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Employee Benefits Security Administration Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W. Washington, D.C. 20210

May 16, 2022

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

Secretary of Labor Martin J. Walsh and Acting Assistant Secretary Ali Khawar:

We write in response to the Request for Information issued by the Employee Benefits Security Administration (EBSA) on February 14, 2022 with regards to what actions your agency can take to protect the life savings and pensions of US workers and families from the threats of climate-related financial risk.¹ We strongly welcome your agency's efforts to ensure pension fund fiduciaries are properly managing climate-related risks, and submit these comments with the aim of establishing robust disclosures and risk management practices by fund fiduciaries that will best serve the interests of retirees.

As recognized by the Financial Stability Oversight Council (FSOC)² and others,³ climate change has the potential to destabilize the normal functioning of the financial system and lead to serious negative consequences for the real economy through a multitude of physical and transition risks. A London School of Economics study projected that unaddressed climate change resulting in warming of 2.5°C by 2100 could reduce the value of global financial assets by as much as \$24 trillion.⁴ The UN has recently warned that global average temperatures may reach 1.5°C above pre-industrial levels by 2026⁵ and 3.2°C by 2100 under current climate policies.⁶ The Director of the IMF's monetary and capital markets

¹ United States, Employee Benefits Security Administration. [Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk](#). 87 FR 8289 (February 14, 2022)

² United States, Financial Stability Oversight Council, [Report on Climate-related Financial Risk 2021](#)

³ See, e.g., Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission, [Managing Climate Risk in the US Financial System](#) (September 9, 2021); CERES, [Addressing Climate as a Systemic Risk: A Call to Action for US Financial Regulators](#) (June 2020); Network for Greening the Financial System (NGFS), [A call for Action: Climate Change as a Source of Financial Risk](#) (April 2019)

⁴ The Grantham Research Institute on Climate Change, London School of Economics and Political Science, [Climate Value at Risk' of global financial assets](#) (April 2016)

⁵ United Nations, [Climate: World getting 'measurably closer' to 1.5-degree threshold](#) (May 9, 2022)

⁶ See Jim Skea et al., Working Group III Summary for Policymakers, at C.3.2, SPM-32, in IPCC, Climate Change 2022: Mitigation of Climate Change [hereinafter WGIII AR6 SPM], at p21

department has warned that the climate crisis could "absolutely" ignite a financial crisis.⁷

With \$39.4 trillion of US retirement assets as of December 31, 2021, including nearly \$15 trillion in defined contribution plans and private sector defined-benefit plans,⁸ retirees have significant exposure to climate-related physical and transition risks. Unfortunately, very few US-based private pension funds have publicly committed to take action to protect their funds from climate risk, for example, by committing to achieve net zero GHG emissions in their portfolio.⁹ Given the increasing severity of the climate crisis, as documented by the recent IPCC reports, the lack of transparency into how private pensions in the US manage climate-related risk is extremely concerning. In order to protect retirees' hard-earned life savings, it is imperative that retirees are able to better understand if in fact they will be able to enjoy the fruit of their labor after retiring, and to hold pension fiduciaries accountable if they are failing to effectively manage climate-related financial risks.

Below we provide answers to specific questions posed in the Request for Information. Given our area of expertise, we have focused our responses on the Employee Retirement Income Security Act (ERISA). However, we believe many of the points below are equally applicable to the Federal Employees' Retirement System Act (FERSA).

1. Please provide your views on how EBSA should address and implement the action items set forth for EBSA in Executive Order 14030 on Climate-Related Financial Risk. Specifically, what agency actions can be taken under ERISA, FERSA, 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?

Given your department's primary responsibility over pension plan reporting, disclosure, and fiduciary requirements, we fully support the proposed collection of data on climate-related financial risk to pension plans and the disclosure of such information for the benefit of employees and their families who are concerned about their future vis a vis the climate crisis. We provide further comments on this below.

In addition to these disclosures, we recommend your agency issue guidance on how fund fiduciaries may interpret their enumerated fiduciary duties in ERISA §404(a) with respect to climate-related financial risk, particularly the duties to diversify and to act for the exclusive purpose of benefiting plan participants. Our recommendations are informed by conversations with pension plan fiduciaries, some of whom have asserted that their fiduciary duties, specifically the duty to diversify, precludes them from eliminating carbon-intensive investments in their portfolio.

Misconceptions of the duty to diversify plan assets contribute to unjustified retention of fossil fuel holdings and/or resistance to evidence-based arguments in favor of divestment. A substantial number of pension fund trustees argue that retaining their funds' fossil fuel investments keeps the portfolio diversified. However, while pension fund fiduciaries have a duty to diversify, that duty is not blind or absolute, and is instead a distillation of the requirement to reduce risk in the portfolio in consideration of the "facts and circumstances" of each case, including the purpose of the plan.¹⁰ The reliance of many

⁷ CNN Business, [Climate change could ignite a financial crisis, IMF official says](#) (June 3, 2021)

⁸ Investment Company Institute, [Retirement Assets Total \\$39.4 Trillion in Fourth Quarter 2021](#) (March 28, 2022)

⁹ See, e.g. UN-convened Net Zero Asset Owners Alliance, <https://www.unepfi.org/net-zero-alliance/alliance-members/> (Wespath Benefits & Investments is the only private pension plan signatory) (Accessed May 12, 2022)

¹⁰ See *Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997)

investors in the US on the Global Industry Classification Standard (GICS)¹¹ to achieve sector-based diversification in their portfolio contributes to the perception that diversity requires investment in fossil fuels. The GICS defines the “energy sector” as encompassing only the fossil fuel industry, neglecting renewables and with them, the necessary renewable energy transition. In recent years, the fossil fuel industry has underperformed the market, and Exxon’s removal from the Dow is a clear indicator of the changes underway in the energy sector, in favor of renewable energy.¹² Currently the S&P 500 index contains 4.2% in fossil fuel holdings, down from its historic high in the 1980s of over 25%.¹³ Investor reliance on GICS is therefore problematic. For this reason, further guidance on how fiduciaries should fulfill their duty to diversify would be beneficial to ensure that trustees are not ignoring or unduly dismissing justifications for divesting certain holdings such as fossil fuels, a measure which we believe would still leave the fund with an amply diversified portfolio while reducing a variety of unacceptable risks.¹⁴

With respect to the exclusive purpose rule, we recommend that new guidance be issued to permit an interpretation of “benefit” that includes non-pecuniary interests. The increasing popularity of Socially Responsible Investment (SRI) funds and Environmental, Social and Governance (ESG) funds reflects a growing desire to construe “benefit” not as confined to a financial gain, but also to encompass social and environmental objectives. Indeed, continued investments in climate change-driving industries significantly endanger the wellbeing of pension beneficiaries by negatively affecting temperatures, critical food supply, water availability, and infrastructure. In 2021, alone, the U.S. experienced 20 separate billion-dollar weather and climate disasters, with a price tag of \$145 billion, coming in second place for the most disasters in a calendar year after 2020.¹⁵ The recently released Intergovernmental Panel on Climate Change (IPCC) report on *Impacts, Adaptation and Vulnerability*¹⁶ — the second part of the Sixth Assessment Report — confirmed that irreversible damage is already occurring to natural ecosystems, communities, and human rights, and will accelerate to an unprecedented scale and pace if global temperature rise surpasses 1.5°C. A retirement income is meaningless to beneficiaries if their environment becomes increasingly uninhabitable.

Guidance should also emphasize the importance of a benefit being realized in the long-term. While this should be presumed given a pension fund’s objectives, this approach is not reflected in practice. Many pension funds currently continue to invest in companies whose long-term value is threatened by a low-carbon transition.¹⁷

¹¹ MSCI, [GICS Sector Definitions](#) (2018)

¹² [Here’s what Exxon’s removal from the Dow says about the energy sector](#), Market Watch (August 25, 2020). See also David Carlin, [The Case For Fossil Fuel Divestment](#), Forbes (February 20, 2021)

¹³ See S&P 500, S&P Dow Jones Indices, [Overview](#) (last visited April 29, 2022) (download “S&P 500 (USD) Factsheet” from Documents dropdown menu); ²⁹ [1980 Revisited](#), Forbes (March 6, 2000); see also [IEEFA update: Oil and gas stocks place dead last in 2019, again, despite 30% price rise](#) (January 9, 2020)

¹⁴ See, e.g., Jeremy Grantham, [The Mythical Peril of Divesting from Fossil Fuels](#), Grantham Research Inst. on Climate Change and the Env’t (June 13, 2018) (arguing that divesting from any single sector produces immaterial results, and noting in particular that “Investors with long-term horizons should avoid oil and chemical stocks on investment grounds. They face a sustained headwind. In contrast, investing in companies that benefit from decarbonising the economy, although they come with no guarantee of success, do offer a sustained tailwind; their top-line revenues will certainly be growing faster than the rest of the economy. Ethical arguments for divestments are simply not necessary. They are a pure bonus.”)

¹⁵ National Oceanic and Atmospheric Administration (NOAA), [2021 U.S. billion-dollar weather and climate disasters in historical context](#) (January 24, 2022)

¹⁶ Intergovernmental Panel on Climate Change (IPCC), [Climate Change 2022: Impacts, Adaptation and Vulnerability](#) (Working Group II contribution to the Sixth Assessment Report)(February 2022)

¹⁷ See, e.g., Bevis Longstreth, [Outline of Possible Interpretative Release by States’ Attorneys General Under The Uniform Prudent Management of Institutional Funds Act](#), InsideClimate News (January 26, 2016), (“The risks and

2. Executive Order 14030 uses the phrase “climate-related financial risk” to encompass a wide variety of risks under two broad categories: Physical risks and transition risks. What are the most significant climate-related financial risks to retirement savings and why?

Retirement assets may be invested in emissions-intensive activities that are subject to regulatory and litigation risks which give rise to transition risks, and/or in sectors particularly exposed to physical risks from climate change such as fires, rising sea levels, and water scarcity.

The most significant climate-related financial risks to retirement savings are the transition risks associated with investments in climate change-driving industries, most notably fossil fuels and their derivatives such as petrochemicals and plastics.

The production and use of fossil fuels and their derivatives are the primary driver of the climate crisis, representing the large majority of global emissions.¹⁸ Amidst a consensus that emissions must be halved by 2030 in order to stay within the 1.5°C Paris Agreement goal, fossil fuels are particularly exposed to several forms of transition risk. These risks arise from regulatory changes required to achieve the Paris Agreement goals, evolving market dynamics favoring renewable energy, shifting consumer sentiment, and accelerating climate litigation. For example, continued regulatory actions to phase out gasoline-powered cars, to support the deployment of renewable energy, and to decarbonize industrial processes, among others, directly threaten the long-term outlook of the fossil fuel sector. Further, this risk is neither slow nor predictable. As outlined by the UN Principles for Responsible Investment,¹⁹ a rapid and significant policy response to climate change could quickly and dramatically devalue—or strand—fossil fuel assets, presenting a severe potential downside risk to investors.²⁰ The recent IPCC report has affirmed this assessment, noting with high confidence that “limiting global warming to 2°C or below will leave a substantial amount of fossil fuels unburned and could strand considerable fossil fuel infrastructure.” The report estimates that “the combined global discounted value of the unburned fossil fuels and stranded fossil fuel infrastructure has been projected to be around 1–4 trillion dollars from 2015 to 2050 to limit global warming to approximately 2°C, and it will be higher if global warming is limited to approximately 1.5°C.”²¹

Amplifying these factors is fossil fuel companies’ fundamental unwillingness to meaningfully participate in the low-carbon transition. In recent years, the sector has spent mere pennies on the dollar on renewable research and deployment, while devoting the vast majority of its budget to continued fossil

rewards now offered by [fossil fuel-linked] securities are asymmetric, in the sense that the foreseeable rewards are not likely to be equal to the foreseeable risks. The risk that, at some unknown and unknowable, yet highly likely, point in the future, markets will begin to adjust the equity price of fossil fuel company securities downward to reflect the swiftly changing future prospects of those companies, is as serious as it is immense. Moreover, the possibility of that adjustment being a swift one is also a serious risk. A decision to linger in an investment with such an overhanging risk, and expect to time one’s exit before the danger is recognized in the market, is a strategy hard to fit within the concept of prudence.”)

¹⁸ See WGIII AR6 SPM, *supra* note 6, at Figure SPM.1, SPM-6.

¹⁹ See UN Principles for Responsible Investment, [The Inevitable Policy Response to climate change](#) (accessed May 16, 2022)

²⁰ Carbon Tracker Initiative, [Balancing the Budget](#) (November 1, 2019) (“Companies that continue to sanction higher-cost projects which do not fit with a lower demand scenario risk destroying significant shareholder value through the creation of stranded assets, as well as contributing to the failure to achieve climate goals.”)

²¹ See WGIII AR6 SPM, *supra* note 6, at p36

fuel extraction.²² Despite recent pronouncements of aligning with a goal of net zero emissions by 2050, no major fossil fuel company today is aligned with the goals of the Paris Agreement,²³ and substantially all industry players both facilitate the spread of misinformation²⁴ and lobby against climate policies.²⁵ Such activities not only leave the industry structurally unprepared for the low-carbon transition, but also create accruing liability risks from climate litigation — both domestically and internationally — which further threaten enormous and unprecedented losses.²⁶ The threat of climate litigation is increasingly extending beyond fossil fuel companies to include pension funds and other financial institutions,²⁷ and it is expected to affect the outcome and ambition of climate governance,²⁸ further increasing the transition risk of fossil fuel companies.

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.

Yes, we support the EBSA collecting data on climate-related financial risk for pension plans. Knowledge of a pension fund's exposure to climate risk, most notably its investments in fossil fuels, is critical in assessing the trustee's fulfillment of its fiduciary duties, particularly its duty of prudence, and in enabling beneficiaries to select a plan that reflects their tolerance for climate-related financial risk.

The duty of prudence focuses on whether the fiduciary has obtained the relevant information to make a prudent decision, whether the fiduciary has given "appropriate consideration" to the facts and circumstances that the fiduciary knows or should know are relevant to a particular investment or investment strategy, and to act in accordance with the conclusions reached after that consideration.²⁹

In this light, we believe it is important to collect information on how the fiduciaries are giving "appropriate consideration" to their investments in carbon-intensive industries, most notably fossil fuels, given they are uniquely vulnerable to the climate transition.³⁰ The IPCC report on *Mitigation of*

²² Ron Bousso, [Big Oil spent 1 percent on green energy in 2018](#), Reuters (November 11, 2018); see also Li M, Trencher G, Asuka J, [The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments](#). *PLoS ONE* 17(2): e0263596. (February 16 2022); Sabrina Valle & Ross Kerber, [Investors on board of U.S. oil majors dismiss wind and solar projects](#), Reuters (October 27, 2021)

²³ See Anjil Raval, [Big fossil fuel groups all failing climate goals, study shows](#), Financial Times (October 6 2020); [Discussion Paper: Big Oil Reality Check](#), Oil Change International (September 3, 2020)

²⁴ See, e.g., Geoffrey Supran and Naomi Oreskes, *Assessing ExxonMobil's climate change communications (1977–2014)*, 12(8) *Envtl. Res. Letters* (August 2017). See also, e.g. ClientEarth, [The Greenwashing Files](#), and CIEL, [Smoke and Fumes](#)

²⁵ [Corporate Climate Policy Footprint](#), InfluenceMap (November 2021)

²⁶ See Subodh Mishra, Institutional Shareholder Services, [The Rise of Climate Litigation](#) in Harvard Law School Forum on Corporate Governance, March 3, 2022; Jessica Bateman, [Why Climate Lawsuits Are Surging](#), BBC (December 7, 2021); 2^o Investing Initiative & MinterEllison, [The Carbon Boomerang: Litigation Risk as a Driver and Consequence of the Energy Transition](#) (2017); Stanley Reed & Claire Moses, [A Dutch court rules that Shell must step up its climate change efforts](#), N.Y. Times (May 26, 2021); Isabella Kaminskion, [Legal Action Against Shell Board Previews Wave of Lawsuits Against Company Directors](#), DeSmog (March 15, 2022)

²⁷ See, e.g. [Activists behind Shell climate verdict target 30 multinationals](#), Reuters (January 13, 2022); [Statement from Australia's Retail Employees Superannuation Trust \(Rest\)](#) (November 2, 2020) (to settle litigation brought by a beneficiary over its handling of climate change risk)

²⁸ See WGIII AR6 SPM, *supra* note 6, at p59

²⁹ 29 CFR Sec 2550.404a-(1)(b)(1)

³⁰ See, e.g., Bevis Longstreth and Connor Chung, [Finance Must Combat Climate Change – or Else](#), Project Syndicate (Nov. 9, 2021) ("In other words, the fossil-fuel industry's business model is now so misaligned with scientific and

*Climate Change*³¹ — the third part of the Sixth Assessment Report — affirmed that fossil fuels remain the predominant driver of the climate crisis and the accelerated phaseout of all fossil fuels must be the centerpiece of a global climate mitigation strategy. The IPCC notes that ambitious pathways limiting global atmospheric temperature rise to 1.5°C could require as much as a 100% decline in the use of coal, and 90% declines in the use of oil and gas, by 2050.³² The IPCC acknowledges that "Finance for new fossil fuel-related assets lock in future GHG emissions that may be inconsistent with remaining carbon budgets and...with emission pathways to reach the Paris Agreement goals."³³ In response to these findings, UN Secretary General António Guterres has clearly stated that "our continued reliance on fossil fuels makes the global economy and energy security vulnerable to geopolitical shocks and crises," and "[i]nvesting in new fossil fuels infrastructure is moral and economic madness."³⁴ Given the growing financial risk associated with fossil fuel investments and the clarity of climate science indicating the necessity to rapidly shift away from fossil fuels in order to avoid surpassing 1.5°C of warming, beneficiaries should be equipped with information that allows them to assess whether the fiduciaries have fulfilled their duty of prudence with respect to any fossil fuel investments.

The disclosure of such information must address both public and private equity investments, especially given the important role of private equity in funding the fossil fuel industry.³⁵ The disclosure must contain sufficient information to enable both beneficiaries and those with oversight responsibilities to evaluate the pension fund's management of climate risk and the portfolio's exposure to risk.

We suggest this disclosure be based on the Recommendations of the Task Force on Climate-related Financial Disclosures (TCFD), and specifically the guidance developed for asset owners.³⁶ The TCFD framework addresses the disclosure of climate-risk governance, strategy, risk management, and metrics and targets. It is now a widely recognized disclosure standard, as evidenced by its endorsement from 3,000 institutions,³⁷ and it is due to be integrated into the new SEC Climate Disclosure Rules. For this reason, we believe it is entirely reasonable for the EBSA to base its disclosure requests on the TCFD, as it will be of minimal burden to pension funds given their existing familiarity with the framework. In particular, we emphasize the importance of pension funds disclosing the GHG emissions for the assets they own, so-called Scope 3 emissions.

4. Should EBSA use Form 5500 Annual Return/Report ("Form 5500") to collect data on climate-related financial risk to pension plans? For example, EBSA could add questions to the Form 5500 to collect data on climate-related financial risks to retirement plans and their service providers. For instance, the Form 5500 could try to collect 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, and whether and how plans have factored

financial reality that betting on these companies... is not just misguided. It is negligently wrong as a matter of law.")

³¹ IPCC, [Climate Change 2022: Mitigation of Climate Change](#) (Working Group III contribution to the Sixth Assessment Report) (April 2022)

³² See WGIII AR6 SPM, *supra* note 6, at C.3.2, SPM-32

³³ Silvia Kreibiehl, Tae Yong Jung et al, [Investment and Finance](#), 15.3.3 at 15-27 in IPCC, *Climate Change 2022: Mitigation of Climate Change*

³⁴ [António Guterres \(UN Secretary-General\) to the press conference launch of IPCC report](#) (February 28, 2022), [Secretary-General Warns of Climate Emergency, Calling Intergovernmental Panel's Report 'a File of Shame', While Saying Leaders 'Are Lying', Fuelling Flames](#) (April 4, 2022)

³⁵ [Private Equity Funds, Sensing Profit in Tumult, Are Propping Up Oil](#), *The New York Times* (October 13, 2021)

³⁶ Task Force on Climate-related Financial Disclosures, [Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures](#), p37-43

³⁷ Task Force on Climate-related Financial Disclosures, [TCFD Supporters around the world](#) (accessed March 14, 2022)

climate-related financial risk into their analysis of individual investments or investment courses of action. Similarly, the Form 5500 could try to collect data on whether, and how, plan fiduciaries voted on proxy proposals involving climate-related financial risk. If you think EBSA should use the Form 5500 to collect this, or similar, information, please specify the data that should be collected, how it should be presented as part of the Form 5500, and how collecting that data or information would help protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.

The use of an existing disclosure report such as Form 5500 is desirable, and we could foresee such questions and requests being added to Schedule H or Schedule I or as a new Schedule. However, we also note that Form 5500 is currently not designed to report on specific financial risks. For this reason, it may be appropriate to create a supplementary form that is appended to Form 5500 and is in line with the TCFD disclosure framework recommended above. The location of this supplemental information could be provided in Form 5500 as an additional line item.

We support the disclosure of how plan fiduciaries have voted on proxy proposals involving climate-related financial risk, and an explanation of why they have voted against such a proposal if that is the case. The collection of this information will be critical in allowing beneficiaries' to assess whether and how fiduciaries are fulfilling their fiduciary responsibilities.

It is important to recognize that there are other systematic risks that pension fund fiduciaries and beneficiaries should be mindful of, and in the future, we encourage your agency to incorporate other ESG risk disclosures into Form 5500 or another reporting framework. These might include risks that are of particular importance to beneficiaries, such as human rights risks including labor and nature-related risks such as impacts on water scarcity and food security.

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?

As suggested above, we suggest pension plans publicly report on their management of climate-related financial risk using the TCFD framework. It is particularly important that plans are transparent about what metrics and targets they have set to address climate-related risks in their portfolio, and to report progress on that basis. The Target Setting Protocol³⁸ of the UN-convened Net Zero Asset Owner Alliance may also be a helpful reference in this effort.

7. Changes in the financial markets, particularly an increased number of metrics and tools allowing for additional analyses of investments, give ERISA plan fiduciaries more information on which to make decisions on climate-related financial risk factors in evaluating the merits of competing investment choices. Some private sector sources are developing structured ESG research data for evaluating corporate performance. What are the best sources of information for plan fiduciaries to utilize in evaluating such risks with respect to plan investments? Are there difficulties or challenges in obtaining such information or comparing information from different sources? If so, what is the source or sources of those difficulties or challenges, and what are the solutions?

³⁸ United Nations Environment Programme (2022): [UN-convened Net-Zero Asset Owner Alliance: Target Setting Protocol—Second edition](#)

As identified by the SEC Climate Disclosure Rule, there is an increasing risk of greenwashing by companies to portray their business activities as low-carbon, when in fact they are not. It is critical that any information sources used provide an accurate assessment of a company's climate-risk profile. While we are not endorsing a specific source of information on ESG risks to tackle this rise in greenwashing, we take this opportunity to flag certain areas that both plan fiduciaries and their beneficiaries should be particularly attentive to.

- 1) Scope 3 emissions: ERISA plan fiduciaries must be extremely careful to ensure that their investee companies are accounting for their Scope 3 emissions in their climate-risk disclosures. This is particularly relevant for financial institutions, fossil fuel-related companies, car companies, and consumer goods companies, as Scope 3 emissions constitute the majority of their emissions.
- 2) Use of offsets: given significant concerns with offset credibility and their use to avoid direct emissions reductions, it is important that company reporting distinguish between reliance on offsets and absolute emissions reductions, as proposed by the SEC Climate Disclosure rules.
- 3) Use of removals: companies are also increasingly incorporating carbon removal technologies into their climate action plans, even before such technologies have been proven to work. It is therefore important to ensure disaggregated reporting of absolute emissions and removals, and to assess the costs and feasibility of an investee company's reliance on removal technologies.
- 4) Uncertainty of carbon capture and storage: carbon capture and storage is increasingly relied upon in corporate proposals to reduce emissions, despite their poor track record of expense and underperformance. Many of the underground storage sites are not properly monitored, verified, and reported. Claims around carbon capture and storage, especially prospective or future looking claims, should be viewed with extreme skepticism.³⁹
- 5) Negative externalities: certain climate mitigation measures, such as offsets and removal technologies, are associated with various negative externalities, such as adverse impacts on air quality, water availability/ quality, food security, and ecosystem integrity, as well as violations of rights to land tenure/use/access. In particular, the protection of land rights has been recognized as an important component of an effective climate mitigation approach. It is therefore important that these negative impacts be considered in evaluating climate-related financial risks and to disclose such impacts to beneficiaries.

11. What policies and practices do managers of sovereign wealth funds or public pensions, in the United States or overseas, follow to help mitigate climate-related financial risks, and are these policies and practices significantly different from the policies and practices of managers of ERISA-covered plans? Which of these policies and practices could the Department or the FRTIB incorporate into their obligations under FERSA?

Given the immense climate-related financial risks associated with fossil fuels, there is a growing movement to divest from fossil fuels and shift investments to renewable energy. Institutions representing an unprecedented total of over \$40 trillion worth of assets have now committed to some form of fossil fuel divestment, a figure that's higher than the annual GDP of the United States and China combined.⁴⁰ At the state level, last year, the state of Maine became the first state in the country to

³⁹ See Center for International Environmental Law, [Confronting the Myth of Carbon-Free Fossil Fuels: Why Carbon Capture Is Not a Climate Solution](#) (2021)

⁴⁰ Global Fossil Fuel Commitments Database, [Divestmentdatabase.org](#) (Accessed April 6, 2022). See also Stand.Earth et al, [Invest Divest 2021: A Decade of Progress Towards a Just Climate Future](#) (October 2021)

commit to fossil fuel divestment through legislation.⁴¹ Fossil fuel divestment has also been demonstrated in New York City,⁴² New York State,⁴³ Minnesota,⁴⁴ Washington DC,⁴⁵ and the city of Baltimore,⁴⁶ as well as internationally by some of the largest private pension funds.⁴⁷

While the fossil fuel industry touts its net zero by 2050 plans and investments in a clean energy transition, the reality shows that there is very little willingness by, for example the big oil, gas and coal companies (“Carbon Majors”), to shift away from its business as usual focus on fossil fuels. The limits of engagement have been illustrated by the Climate Action 100+ initiative, which is backed by 700 institutional investors with \$68 trillion in assets. After several years of engagement, less than 12% of their 166 focus companies currently have adequate short-term emissions reduction targets or decarbonisation strategies, while none have aligned their capital expenditure with a 1.5 degree future or produced financial statements that reflect relevant climate risks.⁴⁸ These companies account for up to 80 percent of corporate industrial greenhouse gas emissions.⁴⁹ Academic research has found no evidence to date that engagement (without divestment) has pushed fossil fuel companies to reduce their own transition and physical risks.⁵⁰ A policy of unquestioning shareholder engagement also presents a significant fiduciary danger, as it requires continued exposure to an industry that faces dire long-term risk. By comparison, recognition of the inadequacy of shareholder engagement with fossil fuel companies was a major factor in the New York State’s divestment decisions.⁵¹ It is for these reasons that an increasing number of financial institutions are choosing to divest over engagement with fossil fuel companies as a way to satisfy its fiduciary duties.

The actions taken by these peer funds should inform trustees and fiduciaries of ERISA-covered plans as to how to fulfill their duty of prudence. Given the scale and accelerating nature of fossil fuel divestment, EBSA should consider incorporating a requirement for fund managers to consider divestment or no-investment options with respect to fossil fuels in evaluating the prudence of an investment strategy.

⁴¹ [New Maine law marks U.S. first on fossil fuel divestment](#), Reuters (June 17, 2021)

⁴² Office of the City of New York, [Mayor de Blasio, Comptroller Stringer, and Trustees Announce Estimated \\$4 Billion Divestment from Fossil Fuels](#) (January 25, 2021)

⁴³ [New York’s \\$226 Billion Pension Fund Is Dropping Fossil Fuel Stocks](#), The New York Times (December 9, 2020); Press Release, Office of the New York State Comptroller, [New York State Pension Fund Sets 2040 Net Zero Carbon Emissions Target](#) (December 9, 2020)

⁴⁴ [Minnesota State Board votes to divest from thermal coal firms](#), Pensions & Investments (June 3, 2020)

⁴⁵ [Washington D.C. Pension Fund Announces Full Fossil Fuel Divestment](#), Inside Climate News (June 6, 2016)

⁴⁶ [City Councilman: Baltimore puts its money where its mouth is, passing bill to divest pension funds from fossil fuels](#), Commentary, The Baltimore Sun (July 26, 2021)

⁴⁷ See, e.g. [One of world’s biggest pension funds to stop investing in fossil fuels](#), The Guardian (October 26, 2021)

⁴⁸ Alex Wilks, The Sunrise Project, [Benchmarks show company climate inaction: why haven’t CA100+ investors achieved more?](#) (March 30, 2022)

⁴⁹ Climate Action 100+, [Companies](#) (accessed April 7, 2022)

⁵⁰ See, e.g., Ellen Quigley, Emily Bugden, and Anthony Odgers, *Divestment: Advantages and Disadvantages for the University of Cambridge* 110 (2021), <https://ssrn.com/abstract=3849513> (“By any threshold one could devise as to the efficacy of a tactic for action on climate change and other social and environmental issues, it would be difficult to deem shareholder engagement a success.”)

⁵¹ See, e.g., Anne Barnard, [New York’s \\$226 Billion Pension Fund Is Dropping Fossil Fuel Stocks](#) (2021) (“But Mr. DiNapoli, who also long advocated for engagement over divestment, said a turning point for him came with what he called ExxonMobil’s “disappointing, frustrating” rebuffs in recent years to the New York State fund, California’s teachers’ pension fund and other shareholders that have pushed for a more environmentally sustainable business plan.”)

21. Is there a need to educate participants, especially those responsible for making their own investment decisions in participant- directed individual account plans, about climate-related financial risks? If yes, what role, if any, should EBSA play in sponsoring and providing such education? In addition, what efforts, if any, should EBSA make to coordinate with the Securities and Exchange Commission on its efforts to inform and protect investors, especially individual investors such as plan participants, from potentially misleading statements about fund adherence to policies that address climate-related financial risk (often referred to as “greenwashing”)? (see <https://www.sec.gov/files/esg-risk-alert.pdf>)

Yes, we support the EBSA in assisting plan participants to better understand climate-related financial risks, including assessing the management of climate-related financial risks by fiduciaries. At present, many so-called “ESG” funds or “Low Carbon” funds have questionable sustainability profiles, and therefore such labels can easily mislead beneficiaries as to the qualities of the fund. The data that is being proposed to be collected will help to elucidate how funds are managing climate risks. However, the EBSA can assist in this further by educating beneficiaries as to how to navigate that information and discuss these matters with their fiduciaries. For example, beneficiaries could ask their fiduciaries whether a fund’s climate impacts take into account the investee company’s Scope 3 emissions. EBSA should also monitor funds’ use of these sustainability labels to ensure that they are accurately representing the investment approach.

For any questions, please contact: Hana Heineken, Senior Attorney, CIEL (hheineken@ciel.org)

The Center for International Environmental Law (CIEL) is a nonprofit 501(c)(3) legal organization with offices in Washington DC and Geneva, Switzerland. Since 1989, CIEL has used the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. We have significant expertise on the subject of climate change and fiduciary duty, and have issued several groundbreaking reports on this matter, such as the [Trillion Dollar Transformation: Fiduciary Duty, Divestment, and Fossil Fuels in an Era of Climate Risk](#). More information is available at www.ciel.org.