

**BOYDEN GRAY & ASSOCIATES PLLC**  
801 17TH STREET, NW, SUITE 350  
WASHINGTON, DC 20006  
(202) 955-0620

May 16, 2022

Mr. Fred Wong  
Office of Regulations and Interpretations  
Employee Benefits Security Association  
U.S. Department of Labor  
200 Constitution Ave., NW  
Room N-5655  
Washington, D.C. 20210

Re: RIN 1210-ZA30

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

Dear Mr. Wong:

This letter comments on the U.S. Department of Labor's Request for Information on "Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk" ("the RFI") published in the Federal Register on February 14, 2022, at 87 Fed. Reg. 8,289 through 8,292.

I served this Department as Acting and Principal Deputy Assistant Secretary for Policy. During my tenure, I was proud to partner with your office in the development of regulations to expand worker access—especially through small-business employers—to group health and retirement plans. I write to express my grave concerns about the timing and scope of the RFI: both its interaction with the proposed rule "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" and the speculative nature of "climate-related financial risk."

The RFI asks for proposals on how ESG can be considered under ERISA but then expressly precludes any comments on the Department's recent proposed regulation about using ESG factors in ERISA plans. The RFI asks for comments on "what agency actions 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," but the RFI simultaneously says that commenters cannot address the Department's recent proposed regulation about "whether a fiduciary may consider climate change and other environmental, social, or governance (ESG) factors in selecting investments and investment courses of action, and exercising shareholder rights."

May 16, 2022

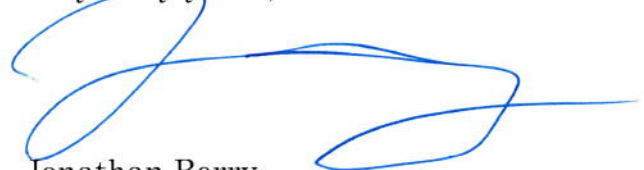
Page 2

By intentionally ignoring—before comments are even filed—an “important aspect of the problem,” the RFI will likely yield agency action that violates the Administrative Procedure Act. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Moreover, by illogically demanding information on a topic but then refusing to accept comments on that very same topic, the RFI itself is internally inconsistent, and presumably any resulting agency actions would likewise be internally inconsistent. *See Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm’n*, 879 F.3d 1202, 1214 (D.C. Cir. 2018) (“[I]t would be arbitrary and capricious for the agency’s decision making to be ‘internally inconsistent.’”).

More directly in response to the substance of the RFI: the assertion that “climate change poses serious and systemic risks to the U.S. economy and financial system” is not borne out by scientific data. While there are risks to businesses posed by the weather, there is significant evidence that the extreme weather events that cause these risks are not increasing and that the damage from natural disasters in lives lost and in economic cost relative to GDP are decreasing. Further, while there is a scientific consensus that global temperatures have increased and are continuing to increase, there is great uncertainty in the magnitude and timescale of this increase. There is even greater uncertainty about the risks that will flow from these changes. If there are risks from climate change to the life savings and pensions of U.S. workers and families, they are not of the sort cognizable by a fiduciary. A summary of the scientific and economic evidence bearing on the physical risks posed by climate change is contained in the attached declaration by meteorologist Dr. Roy W. Spencer.

Out of an abundance of caution about the scope of the RFI and its impact on ongoing rulemaking, I have also attached my previous comments on the aforementioned proposed rule. Additionally, I am requesting that this letter, and Dr. Spencer’s affidavit, be added to the docket in that ongoing rulemaking, as they present matters DOL is obliged to consider there as well.

Very truly yours,



Jonathan Berry