to do so. We strongly urge the Department not to collect additional information from plans on climate risk at this time. Doing so will increase the administrative burdens on plans and plan service providers and increase the threat of litigation against plans, with limited obvious benefit. Ultimately, it will harm the ability of US workers to save for retirement, by increasing plan participants' costs and discouraging plan adoption.

When considering expanding the reporting and disclosure requirements applicable to plans, the Department must carefully weigh the benefits of collecting the information against the costs that would be imposed on plan sponsors and their service providers—costs which will ultimately be borne by plan participants.

When it comes to changes to the Form 5500, even changes that appear relatively simple can actually be complex and burdensome in application because of the systems modifications and monitoring protocols necessary to implement them. Generally, the information that the RFI contemplates collecting is currently either not collected or is not collected in a form or in a database that is easily imported for use in the Form 5500. Many plan sponsors outsource much of the Form 5500 preparation to their recordkeeper or another service provider, and there are many items that a service provider cannot answer for the plan sponsor. These service providers will need to make significant changes to their databases and other systems (and, in turn, request new information from regulated funds and other investment providers, who will themselves also need to make changes) to comply with the new requirements. Collecting and reporting of such data will therefore require more time, analysis and much greater coordination among different parties to obtain information and complete the form.

Adding to the burden in this case is that much of the information being contemplated would essentially amount to asking the plan sponsors to disclose how they made qualitative judgement calls in selecting plan investments—disclosures that are not required for any other type of plan investment decision, and that would leave plan sponsors open to possible second guessing and potentially necessitate the engagement of additional consultants and legal experts to support.

For example, the RFI suggests that the Department could ask plan sponsors whether their service providers have met metrics related to climate-related financial risk. This suggestion raises many questions and, in most cases, would be difficult for plans to determine. For example, what

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[27] Question 4 of the RFI specifies, "For instance, the Form 5500 could try to collect information about whether and how plan investment policy statements specifically 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. Similarly, the Form 5500 could try to collect data on whether, and how, plan fiduciaries voted on proxy proposals involving climate-related financial risk."

[28] Other methods mentioned by the RFI include an information request/survey on plan sponsor or employee awareness of such risks or requiring plans to publicly report on the steps they take to manage climate-related financial risk and the results and outcomes of any such steps taken.

metrics are being measured and who is determining the appropriate metrics? As we discuss above, we strongly caution the Department against adopting an approach for considering climate-related risks that attempts to identify a hierarchical set of metrics for considering such risks.[29] Otherwise, the Department risks not only disrupting current investment management approaches, which continue to evolve (including as a result of market demand for thoughtful, prudent ESG strategies), but also hindering the ability of plan fiduciaries to innovate and improve methods for considering climate risk and their incorporation into prudent investment analysis. Further, although some service providers may have set their own metrics, there may be a concern that a service provider who sets more ambitious climate goals would be judged more harshly for not meeting them.

As another example, the RFI suggests that plans could report data on whether, and how, plan fiduciaries voted on proxy proposals involving climate-related financial risk. While in some cases this information will be clear, in many cases it will be difficult for the plan sponsor to determine whether proxy proposals would be deemed to "involve climate climate-related financial risk." This will require the reporting person to make a subjective determination, and different plans may categorize the same ballot matter differently.[30] A second issue is that by grouping all climate-related votes together, the data provided is unlikely to be useful. Most voting is done on a case-by-case basis, and the plan's vote will depend on the precise question being considered, the background of the company, and several other relevant considerations. As a result, reporting this information is not likely to allow the Department[31] to glean helpful insight regarding how the plan has voted on climate-related issues.

Finally, another burden to plans associated with this potential reporting is the additional risk it would create, including litigation risk. If the Department were to adopt such a focus on climate, it risks drawing distinctions between climate versus other investment factors, which will invite second guessing of fiduciaries' analyses regarding their selection of investment options. Given the difficulty in quantifying the impact of climate risk as part of any investment analysis, it will be challenging for plan fiduciaries to defend against claims that they did or did not sufficiently consider climate risk.[32] Given the large amount of litigation currently filed against plan fiduciaries and the cost of defending even meritless claims, this concern is not overstated.

We also note in the 2021 Proposed Rule, the Department made a point to remove provisions from the 2020 final rule that were viewed as adding burdens to plans that considered ESG

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[29] See discussion in Section 1.2 above.

[30] ICI made similar points in response to the SEC's recent proposal to enhance reporting of proxy votes by registered management investment companies. See pages 4-6 of letter from Susan Olson and Sarah A. Bessin, to Vanessa A. Countryman, dated December 14, 2021, available at https://www.ici.org/system/files/2021-12/proxyltr.pdf.

[31] It is not clear who is this information is intended to inform—the Department, plan participants, or researchers.

[32] This risk is not unique to climate risk. ICI made a similar point in our 2021 letter, expressing our concern about the Department's Proposed Rule unnecessarily differentiates ESG factors from investment factors more generally. See page 6 of letter.

factors.[33] We urge the Department to consider this position and not to effectively undo the improvements it made with the Proposed Rule.

More broadly, we remind the Department that adding to the administrative burden of plan sponsorship increases the cost of operating employee benefit plans and establishes new disincentives for employers to sponsor or maintain plans. In this way, adopting the new reporting and disclosure requirements contemplated by the RFI could, indirectly and over time, impede the ability of US workers to save for retirement, while not meaningfully increasing protections of their life savings from the threats of climate-related financial risk.[34]

3. Miscellaneous Questions (Questions 19-22).

In the Miscellaneous section, the Department asks a series of questions about IRAs, about the need to educate plan participants and IRA owners about climate risk, and about whether the Department should sponsor and publish its own research to help fiduciaries evaluate climate risk. We discuss each of these questions below.

3.1 Non-ERISA savings arrangements are not more vulnerable to climate risk than ERISA plans.

Question 19 of the RFI asks whether there are legal or regulatory impediments that hinder investment managers of non-ERISA savings arrangements (e.g., IRAs) from taking steps to mitigate climate risk, and whether the absence of prudence and loyalty obligations leaves these arrangements vulnerable to climate risk. While there are significant differences in the rules that apply to ERISA and non-ERISA arrangements, these differences do not result in greater impediments for the consideration of climate risk in non-ERISA arrangements. The fact that ERISA's prudence and loyalty obligations do not apply to IRAs should have no impact on whether investment decision-making involving IRAs incorporate climate risk as part of its investment analysis.

One of the benefits of ERISA-governed DC plans is that plan fiduciaries must prudently select and monitor a menu of investment options, so the participant's options are generally limited to options that the fiduciary has deemed appropriate for the plan. IRA investments are not subject to ERISA's fiduciary review. However, this does not mean they are without protections. For example, when IRA owners receive recommendations on IRA investments, generally, there are applicable standards of care that apply to the financial professional that advises the owner (*e.g.*,

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[33] For example, the Proposed Rule eliminates the Current ESG Rule's specific documentation requirements for circumstances in which plan fiduciaries consider non-pecuniary factors using the tie-breaker test which DOL says "singled out and created burdens specifically for investments providing collateral benefits, which many perceived as targeting ESG investing." 86 Fed. Reg. at 57278. The Department added that it "is concerned that singling out this one category of investment actions for a special documentation requirement may, in practice, chill investments based on climate change or other ESG factors, even when those factors are directly relevant to the financial merits of the investment decision, or they are legitimately applied as a tie-breaker." Id at 57279

[34] By contrast, we note the efforts of Congress, in the enacted Setting Every Community Up for Retirement Enhancement (SECURE) Act, enacted at the end of 2019, and the recently House-Passed SECURE 2.0, which includes provisions long advocated by ICI that are intended to promote increased retirement savings, preserve retirement balances in retirement and reduce administrative burdens associated with plan sponsorship.

Regulation Best Interest imposes a standard of care). Under Regulation Best Interest, a broker-dealer must act in the retail customer's best interest, and among other requirements, must satisfy a care obligation, which requires the exercise of reasonable diligence, care, and skill when making a recommendation. Advice provided by an investment adviser is also subject to a fiduciary duty under the Investment Advisers Act of 1940.

While IRA owners have more freedom to select their investments, most of those investments, or their managers, are regulated by the SEC. As discussed above, investment managers that consider climate risk as part of their investment analysis generally do so regardless of whether the assets are held in ERISA or non-ERISA arrangements. In fact, ERISA fiduciaries may feel more constrained to select investment options that include more emphasis on their consideration of climate risks. This is due to the negative views expressed regarding ESG factors when the current Investment Selection rules were finalized in 2020.[35] As a result, investors who prefer to invest in funds that expressly invest according to ESG criteria with an environmental or climate focus will generally have many options by investing in an IRA and will often have no options under an ERISA plan.

3.2 The Department should consider the efficiency of sponsoring and publishing its own climate risk research when other more uniformly used sources are available.

Question 20 of the RFI asks whether the Department should sponsor and publish research that plan fiduciaries could use to evaluate climate-related financial risks. While we appreciate the Department's commitment to ensure that plan fiduciaries have access to tools and information to aid their decision-making, this would be a tremendous undertaking, and it is not clear whether it would be an efficient use of the Department's resources.

ESG and climate risk analysis is a rapidly evolving field. As a result, different investors are using different data sources and assessment methodologies to deliver on their investment objectives.

Currently funds obtain climate data from various sources, including ESG ratings and data providers whose mission is to collect this data. ESG ratings and data providers get data from various sources, including scrubbing corporate websites and analyzing current disclosures. They have methodologies for filling in blanks for the unknown information. Developing this data to make it usable is a time consuming and complex task.

To allow for better risk assessment, as discussed above, the SEC has already issued a proposal to require corporate disclosure, and we anticipate that it will follow with fund disclosure requirements. The SEC's work (along with the work of global regulators) will likely produce additional information—limiting the need for the Department to sponsor and publish its own climate risk research.

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[35] *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 72846 (November 13, 2022). The text of the final rule does not include any reference to ESG factors, referring instead to "pecuniary" and "non-pecuniary" factors. The preamble to final rule, however, continued to cast doubt on the prudence of selecting ESG funds. For example, it cautions, "Moreover, ESG funds often come with higher fees, because additional investigation and monitoring are necessary to assess an investment from an ESG perspective." Id. at 72848.

3.3. In its education efforts, the Department should not overemphasize climate risk to the detriment of participant understanding of other risks.

Questions 21 and 22 of the RFI ask whether there is a need to educate plan participants or IRA owners about climate-related financial risks, and what role the Department should have in providing this education. The RFI further asks whether the Department should take any efforts to inform and protect investors against greenwashing.[36]

We encourage and applaud the Department's efforts in educating plan participants and IRA owners on investing for retirement. The Department has a role in educating plan participants and is a trusted source of helpful information for investors, through seminars, webinars and publications. On its website, there are several brochures that discuss investing generally. We are not aware, however, of any education initiatives that focus on any single investment risk. As explained in our response to questions 1 and 2 above, it is important that communication to retirement savers does not overemphasize one type of risk—climate change—to the detriment of the participant understanding of other risks such as inflation, market volatility, geopolitical, interest rate. A Department led initiative aimed at educating investors about climate risk has a likelihood of mis-signaling the relative importance compared to other investing risks.

Second, if the Department were to decide that some form of participant education was needed on this topic, we would urge it to wait until the SEC has completed their climate initiatives. As described above, the SEC is currently working on multiple projects that related to climate risk disclosure and it important that there are not conflicting efforts in this area. Among these projects, the SEC is expected to address greenwashing.[37] We trust that the SEC will adequately address this issue, and therefore there is no need for the Department to act on its own.

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ICI and its members appreciate the opportunity to help inform the Department as it determines whether there are additional agency actions beyond finalizing the Proposed Rule that can be taken to protect the life savings and pensions of US workers and families from the threats of climate-related financial risk. We are committed to working with the Department on ESG and investment issues. If you have any questions, or if we can be of assistance in any way, please contact David Abbey (202-326-5920 or david.abbey@ici.org) or Shannon Salinas (202-326-5809 or shannon.salinas@ici.org).

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[36] The RFI describes "greenwashing" as potentially misleading statements about fund adherence to policies that address climate-related financial risk.

[37] SEC Chair Gensler discusses the need to understand what information stands behind marketing claims such as "green," "sustainable," and "low-carbon." See Prepared Remarks Before the Principles for Responsible Investment "Climate and Global Financial Markets" Webinar (July 28, 2021), available at https://www.sec.gov/news/speech/gensler-pri-2021-07-28.

Sincerely,

/s/ David Abbey	/s/ Shannon Salinas
David Abbey Deputy General Counsel Retirement Policy	Shannon Salinas Associate General Counsel Retirement Policy