



December 13, 2021

VIA ELECTRONIC SUBMISSION

Mr. Ali Khawar  
Acting Assistant Secretary of Labor  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)**

Dear Acting Assistant Secretary Khawar:

The American Investment Council (“AIC” or “we”, as applicable) is pleased to submit this letter in response to the Department of Labor’s (the “Department”) proposed rule on, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights” (the “Proposed Rule”). We write to provide comments with respect to the Proposed Rule, including how fiduciaries consider environmental, social, and governance (“ESG”) investment factors in compliance with the duty of loyalty imposed by Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). As discussed below, we appreciate the Department’s efforts to revise the regulation regarding “Financial Factors in Selecting Plan Investments,” which was finalized in 2020 (the “2020 Rule”).

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investments. In this effort, the AIC develops, analyzes, and distributes information about the private equity, growth capital and private credit industry and its contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC’s members are the world’s leading private equity, growth capital and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and its members, please visit our website at <http://www.investmentcouncil.org>.

The preamble to the Proposed Rule largely focuses on issues related to ESG investing and shareholder engagement, but the Proposed Rule is relevant to all facets of the fiduciary investment decision-making process. Therefore, we encourage the Department to retain aspects of the Proposed Rule acknowledging that fiduciaries are in the best position to determine what factors and considerations are economically relevant to a

particular investment. As we have previously commented, nothing in ERISA authorizes the Department to endorse one investment strategy over another.<sup>1</sup>

In this regard, the Department should not express a preference for either passively or actively managed investment options. Instead, the Department should make it clear that investment strategies must be evaluated in the context of overall expected net investment performance and other considerations (e.g., diversification). Similarly, the final rule should continue to ensure that fiduciaries have the latitude to consider a broad range of asset classes in order to improve participant outcomes. Recent research supports this approach. For example, the Georgetown Center of Retirement Initiatives recently issued a report concluding that alternative asset classes could improve 401(k) investments performance.<sup>2</sup> The Urban Institute also recently concluded that private equity investments could boost average 401(k) account balances by nearly 10% over the course of a career.<sup>3</sup>

Although members of the AIC have a diversity of views with respect to ESG investing, we generally view the Proposed Rule as an improvement because it corrects for some of the real and/or perceived legal barriers to ESG investing created by the 2020 Rule. However, it is important for a final rule not to overcorrect for the 2020 Rule and give the impression that the Department is anything other than neutral with respect to ESG and other investment considerations.

We are concerned portions of the Proposed Rule could be viewed as putting a thumb on the scale in favor of ESG factors. For example, the Proposed Rule states that a prudent process “may often require an evaluation of the economic effects of climate change and other ESG factors....” It also lists a select group of factors (e.g., climate change, corporate governance, and workplace practices) the Department believes may be material to a fiduciary’s prudent risk-return analysis. We presume that it was not the Department’s intent to give the impression that the Department is directing fiduciaries to consider such factors, regardless of their economic relevance to the plan. However, that is how the Proposed Rule is being perceived by some.

We encourage the Department to make it clear in the final rule that the Department is agnostic as to which investment-related considerations are relevant and, to the extent they are relevant, how much weight to afford them. Those determinations should be made by

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<sup>1</sup> The AIC’s July 30, 2020 letter to the Department commenting on the 2020 Rule provides a robust discussion of this issue.

<sup>2</sup> Antonelli, et al., *The Evolution of Target Date Funds: Using Alternatives to Improve Retirement Plan Outcomes*, Georgetown Center for Retirement Initiatives (June 2018), available at [cri.georgetown.edu](http://cri.georgetown.edu).

<sup>3</sup> Cosic, et al., *How Might Investing in Private Equity Funds Affect Retirement Savings Accounts*, Urban Institute (Aug. 31, 2021), available at <https://www.urban.org/research/publication/how-might-investing-private-equity-funds-affect-retirement-savings-accounts>.

plan fiduciaries acting prudently and solely in the interest of participants and beneficiaries. To accomplish this, the Department could simply:

- remove the phrase “which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action” from section 2550.404a-1(b)(2)(ii)(C); and
- remove paragraphs (i), (ii), and (iii) from section 2550.404a-1(b)(4).

These minor changes would both simplify the Proposed Rule and ensure that it is viewed as a neutral application of the ERISA.

The AIC appreciates the opportunity to submit comments on the Proposed Rule and would be pleased to answer any questions you might have regarding our comments

Respectfully submitted,



Jason Mulvihill  
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American Investment Council