

## DCIIA's Response to the Department's Climate Change RFI

May 13, 2022

### Re: Employee Benefits Security Administration, Department of Labor, "Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk"

This letter is submitted on behalf of the Defined Contribution Institutional Investment Association ("DCIIA") in response to the Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk (the "RFI").<sup>1</sup> DCIIA would like to thank the Department of Labor (the "Department") for the opportunity to provide input on this topic. DCIIA members appreciate the Department's outreach and its interest in stakeholder feedback on the intersection between retirement plans and climate change.

DCIIA's members are uniquely positioned to provide comments on this topic and on retirement investing in general. Members of the DCIIA community include leading recordkeepers, investment consultants and advisers, investment managers, education and advice providers, trustees and custodians, law firms, plan sponsors, and other industry participants. Although DCIIA's membership is diverse, its members are united in supporting initiatives that expand access to retirement savings. DCIIA has an [ESG Subcommittee](#) within its Investment Policy & Design Committee, reflecting our members' strong interest in developing thought leadership and educational information on environmental, social and governance ("ESG") investing by defined contribution ("DC") plans.

DCIIA's membership appreciates the Department's continued consideration of the proper role of ESG in prudent and loyal investment decision-making. DCIIA members generally support the Department's efforts to remove barriers that may prevent the appropriate integration of ESG factors into fiduciary decision-making under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). DCIIA members also support the Department's adoption of a position that recognizes that ESG factors are capable of being material to the prudence of an investment and not inconsistent with ERISA's duty of loyalty.

But while supportive of the Department's efforts to remove barriers to ESG usage, DCIIA continues to believe that the Department's approach to climate change and other ESG-related issues should be in accordance with a principles-based approach to fiduciary duties and, in particular, legal standards that do not uniquely target or single out (positively or negatively) climate change as compared to any other investment risk or factor.<sup>2</sup> DCIIA members believe that a uniform set of objectives and standards should apply to fiduciary decision-making and that climate-related factors should be treated the same as any other factors that may materially impact an investment's risk/return analysis.

DCIIA is concerned that the RFI could be read as singling out an asset class of environmentally minded funds or strategies for unique treatment, and in doing so could be applying a standard that is

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<sup>1</sup> In preparing this letter, DCIIA sought and received input from a number of individuals representing a wide variety of member organizations. However, this letter is submitted solely on behalf of DCIIA, and individual members may have differing views on any of the points made herein.

<sup>2</sup> This position is consistent with DCIIA's previously stated positions (most recently in the [comment letter](#) submitted by DCIIA in response to the Department's Proposed Rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights").

inconsistent with a principles-based approach. Such singling out of an individual risk factor is inconsistent with ERISA's long-standing jurisprudence and the Department's historic regulatory guidance. DCIIA also cannot identify a meaningful reason for the unique treatment of climate change as compared to other risk factors such as market event risks, liquidity risks, geopolitical risks, cryptocurrency risks, cybersecurity risks, etc. The Department should instead encourage that *all* decisions be grounded in a prudent fiduciary process. For these reasons, DCIIA encourages the Department to approach the RFI and the information it gathers in a principles-based manner that does not single out climate change for unique treatment.

The RFI asks a number of specific questions regarding climate change and investment information and disclosures. DCIIA members believe that there is value in facilitating increased access to information and metrics about climate change and ERISA plan investing. DCIIA also believes that the Department should work in coordination with the Securities and Exchange Commission (the "SEC") and harmonize its efforts to improve ESG disclosure with the SEC's rulemaking.

With respect to other avenues for information collection, DCIIA is concerned about the Department's RFI inquiries that suggest the Department might place a reporting burden (in the Form 5500, for example) on ERISA plans or require reporting that could unfairly question fiduciary decision-making. Such reporting would require unique treatment for ESG asset classes and (for the reasons stated above) would be contrary to a principles-based approach. It could also increase costs and place administrative burdens on plans, which could lead to the unintended consequence of aversion to plan adoption. Finally, such reporting could increase ERISA litigation risks on plans, given both the highly litigious ERISA environment and partisan divisions over the climate-change issue. DCIIA members believe that the Department's focus should be on empowering fiduciaries that seek to use climate change factors prudently rather than creating new reporting requirements that could unintentionally expose even good actors to increased burdens and risks.

Concerning the scope of the RFI, DCIIA encourages the Department to focus its evaluation on retirement investing, as opposed to broader issues of climate change unrelated to ERISA plan investment decision-making. For example, certain questions in the RFI might be read as focused on climate change risks that are only indirectly related to retirement (such as the early retirement risks due to health effects of pollution). While these issues may be of societal concern or a concern for retirement planning outside of an ERISA benefit, they are outside of the immediate scope of ERISA's fiduciary duties.

Finally, DCIIA acknowledges that many of the Department's questions pertained to the Federal Employees' Retirement System ("FERs") and the Thrift Savings Plan ("TSP"). DCIIA firmly believes that the FERs and TSP-specific questions should not extend to ERISA plans because of the distinct aspects of ERISA plans and also due to the statutory requirements that uniquely apply to FERs and TSP. For that reason, DCIIA asks that any regulatory action from the RFI related to FERs and/or TSP should be expressly stated as not applying to ERISA.<sup>3</sup>

In addition to the above general comments, DCIIA would like to provide responses to two specific topics in the RFI:

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<sup>3</sup> The Department's TSP-related questions include inquires on indices in TSP. DCIIA notes that to the extent that the Department will opine on the role of climate change and indices in general, DCIIA would encourage the Department not to uniquely treat climate change as a factor in index investing, as that would be contrary to a principles-based approach to ERISA investing. As in any investment decision-making, climate change should at most be one factor among many that fiduciaries could consider in evaluating index funds.

(1) the Department’s role in information gathering of climate-related financial risk for plans (e.g., questions 3 and 20 in the RFI); and

(2) potential disclosure requirements for plans related to climate risk (e.g., questions 4, 5, and 6 in the RFI).

### **1. Plans Should Not Bear the Burden for the Gathering of Climate-Related Financial Risk Information.**

The RFI asks a number of questions regarding climate change and investment information and disclosures, including question 3 and question 20.<sup>4</sup> It is DCIIA’s perspective that because climate change represents many different types of risks, including a systemic market risk with financial implications across industries, there could be value to ERISA fiduciaries and plan participants in facilitating increased information and disclosure about climate change and ERISA plan investing.

Many DCIIA members believe that there could be value in such increased information because of the intricacy of climate-change investing issues. The concerns and manifestations of climate change are complex and vary across sectors, from the physical effects (increasing frequency and intensity of weather events) to transition management risks to a low-carbon economy, including regulatory risks (increased legal and regulatory requirements and costs).

Given the intricacies and complexities of climate-change investing, ERISA plan fiduciaries might benefit from additional information and coordinated metrics on ESG. But as stated above, DCIIA is also cautious about Department guidance that might address this need by increasing reporting burdens on ERISA plans.

Instead, DCIIA believes that reporting and disclosure burdens should be placed on asset managers, and the Department could best support ERISA plans that seek to prudently and appropriately consider climate change in investment decision-making by taking agency actions in coordination or harmonization with the SEC. The SEC is well suited to take the regulatory lead in this area because of the SEC’s position as the primary regulator of registered funds and issuers. ERISA fiduciaries could benefit from reliable, consistent, and comparable climate disclosures from such funds and issuers (in order to more accurately price assets, allocate capital, conduct scenario analysis, and ultimately mitigate risk). The SEC is well positioned to regulate such disclosure requirements and further such goals.

Many DCIIA members believe that the market—with appropriate regulation by the SEC—will create these reporting standards. The SEC has recently released a draft rule on climate risk reporting that, if adopted in its current form, would give fund managers a great deal more information on climate-related risks that could be integrated into pricing models, risk models,

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<sup>4</sup> Question 3: “Should EBSA collect data on climate-related financial risk for plans? If so, please specify with as much precision as possible what information EBSA could and should collect, potential sources of such information, as well as how EBSA should collect it.”

Question 20: “Should EBSA sponsor and publish research to improve data and analytics that ERISA plan fiduciaries could use to evaluate climate-related financial risks? If so, what research subjects should EBSA sponsor?”

and buy/sell decision-making; this in turn should result in increased disclosure to investors.<sup>5</sup> This new SEC proposed rule is one example of how the SEC is best positioned to create a regime for reporting on ESG and steer market standards. The Department can leverage that reporting to ensure the necessary information is available to ERISA plans.

DCIIA believes that the Department has an opportunity to work in coordination or harmonization with the SEC to play an essential role in facilitating these disclosure improvements. Standardizing climate disclosures would provide meaningful, comparable information for investors to incorporate in their decision-making analysis and form the foundation for a principles-based approach grounded in a fiduciary process.

If, notwithstanding our earlier comments, the Department does decide to take an active role in sponsoring or publishing research related to climate-related financial risks to plans, DCIIA believes that it can be a resource to the Department. DCIIA can leverage climate change information and data particular to DC plan investing in part through DCIIA's research and educational efforts on ESG investing; this could be a valuable source of DC plan specific ESG research that minimizes the reporting burden on individual ERISA plans. For example, DCIIA could make available its survey research to help inform Department regulatory actions or be an endorsed research library to ERISA plans. Additionally, DCIIA's Retirement Research Center ("RRC") conducts rigorous, industry-informed research that is grounded in a practical approach focused on actionable insights. The RRC has a focus on fiduciary decision-making and has conducted extensive research on ESG considerations in the DC context.

## 2. Climate-related Risks Should Not Be Singled Out for Reporting.

The RFI includes several questions regarding climate change and investment information and disclosures, including questions 4, 5, and 6.<sup>6</sup> As stated above, DCIIA supports a principles-based approach to ERISA's fiduciary duties that does not uniquely target or single out (positively or negatively) climate change as compared to any other investment strategies, asset classes, or investment styles. DCIIA's members are concerned that these questions point to disclosure that singles out climate change and is not principles based.

DCIIA's members believe that it is important for asset managers to take appropriate steps to manage portfolio risks of all types, both systematic and unsystematic. Many DCIIA members

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<sup>5</sup> Certain DCIIA members also expect that reporting regimes will emerge in the market (with regulation by the SEC). Existing programs have helped to establish the parameters of climate-risk reporting, including the Task Force on Climate-Related Financial Disclosures, the [Carbon Disclosure Project](#), and the Sustainability Accounting Standards Board. The International Accounting Standards Board also launched a new disclosure initiative last year, the International Sustainability Standards Board, which recently released a draft climate disclosure [standard](#) for public review and comment.

<sup>6</sup> Question 4: "Should EBSA use Form 5500 Annual Return/Report ("Form 5500") to collect data on climate-related financial risk to pension plans?"

Question 5: "Other than the Form 5500, are there other methods of collecting data on climate-related financial risks to plans that EBSA should consider? For instance, should the Department conduct an information request/survey on plan sponsor or employee awareness of such risks that is not publicly made available in the same fashion as Form 5500 reporting, and if so, how should that information request categorize the information based on plan size, e.g., large plans versus small plans, or segmented in another way?"

Question 6: "Should administrators of ERISA plans be required to publicly report on the steps they take to manage climate-related financial risk and the results and outcomes of any such steps taken, in a form that is more easily accessible to the public, and timelier, than the Form 5500? If so, what alternative to the Form 5500 could be used for such a report, how should this report be compiled, what should be the contents, and how should it be made available to the public?"

believe that the risks associated with climate change—both transition risks and physical risks—are increasingly recognized as being appropriate for asset managers to assess and price, along with many other types of risk: geopolitical risk, market risk, credit risk, business risk, interest rates and inflation, event risk, liquidity, and volatility.

However, the Department does not require ERISA plans to collect or disclose data on other types of asset classes or risks. DCIIA's members do not believe that it is appropriate for the Department to single out climate risk for such specific reporting requirements in the Form 5500 or in any other manner suggested in the RFI.

In addition, as stated above, a primary concern of DCIIA is that requiring increased reporting by plans could unintentionally expose plan actors that seek to appropriately consider climate change factors to increased costs of compliance. Any increased cost or complexity can cause plan sponsors to decide against the adoption or administration of a plan or, more narrowly, avoid investments in ESG funds. Anything that leads to lower plan adoption rates is detrimental to ERISA and the Department's goal of employees having access to retirement savings plans and could deter plans from investing in prudent ESG investment options.

Increased reporting would also likely increase litigation risks. Forms 5500 are a key source of information by plaintiffs' litigators to bring class action litigation. In recent years, there has been an explosion of ERISA class action litigation, drawing in part from that Form 5500 information. There are also actors that are against climate change investing who may seek to punitively target ERISA plans that consider ESG factors (and also could use Form 5500 reporting for this purpose).<sup>7</sup>

Instead of creating road maps that could increase vulnerability for ERISA fiduciaries and the compliance burdens on plans, the Department's focus should be on making sure that fiduciaries are able to prudently use ESG.

In addition to Form 5500 reporting, the Department asked in question 5 of the RFI about other methods the Department could use to collect climate change-related information.<sup>8</sup> DCIIA is equally concerned about such other forms of possible climate-change reporting, for substantially the same reasons stated above. Moreover, such additional disclosures might conflict with or not coordinate with other (e.g., SEC) reporting requirements.

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In conclusion, DCIIA would like to once again thank the Department for the opportunity to respond to the RFI and contribute to the discussion regarding the intersection of ERISA and sustainability. We continue to support a principles-based approach to the Department's regulation of retirement plans,

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<sup>7</sup> See, e.g., Bridget Hickett, *Conservative Group Seeks to Block State Pensions from ESG Efforts*, FundFire (Apr. 13, 2022) ("The American Legislative Exchange Council, or ALEC, last week released new model legislation meant as an outline for state lawmakers seeking to bar plan fiduciaries from sacrificing returns or taking on additional investment risk to promote 'non-pecuniary or non-financial social, political or other benefits or goals.' The model policies also restrict state pensions from casting proxy votes to further such objectives.").

<sup>8</sup> Question 5: "Other than the Form 5500, are there other methods of collecting data on climate-related financial risks to plans that EBSA should consider? For instance, should the Department conduct an information request/survey on plan sponsor or employee awareness of such risks that is not publicly made available in the same fashion as Form 5500 reporting, and if so, how should that information request categorize the information based on plan size, e.g., large plans versus small plans, or segmented in another way?"

grounded in a fiduciary process. We believe that the Department should follow this principles-based approach in considering climate-change issues and, more generally, provide road maps to empower fiduciaries who are seeking to use ESG appropriately as opposed to increasing risks and costs of compliance on such ERISA plan actors.

Thank you for considering DCIIA's comments. Please do not hesitate to reach out with questions or if DCIIA can offer more direct assistance.

Sincerely,



Lew Minsky  
President and CEO  
Defined Contribution Institutional Investment Association (DCIIA)