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U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Ave. NW,
Room N-5655
Washington, DC 20210

Subject: Z-RIN 1210-ZA30 -Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk

Greetings:

On behalf of the American Council of Life Insurers (ACLI), we offer these comments in response to the Request for Information (RFI) issued by the Department of Labor, Employee Benefits Administration (EBSA) to solicit input EBSA's future work relating to retirement savings and climate-related financial risk. EBSA issued the RFI in response to Executive Order 14030 on Climate-Related Financial Risk, which directed the Department of Labor to identify agency actions that can be taken under ERISA to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.

General Comments

In general, we strongly encourage EBSA, in its response to the Executive Order, to maintain its historical and appropriate focus on procedural prudence, consistent with ERISA section 404 and the existing regulatory framework. Specifically, we note that 29 C.F.R. § 2550.404a1(b)(1) provides that ERISA's prudence requirement is satisfied if the fiduciary has given "appropriate consideration" to facts and circumstances that the fiduciary knows, or should know, are relevant to the particular investment or investment course of action, including the role that the investment

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The American Council of Life Insurers (ACLI) is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security. ACLI's member companies are dedicated to protecting consumers' financial wellbeing through life insurance, annuities, retirement plans, long-term care insurance, disability income insurance, reinsurance, and dental, vision and other supplemental benefits. ACLI's 280 member companies represent 94 percent of industry assets in the United States.

plays in the plan's investment portfolio, and has acted accordingly. Thus, plan fiduciaries are already required to consider and give “appropriate consideration” to financial risks that are climate-related, when and if appropriate. We do not see the value, nor has EBSA demonstrated any value, of requiring plan fiduciaries to consider one type of financial related risk at a higher level of importance than other types of financial related risk, other than the current political or social environment placing more emphasis, at the moment, on a particular financial related risk. Doing so will have a regulatory whipsaw effect on plan fiduciaries, depending on political and/or social views nationally or in the states, and will likely discourage those employers without plans from implementing plans and put more regulatory pressure and potential liability on those employers that have plans. EBSA should be in the business of encouraging, not discouraging the formation and growth of the employer-based retirement system.

In the remainder of this letter, we will respond to Questions 4, 8, and 19.

Question 4

Question 4 asks whether EBSA should use the Form 5500 Annual Return/Report (Form 5500) to collect data on climate-related financial risk, such as information about whether and how plan investment policy statements specifically address climate-related financial risk, whether service providers disclose or meet metrics related to such financial risks, whether and how plans have factored climate-related financial risk into their analysis of individual investments or investment courses of action, and/or whether, and how, plan fiduciaries voted on proxy proposals involving climate-related financial risk.

ACLI member companies provide insurance contracts and other investment products and services to all types of employee benefit plans subject to ERISA’s reporting and disclosure requirements - including both defined benefit and defined contribution plans. The burden associated with providing data and information to complete the Form 5500 and associated schedules rests primarily with plan service providers, and, accordingly, ACLI member companies play a significant and essential role assisting plan sponsors in completing the Form 5500 and applicable schedules.

We have several concerns regarding the inclusion of any climate-related financial risk information on the Form 5500. According to the current EBSA website, “The Form 5500 Series is part of ERISA's overall reporting and disclosure framework, which is intended to assure that employee benefit plans are operated and managed in accordance with certain prescribed standards and that participants and beneficiaries, as well as regulators, are provided or have access to sufficient information to protect the rights and benefits of participants and beneficiaries under employee benefit plans.”¹ The key words in that statement are “prescribed standards” so that the plan sponsor can complete the Form 5500 based on objective, measurable standards – the number(s) of plan participants, plan assets and liabilities, etc. Moreover, the “compliance questions” included within Schedule H are also objective and measurable – *i.e.*, does the plan have a fidelity bond, did the plan have a loss, whether or not reimbursed by the plan’s fidelity bond, that was caused by fraud or dishonesty, did the plan hold any assets whose current value was neither readily determinable on an established market nor set by an independent third-party appraiser? These are yes or no, objective determinations.

Neither the Executive Order nor the RFI defines “climate-related financial risk” or explains how climate-related financial risk could impact retirement plans, or explains how plan fiduciaries should be evaluating and/or analyzing such risks. For example, should the risk to be considered be a regulatory risk or a litigation risk relating to the plan investment? And what standards should be

¹ See <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500>.

used to evaluate such risk? As such, both the definition of “climate-related financial risk” and the evaluation of such risk would be subjective determination, neither prescribed nor measurable, and therefore not an appropriate topic for inclusion in the Form 5500.

Question 8

Question 8 asks whether any guaranteed lifetime income products (e.g., annuities) help individuals efficiently mitigate the effects of at least some climate-related financial risk? If so, what mitigation measures do these products take? Would such products constitute a safe and efficient strategy to transfer climate-related financial risk from the participant/employee to the insurer/ guarantor? If so, should EBSA take steps to facilitate the inclusion of these products in ERISA-covered defined contribution plans? If so, what steps should be taken and what products should be considered, and why? Are there climate-focused annuities that plans could offer?

Those planning for retirement face two major risks – longevity risk (the risk of outliving one’s savings) and market risk (the risk of portfolio losses). Annuities are used to mitigate longevity risk under a contractual guarantee to provide monthly income for life. Also, depending upon the annuity and various optional features, annuities can help mitigate market risk, sequence of return risk and inflation. Thus, the mitigation of exposure to market fluctuations may help to mitigate potential climate-related financial risks.

Question 19

Question 19 asks if there are any legal or regulatory impediments that hinder managers of investments held in savings and retirement arrangements not covered by ERISA, such as IRAs, from taking steps to mitigate against climate-related financial risks to those investments? It further asks if the absence of prudence and loyalty obligations with respect to these arrangements leave them vulnerable to climate-related financial risks.

This question appears to assume that there are no prudence or loyalty obligations associated with savings or retirement arrangements not covered by ERISA. We disagree with this conclusion. ERISA ensures that persons responsible for the management of plan assets and the selection of plan investment options are held ERISA’s fiduciary standards. Non-ERISA arrangements, such as IRA’s, are not held to ERISA’s fiduciary standards, as they are under the complete control of the participant/IRA owner. There is no third party naturally in control of an IRA owner’s benefits. There is no person from whom to protect the IRA owner, but themselves. The absence of a third party with prudence or loyalty obligations does not hinder or prevent an IRA owner from taking her own steps to mitigate against financial risk, climate-related or otherwise with respect to the investments in her IRA. Further, should an IRA owner engage a fiduciary for investment advice or to manage the IRA investments, such person would be subject to the duties imposed under the Investment Advisers Act of 1940 and applicable state law, common or otherwise.

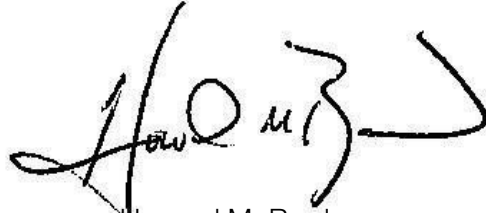
Finally, we note that consideration of the application of prudence or loyalty obligations to non-ERISA arrangements is clearly outside of the scope of EBSA’s regulatory authority. This was highlighted in the Fifth Circuit’s 2017 ruling which vacated the EBSA’s 2016 definition of fiduciary and its new and related amendments to prohibited transaction class exemptions. Under that ruling, the Fifth Circuit held that the EBSA did not have the authority to impose ERISA’s substantive requirements on entities that are not subject to ERISA.

On behalf of the ACLI member companies, thank you for your consideration of these comments. We welcome the opportunity to discuss these comments and engage in a productive dialogue with the EBSA.

Respectfully,

A handwritten signature in black ink, consisting of a large loop on the left and a series of smaller loops and lines extending to the right.

James H. Szostek

A handwritten signature in black ink, starting with a large 'H' and 'B' and including the initials 'M' and 'B' in the middle.

Howard M. Bard