



April 14, 2022

U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 2210

Reference: RIN 1210-ZA30

Dear Sir or Madam,

DALBAR, Inc.<sup>1</sup> appreciates the opportunity to respond to the Department of Labor's ("Department") *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate Related Financial Risk*. We are pleased to see the Department recognize the risk that climate change presents on the financial health of Americans. DALBAR holds the strong belief that plan sponsors can and will appropriately address climate related financial risk as the settlor of their retirement plans if expressly given the freedom to do so.

I. Plan Fiduciaries are Unlikely to Adequately Address Climate Related Financial Risk due to Unsettled Rules and the Proliferation of ERISA Litigation

Fiduciaries to ERISA plans have a path to protecting participants from climate related financial risk but executing this protection within the fiduciary parameters has been a non-starter for the vast majority of plan fiduciaries to date. Under current conditions, this trend is likely to persist.

Previous rulemaking<sup>2</sup> by the Department reinforced a chilling effect on the use of environmental factors in the selection of plan investments. Subsequent proposed rulemaking<sup>3</sup> will help in this area, but the rules and their application will be considered new and unsettled for some time, meaning most plan fiduciaries will have little incentive to go against the current prevailing practices.

Plan fiduciaries are further disincentivized from adequately protecting participants from climate related risk due to a rise in ERISA litigation and breach of fiduciary duty claims. Not only has the risk of a claim risen by the sheer number of cases filed, but the Supreme Court's recent decision<sup>4</sup> has left the pleading standard so low that even meritless claims pose a serious risk to plan sponsors. Faced with an increasing risk of litigation, legal costs and discovery, plan

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<sup>1</sup> DALBAR, Inc. is the financial community's leading independent expert for evaluating, auditing and rating business practices, customer performance, product quality and service. Launched in 1976, DALBAR has earned the recognition for consistent and unbiased evaluations of Investment companies, registered investment advisers, insurance companies, broker/dealers, retirement plan providers and financial professionals.

<sup>2</sup> 29 CFR §§2509 & 2550. Financial Factors in Selecting Plan Investments (2020).

<sup>3</sup> Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 FR 57272 (proposed October 14, 2021).

<sup>4</sup> Hughes v. Northwestern University, No. 19-1401 (Decided January 24, 2022).



fiduciaries have an incentive to avoid the application environmental pecuniary measures. That is because any investment selected based in part on pecuniary environmental measures will certainly be the subject of hindsight scrutiny if those investments underperform.

## II. Settlors of ERISA Plans are in the Best Position to Insulate Participants from Climate Related Financial Risk through the Formation and Design of the Plan

If plan sponsors, as settlors, are given the express freedom to establish and design plans that limit exposure to fossil fuels, many would do so to protect participants from climate related financial risk and to further their company's goals of promoting environmental protection.

Today, many of the nation's leading firms are deeply conscious of social responsibility and environmental protection. These firms spend millions of dollars and dedicate teams of people to minimize the environmental impact of their organizations. All the while, these same firms may have billions of dollars within pensions and individual accounts being invested with no regard to environmental risk. An enterprise's retirement plan is, in most cases, a blind spot that is frustrating the efforts of the firm to minimize their impact on the environment; but more importantly, it is placing undue long-term risk on Americans who rely on these plans as a critical component of retirement savings.

Many plan sponsors who establish an ERISA plan are highly motivated to proactively address environmental risk within their plan investment line-up. Unfortunately, while a plan sponsor may be so motivated this motivation is completely counteracted by the risks of violating fiduciary duties as currently constituted.

The solution lies in the plan sponsor moderating environmental risk in its role as the plan settlor.<sup>5</sup>

The settlor role is the best avenue for addressing climate related risk if a plan is established with environmental standards for investments as a prerequisite. Such settlor defined standards become an integral part of plan documents. Establishing these standards could be considered the very type of discretionary settlor activity that relates to the formation and design of the plan, not its management. The establishment of the environmental standards would therefore not be a fiduciary activity, preempting any possible fiduciary breach.

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<sup>5</sup> "[T]he Department has long taken the position that there is a class of discretionary activities which relate to the formation, rather than the management, of plans. These so-called 'settlor' functions include decisions relating to the establishment, design and termination of plans and, except in the context of multiemployer plans, generally are not fiduciary activities subject to Title I of ERISA." Advisory Opinion 97-03A, January 23, 1997.



III. DALBAR Recommends that the Department Create a Safe Harbor for Establishment of Plans that Seek to Mitigate Climate-Related Risk

DALBAR proposes that the Department create a safe harbor for plan settlors to set environmental standards for investments as part of the establishment and design of their plan. The safe harbor can set forth parameters that give comfort to the settlor that such plan documents, like an Investment Policy Statement, which contain such environmental standards are consistent with the provisions of Titles I and IV of ERISA. Plan fiduciaries can then discharge their duty in accordance with the plan documents without fear of fiduciary breach.<sup>6</sup> This will combat the disincentive of plan **fiduciaries** to proactively mitigate climate related financial risk by providing a path for plan **settlors** to do so instead.

Thank you for taking DALBAR's views into consideration. If DALBAR can be of further assistance, please contact me at 617-624-7156 or cclark@dalbar.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cory Clark", written over a light blue horizontal line.

Cory Clark  
Chief Marketing Officer  
DALBAR, Inc.

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<sup>6</sup> ERISA §404(a)(1)(D) requires plan fiduciaries to discharge their duties in accordance with the documents and instruments governing the plan so long as such documents and instruments are consistent with the provisions of Titles I and IV of ERISA.