



**Insured Retirement Institute**  
1100 Vermont Avenue, NW | 10<sup>th</sup> Floor  
Washington, DC 20005  
t | 202.469.3000  
f | 202.469.3030  
[www.IRlonline.org](http://www.IRlonline.org)  
[www.myIRlonline.org](http://www.myIRlonline.org)

December 13, 2021

**VIA ELECTRONIC SUBMISSION**

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:

The Insured Retirement Institute, Inc. (IRI)<sup>1</sup> appreciates the opportunity to provide these comments to the Department of Labor (the Department) in response to its proposed rule, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights” (Proposed Rule).<sup>2</sup> The Proposed Rule would amend the “Investment Duties” regulation under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, to clarify obligations related to the consideration of environmental, social and governance (ESG) factors by fiduciaries of private sector employee benefit plans as well as the exercise of proxy votes for retirement plans.

The Proposed Rule was developed, in part, in response to a directive to the Department in Executive Orders issued by President Biden earlier this year on climate change<sup>3</sup> and climate-based financial risk.<sup>4</sup> Under Executive Order 14030, Climate-Related Financial Risk, the Department was explicitly instructed to “consider publishing, by September 2021, for notice and comment a proposed rule to suspend, revise, or rescind “Financial Factors in Selecting Plan Investments,”<sup>5</sup> and “Fiduciary Duties Regarding

---

<sup>1</sup> IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, and distributors such as broker-dealers, banks, and marketing organizations. IRI members account for more than 95 percent of annuity assets in the U.S., the top 10 distributors of annuities ranked by assets under management and are represented by financial professionals serving millions of Americans. IRI champions retirement security for all through leadership in advocacy, awareness, research, and the advancement of digital solutions within a collaborative industry community.

<sup>2</sup> 86 FR 57272 (Oct. 14, 2021).

<sup>3</sup> 86 FR 7619 Executive Order 14008: Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021).

<sup>4</sup> 86 FR 27967, Executive Order 14030: Climate-Related Financial Risk (May 20, 2021).

<sup>5</sup> 85 Fed. Reg. 72846 (Nov. 13, 2020)

Proxy Voting and Shareholder Rights,”<sup>6</sup> (collectively, the 2020 Rules). In addition to clarifying investment duties obligations under ERISA, the Proposed Rule removes many of the impediments to consideration of ESG factors in investment selection created under the 2020 Rules.

Based on the foregoing, we commend the Department for its extensive and thoughtful engagement with stakeholders regarding comments submitted on the 2020 Rules. The Proposed Rule successfully addresses several of IRI’s key concerns <sup>7</sup> on the then-proposed 2020 Rules.

The Proposed Rule is generally consistent with IRI’s position that ESG factors and investments should be treated no differently than non-ESG factors and investments. Therefore, IRI’s top priority for any investment selection rulemaking is to establish neutrality between types of investments. Neutrality between ESG and non-ESG investment factors is attainable under a rule built around ERISA’s fundamental principles of prudence and loyalty, under which plan fiduciaries are required to act in the best interest of plan participants. The Department’s Proposed Rule would amend the regulations under ERISA Section 404(a), which lays out what an ERISA fiduciary must do to meet the prudent person standard of care imposed by ERISA Section 404(a)(1)(B).

The Proposed Rule establishes that objective risk and return factors are the primary considerations in any fiduciary’s evaluation of investment alternatives. IRI strongly supports this position. Once a fiduciary has objectively satisfied its duties of prudence and loyalty, the fiduciary should be permitted to consider other factors, such as operational factors impacting administration of the plan or fees borne by participants, a firm’s reputation, or the tenure of an investment manager and team. While IRI supports the Proposed Rule’s clarification of ESG investing, we urge the Department to strive for impartiality in any references to types of specific investments in its rulemaking. Neutrality in the types of investments and factors considered by a fiduciary will ensure that this investment selection rule will endure over time. The principles-based approach embodied in the Proposal should reduce the likelihood of further revisions, revocation, or a return to past sub-regulatory guidance that is now clearly out-of-date.

Therefore, IRI supports the Department’s wide-ranging improvements in the Proposed Rule. We specifically emphasize our two principal comments: (1) the importance of neutrality as to investment type, and (2) the need for a regulatory approach that provides long-term clarity and certainty for plan fiduciaries. IRI appreciates the objective, principles-based approach in most of the operative text of the regulation, and we offer the following, specific recommendations to better achieve our stated objectives above:

IRI supports and commends the Department for making several specific improvements to the 2020 Rules. First, we applaud the Department for proposing to allow ESG funds to be used as Qualified Default Investment Alternatives (“QDIAs”) in defined contribution plans. The 2020 Rules had an unfortunate and chilling effect on the use of ESG funds in DC plans generally and, specifically, as QDIAs. The Proposed Rule has removed these barriers for the use of ESG funds as QDIAs. Further, we appreciate the Department’s public statement that QDIAs are governed by ERISA, and the specific laws and rules directly pertaining to QDIAs.

Additionally, we commend the Department for removing the confusing and inaccurate terminology used in the 2020 Rules. As we noted in our comments when the 2020 Rules were proposed, “pecuniary” and

---

<sup>6</sup> 85 Fed. Reg. 81658 (Dec. 16, 2020)

<sup>7</sup> <https://www.regulations.gov/comment/EBSA-2020-0004-0596>

“non-pecuniary” are not an accurate or effective manner of assessment within the prudent investment selection process. The Proposal is stronger by virtue of the use of more clear and accurate terminology.

IRI’s members offer the following additional comments in furtherance of the intent and purpose of the Proposed Rule as it relates to balanced, neutral and equitable investment selection:

- There is a vast amount of real-world investment selection analysis to show that the types of facts and circumstances that would result in a tie-breaker situation almost never exist. The inclusion of the tie-breaker provision in the Proposed Rule will likely cause significant challenges for recordkeepers, who will need to produce – but almost never use – a wide variety of disclosures to cover the different reasons why plan sponsors might want to offer an ESG option in their plans. As such, we respectfully recommend that the Department consider removing the tiebreaker provision from the Proposed Rule.
- The Proposed Rule includes language that we believe could be interpreted as requiring consideration of ESG factors in many situations. In particular, we note that Section (b)(2)(ii)(C) of the Proposed Rule suggests that consideration of projected return relative to the plan’s funding objectives “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.” Similarly, we note that Section (b)(4) identifies three examples of ESG-related considerations a plan fiduciary can take into account when evaluating potential investments or investment courses of action. This specific wording related to ESG investment selection creates a risk that plan fiduciaries will believe they are required to consider these factors in all circumstances or value ESG investments over other investment options. We do not believe this was the Department’s intention. To avoid this risk of confusion and misinterpretation, we respectfully recommend that the Department revise the language in Section (b)(2)(ii)(C) to “*which would not preclude* 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.” We further recommend that the Department remove the specific list of ESG factors from Section (b)(4) of the Proposed Rule. Making these changes would enhance the neutrality and long-term stability of the finalized rule.

With respect to the Proxy Voting provisions of the Proposed Rule, our members have raised the following comments and questions:

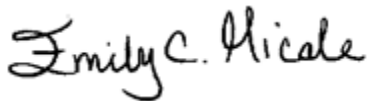
- Under the Proposed Rule, it remains unclear how mutual funds will be treated as opposed to other forms of funds. IRI respectfully requests clarification as to shareholders’ rights with respect to the use of mutual funds.
- The portion of the preamble focused on the proxy voting element of the rule says that, in the case of a pooled investment, “the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan’s economic interest in the pooled investment vehicle.” The preamble also says that “an investment manager may, however, develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager’s investment policy statement, including any proxy voting policy, before they are allowed to invest.” In practice, nearly all Collective Investment Trusts (CITs) (which are ERISA plan assets) have a proxy voting policy, and any plan that signs up to participate in the CIT adopts the declaration of trust and the

proxy voting policy of the CIT. However, it is unclear how pervasive, and uniform, this CIT practice is for other ERISA plan assets managers, like those managing insurance company separate accounts and separately managed accounts. In turn, it is burdensome to tailor their proxy voting policies to align with the policies of participating plans. As such, we respectfully encourage the Department to revise the above-referenced provisions to reflect the actual practices of CIT trustees.

\* \* \* \* \*

On behalf of IRI and our members, thank you again for the opportunity to provide these comments. If you have questions, or if we can be of any further assistance in connection with the Proposed Rule, please feel free to contact the undersigned at [emicale@irionline.org](mailto:emicale@irionline.org).

Respectfully submitted,



Emily Micale  
Director, Federal Regulatory Affairs