Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York

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 Avenue NW
Washington DC, 20210

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights; RIN 1210–AC03

Dear Sir or Madam,

Managed Funds Association ("MFA")[1] appreciates the opportunity to provide comments to the Department of Labor ("DOL") in response to the proposed rule (the "Proposed Rule") regarding the application of the fiduciary duties of prudence and loyalty under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), with respect to selecting investments and investment courses of action, including selecting qualified default investment alternatives ("QDIAs"), and to exercising shareholder rights, such as proxy voting and the use of written proxy voting policies and guidelines.[2] MFA supports the DOL's efforts to remove barriers to plan fiduciaries' ability to consider climate change and other ESG factors when selecting investments and exercising shareholder rights.[3]

Consistent with this goal, MFA supports the DOL's clarification of an ERISA fiduciary's duty of prudence and loyalty in this context, and the elimination of certain modifications to the Investment Duties regulation[4] adopted in 2020, which we believe may have resulted in significant chilling effects on the selection by ERISA fiduciaries of the many investment strategies and products that incorporate ESG considerations into their investment analyses, as well as the imposition of substantial compliance costs to justify and document the fiduciary's determination

[1] MFA represents the global alternative investment industry and its investors by advocating for regulatory, tax and other public policies that foster efficient, transparent, and fair capital markets. MFA's more than 150 members collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia.

[2] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (proposed Oct. 14, 2021) (to be codified at 29 C.F.R. 2550.404a-1) (the "Release"), https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.

[3] *See* Release at 57276.

[4] 29 CFR 2550.404a-1.

of whether and how to vote proxies. As discussed in more detail below, we have some concerns that the proposed rule text and related guidance in the Release could, in certain cases, suggest that consideration of certain ESG matters is effectively mandatory, which may not be in the best interest of plan participants and beneficiaries in all cases. We provide several suggestions to help mitigate these potential adverse consequences.

Discussion

We agree that "appropriate consideration" of the projected return of a portfolio relative to the funding objectives of the plan may in appropriate circumstances include an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action.[5] We believe that it is helpful to expressly state that such evaluation is permitted in the Investment Duties regulation. However, we are concerned with the rule text included in paragraph (b)(2)(ii)(C) of the Proposed Rule that states that these considerations *may often be required*. This language suggests not only that ESG consideration is permitted in appropriate circumstances, but that it may be *required* and, in fact, may *often* be required. We believe, as a result, that many ERISA fiduciaries would feel compelled to consider ESG matters or incur substantial compliance costs to justify and document their justifications for why such considerations are not required. We note that there may be instances where such considerations are not relevant to the risk/return analysis of the strategy, such as certain shorter-term trading strategies. Accordingly, we suggest that the text of the Proposed Rule be modified to state that consideration of the projected return of a portfolio relative the funding objectives *may include* an evaluation of the economic effects of climate change and other ESG factors on the particular investment or investment course of action.

Relatedly, we believe that expressly including three categories of permissible ESG considerations—climate change-related factors, governance factors and workforce practices—in the rule text would likely lead ERISA fiduciaries to conclude that consideration of those categories are effectively mandatory.[6] Although we appreciate the careful drafting of the text of the Proposed Rule to the contrary,[7] we believe many ERISA fiduciaries nonetheless would feel compelled to expressly consider these factors, which may not be relevant or in the best interest of plan participants and beneficiaries. These categories are, of course, highly prominent ESG matters today, but they may not be relevant for all investment strategies and, even if they are material to the risk-return analysis of some investment strategies today, it is unclear whether these specific categories will continue to be material in the future. Accordingly, we recommend that the DOL remove these categories from the rule text and instead include them as examples of permissible ESG considerations in the guidance accompanying the final rule.

MFA supports the removal of the prohibition of ESG-oriented investment funds as QDIAs.[8] We believe that the DOL's decision to apply the same standards to QDIAs as to other investments

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[5] *See* Prop. 29 CFR 2550.404a-1(b)(2)(ii)(C).

[6] *See* Prop. 29 CFR 2550.4041-1(b)(4).

[7] The Proposed Rule states that consideration "*might include, for example*" these three categories.

[8] *See* 29 CFR 2550.404c-5.

addresses our previously outlined concerns that the special rules for QDIAs would discourage ERISA fiduciaries from considering ESG investments in this context.[9] We also support the DOL's proposal to replace the economically indistinguishable "tie-breaker" standard adopted in 2020, which as we previously noted could result in ERISA fiduciaries avoiding comparable investments that incorporated ESG considerations.

MFA strongly supports eliminating the specific monitoring obligations where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager or where a proxy voting firm performs advisory services as to voting proxies. We also strongly support eliminating the specific requirements that plan fiduciaries maintain records on proxy voting activities and other exercises of shareholder rights. We believe that removing these obligations will encourage ERISA fiduciaries to vote proxies, where it is in the best interest of plan participants and beneficiaries, and avoid substantial compliance costs associated with justifying and documenting the decision of whether and how to exercise shareholder rights.

Although we do not object to eliminating the statement from the rule text that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right," we believe that concept is important for many investment strategies where the costs of voting proxies (or voting on certain types of matters) outweigh any potential benefit to the plan participants and beneficiaries. Accordingly, we support the DOL's guidance in the Release that removing this statement does not mean that fiduciaries must vote every proxy or engage in shareholder activism.[10] To ensure continued clarity on this point, we request that this guidance be carried forward to the guidance accompanying the final rule.

We also do not object to the removal of the two safe harbor examples for proxy voting policies. However, we believe (as noted above) that it is important for the DOL to state clearly that fiduciaries are not required to vote every proxy and could adopt proxy voting policies that are consistent with the safe harbor examples that the DOL proposes to remove. For many types of investment strategies, limiting voting resources, for example, to those matters that are expected to have a material effect on the value of the investment is the prudent course of action and in the best interest of plan participants and beneficiaries. In other cases, adopting a policy to refrain from voting on proposals, or particular types of proposals, based on a prudently determined quantitative threshold could be in the best interest of plan participants and beneficiaries. Accordingly, if the DOL determines to remove these safe harbors, we request that the DOL clarify in the adopting release that the removal does not preclude, and should not be interpreted as discouraging, the adoption of such policies in appropriate circumstances.

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MFA appreciates the opportunity to contribute to the DOL's efforts to set forth a regulatory structure to assist ERISA fiduciaries in navigating ESG investment trends. If you have

[9] *See* Managed Funds Association and the Alternative Investment Management Association, Comment Letter on Proposed Regulation on Financial Factors in Selecting Plan Investments Under ERISA of 1975 (July 30, 2020).

[10] *See* Release at 57281.

any questions about these comments, please do not hesitate to contact the undersigned at 202-730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
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