

May 13, 2022

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210  
Attention: Request for Information on Possible Agency Actions  
Z-RIN 1210-ZA30

Re: Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk

Dear Office of Regulations and Interpretations, Employee Benefits Security Administration:

McGuireWoods, LLP (“**MW**”) and Brownstein Hyatt Farber Schreck, LLP (“**BHFS**”) hereby submit this letter in response to the Employee Benefits Security Administration’s (“**EBSA**”) 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> The RFI solicits public input for EBSA’s future work relating to retirement savings and climate-related financial risk pursuant to Executive Order 14030 on Climate-Related Financial Risk (the “**Order**”).<sup>2</sup>

Section 4 of the Order directed the Department of Labor (“**DOL**”) to identify agency actions that can be taken under the Employment Retirement Income Security Act of 1974 (“**ERISA**”),<sup>3</sup> the Federal Employees’ Retirement System Act of 1986 (“**FERSA**”),<sup>4</sup> and any other relevant laws to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk. In accordance with that mandate, the DOL issued the RFI to solicit public assistance in identifying steps that can be taken under applicable law to further protect life savings and pensions from climate-related financial risk.

We represent many private employers, from large publicly traded companies to privately held businesses, the vast majority of which sponsor broad-based retirement plans for the benefit of their employees. As such, our clients’ retirement plans are subject to ERISA and our letter focuses on the ERISA considerations associated with the information contemplated by the RFI. We thank you for the opportunity to provide comments and information for EBSA’s consideration.

---

<sup>1</sup> Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk, 87 Fed. Reg. 8289 (Feb. 14, 2022).

<sup>2</sup> Executive Order 14030, Climate-Related Financial Risk, 86 Fed. Reg. 27967 (May 20, 2021).

<sup>3</sup> Pub. L. 93-406.

<sup>4</sup> Pub. L. 99-335.

## **I. ERISA Provides the Foundation for Employee Benefit Plans**

### ***A. ERISA Has Historically Imposed Fiduciary Obligations on Plan Administrators to Protect Plan Participants***

Following years of deliberation and debate, ERISA was originally enacted in 1974. ERISA was enacted after Congress observed the significant and rapid growth in size, scope, and numbers of employee benefit plans<sup>5</sup> and the need for legislation that would safeguard the “well-being and security of millions of employees and their dependents,” and protect the “successful development of industrial relations.”<sup>6</sup> Since its original enactment, ERISA has been frequently amended to continue facilitation of this original intent.

At a high-level, ERISA sets the minimum standards for employee benefit plans, which include rules surrounding participation, vesting, benefit accrual, funding, claim procedures and participant disclosures. These standards are the foundation for the establishment, operation, and administration of such employee benefit plans.

Central to its purpose, ERISA provides significant protection for individuals who participate in employee benefit plans. Chief among these protections are ERISA’s robust fiduciary obligations, which courts have referred to as the “*highest known to law*.”<sup>7</sup> These fiduciary obligations were created to ensure that plan administrators act solely in the best interests of plan participants. Specifically, these duties imposed upon fiduciaries by ERISA “relate to the proper management, administration, and investment of fund assets.”<sup>8</sup>

As described in greater detail below, ERISA’s robust fiduciary standards, as articulated in DOL guidance over the past four decades and applicable case law, requires consideration of all risks associated with the management of retirement plan assets. Importantly for retirement plan participants, this broad mandate means that fiduciaries should not and cannot elevate one particular type of risk, such as climate risk, above all others in connection with the evaluation of the prudence of a particular investment or a retirement plan’s investment portfolio more generally.

### ***B. The Role of the Fiduciary Has Evolved Since the Enactment of ERISA***

Prior to ERISA’s enactment, the only federal fiduciary standards were the disclosure provisions and financial operations standards under the Welfare and Pension Plans Disclosure Act.<sup>9</sup> This lack of fiduciary responsibility and disclosure was one of Congress’ major concerns, and of particular interest, was the “course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension ‘fiduciaries,’ and the standards of accountability [fiduciaries] shall be

---

<sup>5</sup> ERISA-LH 1, 1974 WL 186647 (A.&P.L.H.), 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014).

<sup>8</sup> ERISA-LH 1, *supra* note 5.

<sup>9</sup> 29 U.S.C. § 301.

governed by in the management and disposition of pension funds.”<sup>10</sup> Further, Congress was concerned with the (i) effectiveness of communications surrounding plan contents to employees and (ii) technicalities and complexities in the language used to describe plans to employees (i.e., such descriptions were not being presented in a manner that an average and reasonable worker understood).<sup>11</sup>

Through the enactment of ERISA, specific duties and obligations are imposed on employers, individuals, and other entities involved with employee benefit plans (generally referred to herein as “**fiduciaries**”) to protect plan participants and beneficiaries and ensure that the plans are operated in the best interest of such participants and beneficiaries. Specifically, and as the DOL noted, ERISA “protects [] plan’s assets by requiring that those persons or entities who exercise discretionary control or authority over plan management or plan assets, anyone with discretionary authority or responsibility for the administration of a plan, or anyone who provides investment advice to a plan for compensation or has any authority or responsibility to do so are subject to fiduciary responsibilities.”<sup>12</sup>

These responsibilities include running the plan solely in the interest of the participants and beneficiaries, following the plan terms to the extent such terms are consistent with ERISA, and avoiding any conflicts of interest (i.e., not engaging in transactions that benefit other fiduciaries, service providers or the plan sponsor).<sup>13</sup> Importantly, and discussed in this comment letter, fiduciaries have a duty of prudence and must diversify the investments of the plan to minimize risk of large losses.<sup>14</sup>

## **II. Prior DOL Guidance and Case Law Require ERISA Fiduciaries to Wholistically Evaluate Investment Risks**

### ***A. Prior DOL Guidance Has Opined on the Role of Non-Pecuniary Aspects of Investments When Considering Investment Risk***

Pursuant to regulations promulgated in 1979, in order for a fiduciary’s investment decisions to meet the prudence standard, the fiduciary must give “appropriate consideration” to the facts and circumstances they know or should have known are relevant to the particular investment or investment course of action.<sup>15</sup> This “appropriate consideration” must take into account several determinations, including the risk of loss and / or the opportunity for gain that may be associated with the investment, consideration of portfolio diversification, liquidity, and current return relative to the plan’s anticipated cash flow requirements and projected return of the portfolio relative to the plan’s funding objectives.<sup>16</sup>

---

<sup>10</sup> ERISA-LH 4, 1973 WL 172969 (A.&P.L.H.), 10.

<sup>11</sup> *Id.*

<sup>12</sup> Fiduciary Responsibilities, DEP’T OF LABOR, <https://www.dol.gov/general/topic/retirement/fiduciaryresp> (last visited Mar. 23, 2022).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Reg. 2550.404a-1(1979).

<sup>16</sup> *Id.*

In 1994, the DOL first offered guidance surrounding fiduciaries and the considerations necessary when selecting plan investments. Specifically, this guidance discussed climate change as well as other environmental, social, corporate governance (collectively, “ESG”) factors and economically targeted investments (“ETIs”). Since this initial guidance, the DOL has released a plethora of guidance, all of which has been the subject of confusion and controversy.

Under the DOL’s Interpretative Bulletin 94-1 (the “**1994 guidance**”),<sup>17</sup> the DOL stated that ESG investing<sup>18</sup> does not prevent a fiduciary from complying with its obligations under ERISA; however, in selecting such ESG investments, a participant’s interest in their retirement income may not be subordinated to unrelated objectives.<sup>19</sup> The DOL essentially permitted ESG factors to be utilized as “tie-breakers” in the event an ESG investment had the same expected return and risk characteristics as an investment that did not consider ESG factors.<sup>20</sup>

More than a decade later, the DOL replaced its standing guidance with Interpretive Bulletin 2008-01 (the “**2008 guidance**”).<sup>21</sup> This guidance provided that fiduciaries were never permitted to subordinate the economic interests of the plan to unrelated objectives.<sup>22</sup> Fiduciaries are permitted, however, to select investments based on factors other than economic interests but only where two or more investments were of equal economic value. The DOL noted, however, that fiduciaries would rarely be able to demonstrate compliance without a written record showing such investments were of equal value.<sup>23</sup>

On October 26, 2015, the DOL’s views were once again revisited in Interpretive Bulletin 2015-01 (the “**2015 guidance**”),<sup>24</sup> with language nearly identical to its 1994 guidance. The DOL believed the 2008 guidance had “unduly discouraged fiduciaries from considering ETIs and ESG factors,”<sup>25</sup> noting that some fiduciaries believed that the 2008 guidance had set “a higher but unclear standard of compliance for fiduciaries when they [were] considering ESG factors or ETI investments.”<sup>26</sup> In this “new guidance” the DOL reiterated that ESG factors may serve as “tie-breakers” and that ETIs do not require “special scrutiny” and were not “presumptively required to maintain special documentation.”<sup>27</sup> Thus, in making investment decisions between two “equal investments,” the 2015 guidance permitted a fiduciary to use ESG factors to “tip the scale” towards a particular investment.

---

<sup>17</sup> DEP’T OF LABOR, ERISA Interpretive Bulletin 94-1 (1994).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> DEP’T OF LABOR, ERISA Interpretive Bulletin 2008-01 (2008).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> DEP’T OF LABOR, ERISA Interpretive Bulletin 2015-01 (2015).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Then in 2018, the DOL released Field Assistance Bulletin 2018-01,<sup>28</sup> stating that fiduciaries must “not too readily treat ESG factors as economically relevant,” but also suggested that ESG could be more than just “tie-breakers.”<sup>29</sup> The DOL further suggested that prudently selected, well managed, and properly diversified ESG-themed investment alternatives could be added to the available investment options on a 401(k) plan platform without requiring the plan to remove or forgo adding other non-ESG-themed investment options to the platform.<sup>30</sup>

Later, in June 2020, the DOL published a proposed rule for public comment that would replace its 2015 guidance, discouraging the inclusion of nonpecuniary factors in investment decisions, and opining that such an approach usually involves trading off returns for social goals – which has no place in ERISA plans. Thus, under this proposed rule, fiduciaries needed to focus on financial factors and not non-pecuniary factors. The final rule,<sup>31</sup> released in October 2020, requires fiduciaries to evaluate investment opportunities based upon pecuniary factors, but if fiduciaries are unable to distinguish investments based on pecuniary factors, they may consider non-pecuniary factors as the “tie-breaker.”

Then, most recently, in October 2021, the DOL released new proposed rules that retained the basic framework of the 2020 final rule, but modified provisions that suggested skepticism surrounding fiduciary reliance on ESG considerations.<sup>32</sup> While the DOL once again acknowledged that ERISA requires plan fiduciaries to prudently evaluate investments, it proposed that the duty of prudence “may often require an evaluation of the effect of climate change or other environmental, social and governance factors” on investments’ risks and returns. Importantly, in its proposed rule, the DOL confirmed that many factors may be material to an investment’s risk return, including all of the ESG factors.

### ***B. Case Law Requires That Fiduciaries Focus on Pecuniary Aspects of Investments When Considering Investment Risk***

The Supreme Court has also weighed in on the extent to which fiduciaries must focus on pecuniary aspects when considering investment risk. In *Fifth Third Bancorp et al., v. John Dudenhoefter et al.*, employees and participants (collectively, the “**Plaintiffs**”) in the Fifth Third (the “**Fifth Third**”) ESOP claimed the Fifth Third’s investments in the employer stock was “overvalued and excessively risky.”<sup>33</sup> As a result, the Plaintiffs claimed the fiduciaries of the ESOP made material misstatements related to the Fifth Third’s financial

---

<sup>28</sup> DEP’T OF LABOR, Field Assistance Bulletin 2018-01 (2018).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Dept. of Labor, U.S. Department of Labor Statement Regarding Enforcement of Its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans (March 10, 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf>; see also 85 Fed. Reg. 72846 (November 13, 2020), While this is a final rule, the Biden Administration said it will not enforce this Trump administration rule that makes it harder for fiduciaries to use ESG factors and investment funds in retirement plans.

<sup>32</sup> *Id.*

<sup>33</sup> *Fifth Third Bancorp v. Dudenhoefter*, 573 U.S. 409, 421 (2014).

prospects and “breached their fiduciary duties by failing to act on nonpublic information.”<sup>34</sup> “Rather than continuing to invest in Fifth Third stock, the Plaintiffs asserted, the fiduciaries should have (1) sold off the ESOP’s holdings of company stock, (2) refrained from purchasing more stock, (3) cancelled the plan’s ESOP option, or (4) disclosed the negative inside information to engender market correction.”<sup>35</sup> Instead, the “fiduciaries continued to hold and buy Fifth Third securities; after the market crashed, the stock price fell by seventy-four percent between July 2007 and September 2009.”<sup>36</sup>

In its ruling, the Supreme Court interpreted ERISA’s prudent person standard for fiduciaries making investment decisions and held that fiduciaries (1) are required to manage retirement plan investments solely for the purposes of providing retirement income to participants and (2) are prohibited from considering nonpecuniary factors.<sup>37</sup> Specifically, the Court stated that it could not “accept the claim that underlies the argument, namely, that the content of ERISA’s duty of prudence varies depending upon the specific nonpecuniary goal set out in an ERISA plan, such as what petitioners claim is the nonpecuniary goal here.” Further, “[t]hat steadfast standard of loyalty, Justice Breyer wrote, mandates that plan trustees focus upon ‘*financial* benefits (such as retirement income)’ for participants rather than pursue ‘nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.’”<sup>38</sup>

**C. *All Financial Risks are Relevant and ERISA Does Not Contemplate Singling Out or Elevating any Particular Financial Risk, Such as Climate-Related Financial Risk***

As outlined above, the DOL has provided significant, and at times conflicting, guidance over the past nearly four decades, on factors important for investment decisions. Consistently throughout such guidance, the DOL reiterated that fiduciaries have an obligation to not focus on any one single risk but must focus on all risks collectively. As described above, the most recent guidance specifically requires fiduciaries to consider all financial risks, indicating that all ESG factors should be considered during analysis – like governance and workplace practices, and not just focus on climate-related financial risks.

By requiring focus on climate-related financial risks, the RFI is too narrow and undermines the importance of other financial risks, which is in direct conflict with a fiduciary’s obligations under ERISA. In fact, this was a primary concern of the DOL in 2015 when it replaced its 2008 guidance (as described above). Specifically, the DOL stated:

“[t]he focus of plan fiduciaries on the plan’s financial returns and risk to beneficiaries must be paramount. Under ERISA, the plan trustee or other investing fiduciary may not use plan assets to promote social, environmental, or other public

---

<sup>34</sup> Remy Grosbard, *The Duty to Inform in the Post-Dudenhoeffer World of ERISA*, 117 COLUM. L. REV. 79, 96 (2017).

<sup>35</sup> *Id.* at 97.

<sup>36</sup> *Id.*

<sup>37</sup> *Fifth Third Bancorp supra* note 33 at 421 (2014) (the “benefits” to be pursued by ERISA fiduciaries as their “exclusive purpose” does not include “nonpecuniary benefits”).

<sup>38</sup> Edward A. Zelinsky, *The Continuing Battle Over Economically Target Investments: An Analysis of the Department of Labor’s Interpretive Bulletin 2015-01*, CARDOZO L. REV. (2016).

policy causes at the expense of the financial interests of the plan’s participants and beneficiaries. Fiduciaries may not accept lower expected returns or take on greater risks in order to secure collateral benefits.”<sup>39</sup>

In direct conflict with earlier DOL guidance, the RFI implies that a fiduciary must elevate analysis of climate-related financial risk. The proposed rule also does not acknowledge that climate-related financial risk, like all risk factors, must be considered by the fiduciary in the context of a risk-return analysis, taking potential return into account as well as risk.

Commonly acknowledged by the DOL and under ERISA, the Modern Portfolio Theory (“MPT”) requires an analysis of the investment portfolio as a whole, rather than a focus on each investment separately. In fact, at the core of MPT is diversification, which can be done in a multitude of ways (i.e., assets can be from different industries, different asset classes, different markets and of different risk levels).<sup>40</sup>

### **III. More Guidance is Needed to Properly Account for Climate-Related Financial Risk**

Climate-related financial risk is meant to encompass a wide variety of risks under the broad categories of physical and transition risks.<sup>41</sup> The Order provides that failure to appropriately and adequately account for and measure climate-related financial risks threatens the competitiveness of U.S. companies and markets, as well as the life savings and pensions of U.S. workers and families.<sup>42</sup> We agree.

However, this is a very complex and evolving issue with limited guidance. There are many issues on which neither the RFI nor the Order provide guidance. For instance, what physical and transition risks should be taken into account; how they should be measured; and what climate-related data is relevant in comparing and evaluating various risks. The Order only provides two simplistic examples of physical risk and transition risk.<sup>43</sup>

Thus, while we agree that it is important for fiduciaries to appropriately and adequately account for and measure climate-related financial risk (as well as all other financial risks), in response to the RFI’s request for comment,<sup>44</sup> we believe it is too burdensome and premature to require administrators of ERISA plans to publicly report on the steps they take to manage climate-related financial risk.

#### ***A. Fiduciaries Need Climate-Related Information in Order to Adequately Evaluate Climate-Related Financial Risk***

---

<sup>39</sup> DEP’T OF LABOR, ERISA Interpretive Bulletin 2015-01 (2015).

<sup>40</sup> Corporate Financial Institute, *Modern Portfolio Theory (MPT)*, <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/modern-portfolio-theory-mpt/> (last visited Mar. 23, 2022).

<sup>41</sup> 87 Fed. Reg. at 8290.

<sup>42</sup> Executive Order 14030, Climate-Related Financial Risk, 86 Fed. Reg. 27967 (May 20, 2021).

<sup>43</sup> *Id.*

<sup>44</sup> 87 Fed. Reg. 8291.

In order to appropriately and adequately account for and measure climate-related financial risk, sufficient information first needs to be available for fiduciaries. The latest report from the Task Force on Climate-Related Financial Disclosures (“**Task Force**”) confirms that the primary challenges when trying to evaluate climate-related financial risk is insufficient information.<sup>45</sup> However, this issue is not going unaddressed.

On March 15, 2021, the Securities and Exchange Commission (“**SEC**”) requested public input on how it can regulate climate-related disclosures,<sup>46</sup> and on March 21, 2022, the SEC released a proposed rule (“**SEC Proposal**”).<sup>47</sup> The SEC Proposal provides that a company’s disclosure of its climate-related information would provide consistent, comparable, and reliable – and therefore decision-useful – information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments.<sup>48</sup> The SEC notes the problem that, currently, companies provide different climate-related information, varying degrees of completeness of information, and in different documents and formats, meaning that the same information may not be available to investors across different companies.<sup>49</sup> Further, the SEC notes that companies may not disclose certain information needed to understand their existing climate-related disclosures, such as the methodologies, data sources, assumptions, and other key parameters used to assess climate-related risks, making it difficult to understand how climate-related risks are likely to impact a company’s business operations and financial performance.<sup>50</sup> However, by requiring more consistent, comparable, and reliable disclosure about climate-related risks, the SEC Proposal could increase confidence in the capital markets and help promote efficient valuation of securities and a company’s business operations and financial performance.<sup>51</sup>

Fiduciaries are investors on behalf of their respective plans, and the SEC Proposal is an important step that will allow them to better understand the potential implications of climate change on organizations they are considering for plan investments. However, while improved climate-related disclosures will be helpful for fiduciaries in considering plan investments, we are still in the early stages of finding proven methods for translating climate-related risks into quantifiable financial risk. There is no consensus on preferred modelling approaches, and this is an area that warrants further study. Thus, because fiduciaries must assess all risks on behalf of participants, we do not believe they should be required to publicly report on the steps they take to manage any one particular risk, including climate-related financial risk. Before any such requirement is imposed on fiduciaries, there should first be (1) settled standards for company disclosures of climate-related financial risk (i.e., after the SEC issues a final rule) that are consistent, comparable,

---

<sup>45</sup> Task Force on Climate-related Financial Disclosures, *2021 Status Report*, at 99 (Oct. 2021), <https://www.fsb.org/wp-content/uploads/P141021-1.pdf> (last visited Mar. 23, 2022).

<sup>46</sup> U.S. Securities and Exchange Commission, *Public Input Welcomes on Climate Change Disclosures* (Mar. 15, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures> (last visited Mar. 23, 2022).

<sup>47</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022).

<sup>48</sup> *Id.* at 21335.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 21340.



and allow fiduciaries to understand how climate-related risks are likely to impact a company's business operations and financial performance, and (2) guidance for what methodologies fiduciaries should consider in evaluating climate-related financial risk. As described herein, fiduciaries are required to consider all financial risks, and do so to the extent they can with respect to climate-related risks (e.g., by requesting climate-related information from companies, seeking out ESG rating providers for analysis, and using various risk-evaluation methods to consider potential risk), but there are still a number of open issues that should be addressed before imposing a substantial disclosure burden on fiduciaries.

***B. Fiduciaries Need Consistent Standards for Measurement of Climate Related Risks in Order to Adequately Evaluate Climate-Related Financial Risk***

In principle, conventional measurements of risk could be adapted to assess climate-related financial risk, as the analysis of climate-related impacts, at both the micro and macro level, is not fundamentally different from standard scenario analysis or stress tests. In practice, however, the range of impact uncertainties, time horizon inconsistencies, and limitations in the availability of historical data on the relationship of climate to traditional financial risks, in addition to a limited ability of the past to act as a guide for future developments, render climate risk measurement complex and its outputs less reliable as risk estimators.<sup>52</sup>

In addition to modeling problems, there are also issues with data availability and quality, including:

- The gaps in emissions measurement methodologies, including product life-cycle emissions methodologies, make reliable and accurate estimates difficult;<sup>53</sup>
- The lack of robust and cost-effective tools to quantify the potential impact of climate-related risks and opportunities at the asset and project level makes aggregation across an organization's activities or investment portfolios problematic and costly;<sup>54</sup>
- The need to consider the variability of climate-related impacts across and within different sectors and markets further complicates the process (and magnifies the cost) of assessing potential climate-related financial impacts;<sup>55</sup> and
- The high degree of uncertainty around the timing and magnitude of climate-related risks makes it difficult to determine and disclose the potential impacts with precision.<sup>56</sup>

---

<sup>52</sup> Basel Committee on Banking Supervision, *Climate-related financial risks – measurement methodologies*, at 23 (April 2021), <https://www.bis.org/bcbs/publ/d518.pdf> (last visited Mar. 23, 2022).

<sup>53</sup> Task Force on Climate-related Financial Disclosures, *Final Report*, at 36 (June 2017), <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf> (last visited Mar. 23, 2022).

<sup>54</sup> *Id.* at 36.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

### ***C. Consistent, Comparable and Reliable Climate-Related Data is Necessary in Order to Adequately Evaluate Climate-Related Financial Risk***

Even when the data is available, how should the climate-related financial risks be evaluated? Most fiduciaries do not hold themselves out to be experts in analyzing climate-related financial risk, so to prudently carry out their duties, they request information from companies they are considering investing in, use various risk-evaluation methods and models, and seek out analysis from ESG rating providers. However, companies currently do not provide consistent, comparable or reliable – and therefore decision-useful – information that would allow fiduciaries to make informed judgments about the financial impact of climate-related risks (as noted by the SEC), there is no uniform measurement or risk evaluation methodology to consider climate-related financial risks, and ESG rating providers are limited in their ability to provide fiduciaries with comparable and consistent information (as provided in more detail below).

While it is widely recognized that continued emissions of greenhouse gases will cause further warming of the planet and this warming could lead to damaging economic and social consequences, there is no consensus for how to evaluate these risks in the context of economic decision making. For example, MIT researchers looked at the evaluation methods used by six different ESG rating providers and found that their assessments differed significantly.<sup>57</sup> Another group of researchers also found a wide range of rating outcomes for any given company. A Fortune 500 Company for example, received a top score on ESG from one rating provider but was rated as “below average” on ESG by another.<sup>58</sup> These inconsistencies make it difficult for a fiduciary to accurately account for ESG, including the climate-related financial risks of investments. The SEC’s Investor Advisory Committee has noted this problem as well, providing that ESG data providers are limited in their ability collectively to provide investors with comparable and consistent information as they use different information sources and different – frequently opaque – methodologies to conduct their analyses, which compromises the usefulness and reliability of the information.<sup>59</sup>

Another hurdle in adequately accounting for climate-related financial risks, is that the goalposts (of what data is important) continue to move with emerging research, creating difficulties in evaluating the weight or importance of various climate-related data. For example, while most current sustainability frameworks focus only on carbon dioxide emissions or more broadly on greenhouse gases, new research suggests that local pollutants (particulates, sulfur dioxide, nitrogen oxides, volatile organic compounds, ammonia) have much higher per-ton health risks and greater financial materiality.<sup>60</sup>

---

<sup>57</sup> Center for Retirement Research at Boston College, *ESG Investing and Public Pensions: An Update*, at 4 (Oct. 2020) <https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf> (last visited Mar. 23, 2022) (citing Florian Berg, Julian Kölbel, and Roberto Rigobon, “Aggregate Confusion: The Divergence of ESG Ratings” (2020) <https://ssrn.com/abstract=3438533>).

<sup>58</sup> *Id.*

<sup>59</sup> 87 Fed. Reg. at 21341.

<sup>60</sup> Forbes, What To Make Of The Labor Department’s Request For Comment On Protecting Retirement Assets From Climate Risks, (Feb. 13, 2022), <https://www.forbes.com/sites/bhaktimirchandani/2022/02/13/what-to-make-of-the->

Fiduciaries are required to consider all financial risks, but singling out the impact of climate-related financial risk is no simple task. The large-scale and long-term nature of climate change makes it uniquely challenging to report to shareholders, especially in the context of economic decision making. While climate-related disclosure efforts have increased in maturity, significant work still remains in order to “mainstream” consideration of climate-related issues.<sup>61</sup> It is not just a matter of defining the perceived risk, modeling it, and collecting data that is the issue – there is also the problem of ensuring the reliability of data and models because none of the infrastructure to validate and audit climate-risk data and models exists yet even for publicly traded companies, much less the whole universe of investments.

A 2015 study estimated the value at risk, as a result of climate change, to the total global stock of manageable assets as ranging from \$4.2 trillion to \$43 trillion between now and the end of the century.<sup>62</sup> The study highlights that “much of the impact on future assets will come through weaker growth and lower asset returns across the board.”<sup>63</sup> This range of potential risk valuation highlights the radical uncertainty associated with measuring climate-related financial risk. Is it \$4T or \$40T? In any other context, such a huge range would be seen as prima facie indication of an analytical problem. In addition, this sizeable range suggests that investors may not be able to avoid climate-related risks by moving out of certain asset classes as a wide range of asset types could be affected. To date, there has been little to no evidence in the academic literature to prove ESG factors are related to better firm performance.<sup>64</sup> Recent ESG research finds that the major state and local government pension plans that have incorporated ESG factors into their investment policies underperformed those that did not.<sup>65</sup>

Thus, while progress has been made regarding how to measure climate risk, the discussion around what are the most appropriate measurements; how to present those measurements in a comparable manner; and what “weight” such metrics should be given is still evolving. EBSA must acknowledge that this discussion regarding climate risk is in its infancy and singling out the impact of climate-related financial risk may be harmful to the overall mission of helping individuals save for retirement.

#### **IV. The Form 5500 is Not An Appropriate Platform for Reporting and Collecting Data on Climate-Related Financial Risks**

---

labor-departments-request-for-comment-on-protecting-retirement-assets-from-climate-risks/?sh=43feadf327ec (last visited Mar. 23, 2022).

<sup>61</sup> Task Force on Climate-related Financial Disclosures, *2021 Status Report*, at 3 (Oct. 2021), <https://www.fsb.org/wp-content/uploads/P141021-1.pdf> (last visited Mar. 23, 2022).

<sup>62</sup> Task Force on Climate-related Financial Disclosures, *Final Report*, at 3 (June 2017), <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf> (last visited Mar. 23, 2022).

<sup>63</sup> *Id.*

<sup>64</sup> Center for Retirement Research at Boston College, *ESG Investing and Public Pensions: An Update*, at 5 (Oct. 2020) <https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf> (last visited Mar. 23, 2022).

<sup>65</sup> *Id.*

The Form 5500 is central to the proper administration of the U.S. private retirement plan system. It fulfills several critical functions, foremost among them being its use by federal agencies for information that can lead to plan investigations and ERISA enforcement actions. It should go without saying that the information required to be reported on the Form 5500 should be the most accurate and reliable possible. Consequently, for the reasons set forth below, we respectfully suggest that the Form 5500 is not an appropriate platform for the collection, reporting and disclosure of information concerning climate-related financial risk.

***A. Consideration of a Plan Investment’s Climate-Related Financial Risk Characteristics Should Not be Singled out for Reporting on the Form 5500***

Fiduciaries are subject to a general duty of prudence that includes an obligation to consider all risks associated with plan investment decisions. Further, fiduciaries commonly document and maintain records about their investment selections pursuant to that obligation. However, EBSA has never taken the position that any particular investment risk should be singled out for special consideration or a heightened level of documentation. Requiring the collection of data on climate-related financial risk, and the reporting of such data on the Form 5500 would go far beyond any requirement previously imposed on plan fiduciaries.<sup>66</sup>

It is the long-standing position of EBSA that the requirement to document investment decisions is a general fiduciary obligation that depends on the facts and circumstances. Even in the context of ESG investing, of which the consideration of climate-related financial risk is a part, the DOL has stated that special documentation requirements that single out and create burdens for specific investments (including “one-size-fits-all” documentation requirements) are not appropriate. See *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57,272 at 57,278-79 (proposed Oct. 14, 2021). Consequently, we strongly urge the DOL to not require plan fiduciaries to single out climate-related financial risk for special reporting on the Form 5500.

***B. Global Uniform Standards Are Needed for Reporting and Collecting Climate-Related Financial Risk***

There is no uniform method of measuring or reporting on climate-related financial risk. The development of such standards is still a work in progress at organizations like the International Accounting Standards Board (“IASB”) and the international version of Financial Accounting Standards Board (“FASB”). As recently as November 2021, the International Financial Reporting Standards Foundation announced the formation of a new International Sustainability Standards Board (“ISSB”) to operate alongside the IASB to develop disclosure standards to enable companies to provide comprehensive sustainability information for the global financial markets. There are numerous U.S. and international

---

<sup>66</sup> In addition, ERISA does not provide authority for EBSA to impose such a requirement. ERISA § 103, 29 U.S.C § 1023.

bodies developing divergent standards for defining and measuring climate-related financial risk. However, while much work is being done, competing initiatives means there is no uniform set of standards for measuring and reporting on climate-related financial risk.

While the SEC is working to establish a uniform definition and method of measuring financially material climate risk for purposes of company filing requirements, an unsettled issue is whether auditors should sign off on the disclosures, an issue also relevant to Form 5500 reporting (discussed below).

The SEC's stated goal in the SEC Proposal is to facilitate the disclosure of consistent, comparable and reliable information on climate change. In addition, EBSA has stated that information relating to ESG investment decisions, if reported on the Form 5500, must be "standardized, comparable and reliable."<sup>67</sup> In short, information related to climate change that meets these requirements does not yet exist.

At a minimum, the imposition of climate-related reporting and disclosure requirements on retirement plans should await the development of generally applicable disclosure standards. Requiring disclosures at this time is premature, impractical, and would put plan sponsors in the untenable position of reporting information that would be confusing at best, and misleading at worst.

### ***C. ERISA-Compliant Form 5500 Audits Are Not Feasible***

The administrator of a retirement plan is required to file the plan's annual report (Form 5500), and is required to engage an independent, qualified public accountant ("IQPA") to audit the Form 5500.<sup>68</sup> Plan administrators are reliant on e.g., insurance companies, banks and plan sponsors for the information necessary to comply with the filing and audit requirements.<sup>69</sup> Furthermore, the carriers, banks or plan sponsors must "certify the accuracy" of the information provide to the plan administrator.<sup>70</sup>

IQPAs must perform Form 5500 audits using three sets of auditing standards: Generally Accepted Auditing Standards ("GAAS"), Generally Accepted Accounting Principles ("GAAP") and ERISA reporting and disclosure requirements.<sup>71</sup> GAAP and GAAS standards are set by the FASB and the American Institute of Certified Public Accountants ("AICPA").

As noted above, the development of such standards is still a work in progress. The SEC is still developing climate-related disclosure standards. To date, the FASB has not established climate-related financial risk reporting standards that would facilitate ERISA-compliant audits pursuant to GAAS and GAAP.

---

<sup>67</sup> Notice of Proposed Forms Revisions, 81 Fed. Reg. 47534, 47564 (July 21, 2016).

<sup>68</sup> ERISA §§ 103(a) and 104(a).

<sup>69</sup> ERISA § 103(a)(2).

<sup>70</sup> *Id.*

<sup>71</sup> See ERISA §§ 103(a)(3).

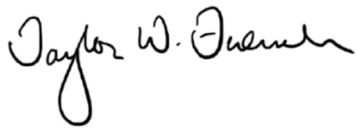
The recently announced partnership of the ISSB and the IASB, which aspires to establish global ESG reporting standards that can be embraced by the SEC as well as the EU, is a positive development. But for now, it is just a development. Additionally, like the SEC's efforts described above, there is no certainty regarding the timing or the content of such standards. Furthermore, certainty is what EBSA and the retirement plan community should have before federal agencies consider whether or how to compel retirement plan administrators to report climate-related financial risk on the annual Form 5500.

## V. Conclusion

We agree that climate change is real and agree that ERISA fiduciaries should consider climate risk, along with all other financial and ESG risks that could affect investment performance, but recommend the DOL reconsider a reporting requirement that (1) elevates one potential risk factor over all others – contrary to case law and DOL guidance, and (2) suffers from significant reporting, measurement and analysis issues that would likely lead to confusing disclosures and elevated fiduciary risk for plan sponsors.

We welcome the opportunity to further discuss the concerns and recommendations set forth in this letter and hope that we can be a resource to the DOL as you review and consider all of the comments. If you have any questions, please do not hesitate to contact Taylor Wedge French at (704) 373-8037 or Rosemary Becchi at (202) 359-4270.

Sincerely,



---

Taylor W. French  
Partner, McGuireWoods, LLP



---

Rosemary Becchi  
Strategic Advisor and Counsel  
Brownstein Hyatt Farber Schreck