



December 13, 2021

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

Dear Director Canary,

JUST Capital is pleased to submit this comment in strong support of the U.S. Department of Labor's proposed rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights ("the Proposed Rule"), 86 Fed. Reg. 57272 (Oct 14, 2021). We applaud the DOL's effort to clarify that the managers of 401(k)s and private pension plans, governed under the Employee Retirement Income Security Act (ERISA), can and should consider material ESG factors in their investment decisions. Below we share our support for this rule. First, a note about JUST Capital.

### **Background on JUST Capital**

JUST Capital is a nonprofit, co-founded and chaired by Paul Tudor Jones, that exists at the intersection of business, finance, and civil society to build a market that works for *all* Americans. To drive change at scale, JUST Capital uses a combination of data-driven research and strategic engagement to shift norms and practices in corporate America and the financial markets away from a shareholder primacy model toward one that delivers value for all stakeholders. Each year, JUST Capital surveys thousands of Americans to identify the issues that matter most to them when it comes to just business behavior. JUST Capital then tracks, measures, and ranks the performance of publicly-traded companies (currently the Russell 1000) on these criteria, identifying the tangible steps each company can take to create greater value and support for all of their stakeholders, including investors.

We engage all market participants, including policymakers, investors, and the general public, to drive change at scale on society's biggest challenges:

- We've spent over 80,000 hours collecting ESG data, including over 500,000 individual data points across companies within the Russell 1000.
- We've polled over 150,000 Americans, across all demographic groups, in partnership with The Harris Poll, on what is most important for companies to prioritize. We then rank the Russell 1000 companies across five stakeholder groups: Workers, Communities, Customers, Shareholders, and the Environment.



- We create thematic analysis, corporate rankings, and ongoing content features with key media partners, like CNBC, to elevate the stakeholder capitalism narrative and accelerate adoption of a stakeholder-focused operating model for business.
- We promote the investor case for ESG through our product and index partnerships, data licensing, and ongoing thought leadership.
- JUST has established partnerships with asset managers to launch 14 investment products totaling over \$425 million in assets under influence.
- We have relationships with hundreds of Russell 1000 companies, with an engagement strategy focused, in part, on driving ESG disclosure, and to incentivize companies to prioritize action around the issues that matter most to the American public.

**Request for Comment Regarding:** *The Department of Labor (Department) in this document proposes amendments to the Investment Duties regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to clarify the application of ERISA's fiduciary duties of prudence and loyalty to selecting investments and investment courses of action, including selecting qualified default investment alternatives, exercising shareholder rights, such as proxy voting, and the use of written proxy voting policies and guidelines.*

As an organization that is driving the narrative about stakeholder capitalism, tracking American sentiment, and making the business case for prioritizing ESG, JUST Capital welcomes the DOL's proposal. We believe there is a powerful business and investor case for company leadership on stakeholder issues. Our research and index performance supports this view.

The proposed rule reinforces the fact that the market, and Americans, are increasingly factoring ESG considerations into their investment decisions – and we know that ESG factors are material to financial performance. Morningstar data shows that asset flows into U.S. sustainable open-end and exchange traded funds reached a record \$51.1 billion in 2020, up by more than double 2019's total, and nearly 10 times higher than 2018 flows.<sup>2</sup> We believe the DOL's proposal is a step in the right direction to ensuring fiduciaries, and ultimately individuals, are able to fully and fairly seize the opportunity in this growth.

As ESG has become increasingly politicized, JUST Capital polling shows that the vast majority of Americans, regardless of political ideology, want companies to prioritize the same issues: paying a living wage, providing good jobs, cultivating a strong, diverse and inclusive workforce, and protecting workplace health and safety.<sup>3</sup> The DOL's new proposal is one way of helping drive capital to the companies leading on these and other important issues. Relatedly, we endorse the DOL's removal of the restrictions on the use of ESG products as Qualified Default Investment Alternatives (QDIAs) – given that plan participants have the autonomy to opt into those or different investment vehicles. We agree wholeheartedly that workers and retirees should be able to make informed, values-aligned decisions about their retirement funds. The DOL is wise to ensure that



Americans have access to prudent investment options that provide collateral benefits for workers, communities, and the environment.

We appreciate that the DOL's proposal would reverse the detrimental provisions of two rules that the previous administration adopted in late 2020, *Financial Factors in Selecting Plan Investments* and *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*. Among the provisions of these rules is the untenable "pecuniary test" stating that a fiduciary can factor ESG-related benefits into deciding between competing investments only when the funds are "economically indistinguishable." This provision, known as the "tie-breaker rule," fails to acknowledge that climate and other ESG factors are themselves material financial risks to markets, and that they are "no different than any other 'traditional' material risk-return factors." This and other burdensome rules have caused investor confusion, stifling fiduciaries and plan sponsors from considering ESG factors in their decision-making and proxy voting. Consequently, they have denied American workers and retirees access to ESG investment opportunities that offer competitive returns and reduce risks to their investments. Therefore, we celebrate that the proposed rule, consistent with the original spirit and intent of ERISA, would restore fiduciary authority to consider all relevant factors when choosing among available investment options.

Thank you for providing the opportunity to comment on a vital issue that has potential to help mitigate climate and other ESG risks, prove the business case for prioritizing ESG, and shift financial markets to better serve workers, communities, and the environment in alignment with Americans' values.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin Whittaker".

Martin Whittaker  
CEO, JUST Capital

## Endnotes

1. “The Value of JUST Business.” *JUST Capital*. <https://justcapital.com/value-of-just-business/>
2. Hale, Jon. “A Broken Record.” *Morningstar*, 28 Jan. 2021, <https://www.morningstar.com/articles/1019195/a-broken-record-flows-for-us-sustainable-funds-again-reach-new-heights>
3. Tonti, Jennifer. “SURVEY ANALYSIS: In Great Resignation, Americans Are United in Wanting Action on Wages and Jobs, and Accountability from Corporate America.” *JUST Capital*, 9 Dec. 2021, <https://justcapital.com/reports/survey-analysis-in-great-resignation-americans-are-united-in-wanting-action-on-wages-and-jobs-and-accountability-from-corporate-america/>