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May 9, 2022

Acting Assistant Secretary Ali Khawar
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave.
Washington, DC 20001

Re: Z-RIN 1210-ZA30

Dear Secretary Khawar:

The Securities Industry Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the 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”). While we understand the Department is responding to the Executive Order requiring agencies to assess whether to collect this information,² we believe the Department should focus on retirement specific aspects when looking at climate-related financial risk. Particularly, the Department should work to avoid issuing any regulatory guidance that overlaps with any SEC guidance that would be designed to protect all investors, including retirement investors.

As we explained in detail in our December 10, 2021, comment letter on the Department’s proposed ESG and proxy voting proposal,³ SIFMA believes the Department should not depart from its’ (and ERISA’s) historic emphasis on process – that ERISA’s prudence requirement centers on maintaining a prudent process in a fiduciary’s analysis of how any particular risk should be incorporated in its fiduciary decision-making. Any type of risk, including for example, climate-related financial risk, interest rate risk, or geopolitical risk, at any given time, could capture the governments or the public’s attention. A regulation that focuses on the issue of the day, rather than the process of considering relevant and material risks could harm plans by forcing fiduciaries to over-weight or under-weight some risks relative to others solely to comply with regulatory guidance.

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Executive Order 14030 on Climate-Related Financial Risk issued on May 20, 2021, 86 FR 27967 (May 25, 2021)

³ Found here: <https://www.sifma.org/resources/submissions/dol-esg-proposal/>

We have long appreciated the Department's proposed principles-based approach, and most recently the approach taken in the ESG and proxy voting proposal, but this RFI seems to depart from that sound approach. The standard the Department should use for ensuring that retirement savings are held solely for the benefit of the individual and their beneficiaries should allow flexibility for plan fiduciaries to consider the factors they deem relevant. The standard should not tip the scales in any direction, nor should it dictate to fiduciaries the risks they should or should not consider. The focus should continue to be a prudent process that is principles-based. This will provide future certainty and flexibility for fiduciaries, and the best result for plan participants and their beneficiaries.

General Questions (Questions 1-2)

The Department asks what agency actions it can take to protect retirement savings from climate-related financial risk. We believe the Department can best protect individuals in employer sponsored retirement plans by emphasizing a prudent process, and the use of knowledgeable consultants where necessary. While we understand the Administration asked the Department to consider whether climate-related risks are appropriately considered in connection with the investment of plan investments, we are concerned that a laser-focus on one type of risk will in fact hurt plans. We believe fiduciaries should be encouraged to adopt a prudent process whereby they consider ALL factors they consider relevant to their investment decisions, including climate-related risks where appropriate. To that end, we would advise against requiring consideration of climate-related risk, or any other particular risk and return factors. Which factors to consider and how to weigh various risks, returns and opportunities is all part of the investment and risk management decision-making done by investment managers and plan fiduciaries.

We would also recommend the Department consider carefully before engaging in any regulatory activity before understanding what other regulators are doing in this space since these are issues that go beyond the retirement industry. As the Department considers whether any regulatory activity is appropriate considering concerns specific to retirement plans, it will be important for it to consider what actions other regulators, both inside and outside the U.S., are taking that already impact retirement plan investors. Of particular note, on March 21, 2022, the SEC proposed over 500 pages of new disclosure requirements intended to enhance and standardize the disclosure of climate-related risks to address the needs of investors, as well as streamline the process for issuers.⁴ Regarding companies reporting outside of the US, the IFRS Foundation Trustees created the International Sustainability Standards Board (ISSB) in November 2021. The ISSB is intended to standardize climate-related risk disclosures. Creating consistency across US and international regulators would help standardize disclosures for companies operating across jurisdictions and allow for comparable disclosures for investors with global portfolios. This would protect against confusing disclosures across multiple regulators, as well as ensuring that there are not conflicting obligations for managers. Once the disclosures become more standardized, plan fiduciaries, like all other investors, will be in a better position to consider the climate-related risks, and other relevant risks, impacting their plans.

One practical and impactful step the Department could take to move the country forward on reducing climate-related financial risk would be to expand plans' ability to deliver information electronically. Providing electronic documents not only is secure and convenient for investors, but also it eliminates the production of paper and printing of documents which contributes to Co2 emissions. By expanding electronic delivery, the Department can do its part to help meaningfully limit the retirement industry's contribution to the country's carbon footprint.

⁴ SEC Release No. 33-11042

Data Collection Regarding ERISA-Covered Plans (Questions 3-6)

The Department asks whether it should collect from plans data on investments focused on climate-related financial risk, and, if so, the types of data and forms to use. We believe there are multiple steps to take before even considering whether to collect such data. There still is no agreement among researchers, investment analysts, or the various banking, securities, and international regulators regarding the definition of various terms used in the climate impact analysis space. Even once terms are agreed upon on a national and international level among the various stakeholders, we would want to understand the Department's goal in collecting such data. We question how the Department's collection of such plan data will further the best interest of plan participants and their beneficiaries, enhance participant protections, or assist in the safeguarding of plan assets. To the extent factors regarding climate-related risks are relevant to any investment option in any defined contribution plan, such factors will be disclosed in the fund documentation, consistent with the disclosure available to other investors.

We also are unclear as to why the Department would deem it appropriate to focus disproportionately on data related to climate-related financial risk when there could be many other emergent issues that a plan fiduciary may consider more urgent, such as the impact of cyberbreaches, rising inflation, the war in Ukraine, pandemic supply chain issues, and the sanctions on Russia and China. Each of these could have a more immediate impact on a retirement plan and its participants. New issues impacting fiduciaries risk and return calculations constantly emerge and evolve. Plan fiduciaries need to have the flexibility to address these issues based on their judgment, without fear that a regulator or regulation requires them to weight or discount any issue differently.

In addition, we are unsure as to the purpose of providing such data either publicly or for participants. There are many risks for fiduciaries and participants to consider and fiduciaries and participants have the tools to consider these risks. It would be a disservice to plan fiduciaries and participants to create a misleading materiality hierarchy. There is no evidence that plan fiduciaries have failed to follow a prudent process in considering risk, and we urge the Department not to attempt to solve a problem that does not exist.

Given the lack of clarity noted above, it is not possible to assess whether Form 5500 would be an appropriate means of collecting data. However, we have significant doubts that Form 5500 would be an appropriate place to collect data related to climate-related financial risks or a plan fiduciaries' actions with respect to it. To the extent the Department believes that Form 5500 should be used for these purposes, we request that it first engage with the industry on specific data points so that they can be fully explored and considered prior to making any changes to the Form.

ERISA Fiduciary Issues (Questions 7-8)

The Department asks about sources of information for plan fiduciaries to use in evaluating climate-related financial risk with respect to plan investments. Currently, there is no such reliable tool. While there are a variety of agencies and independent organizations looking for a standard method of evaluation, there is no consistent standard with consistent terms or analysis. This is an evolving area and appears it will remain this way for the near future. Nevertheless, this is not an issue unique to retirement plans and does not require a solution unique to retirement plans.

Currently there are groups, such as the Task Force on Climate-Related Financial Disclosures,⁵ which was created by the Financial Stability Board, that are looking to create a means for such an analysis, but these are still in development. As the SEC works through its own recent proposal, we anticipate it will ultimately adopt a broadly applicable set of standards that will benefit retirement plans as well as other

⁵ <https://www.fsb-tcfd.org/>

market participants. We urge the Department to defer to these other regulators and not to create a competing set of standards.

On the Department's question about climate-related financial risk and guaranteed lifetime income products, we do not believe it is appropriate for the Department to utilize this forum to address lifetime income products in plans. However, should the Department want to consider how enhancing lifetime income products in retirement plans potentially may assist in providing protections for participants' retirement benefits, it should be proposed as a stand-alone proposal with its own notice and comment period.

FERSA (Questions 9-18)

The Department asks a variety of questions about the actions EBSA should take in light of their role under the Federal Employees Retirement System Act of 1986 ("FERSA") relating to climate-related financial risks. We believe that many of the ideas the Department proposes would not be appropriate. We do not believe it is appropriate for the Department to consider adding an audit program under FERSA, since we do not believe the Department can audit a specific element under a prudence standard. Auditing for a specific element is inconsistent with the concept that a fiduciary should be balancing and reviewing all factors it determines are relevant. Rather than seeking to assess a plan fiduciary's judgment, the Department should focus, as it always has done, on assuring the plan fiduciary has a prudent process.

The Department asks specifically about the policies and practices used by sovereign wealth funds or public pensions in the US or overseas; however, currently there are no such uniform standards. As mentioned earlier, there are multiple US and international groups looking at creating uniform terminology and assessment tools. Consistent regulatory standards should be the goal, so the Department should allow the organizations with authority broader than retirement accounts to take the first steps – and then act only to the extent the broadly applicable standards do not address some issue, if any exists, unique to retirement plans.

We note also that various states and municipalities have taken radically different approaches in this area. While some are quite concerned about climate-related financial risk, others are more concerned about the economic effects of greater regulation of the oil and gas industry. Because of these different viewpoints, it is important that the Department and plan fiduciaries focus on assuring investment decisions are made pursuant to a prudent process and that the Department engage in no regulatory activity that would make it more difficult for plan fiduciaries to review and consider investment risks using their best judgment.

Miscellaneous Questions (19-22)

The Department asks about accounts that are not covered by ERISA. As we have said in other contexts, and as the 5th Circuit Court of Appeals agreed,⁶ Congress intentionally did not authorize the Department to impose fiduciary standards on IRAs. Accordingly, we urge the Department to allow the SEC, as it has always done, to address these individual retail-based accounts together with all other similar accounts. The risks impacting IRA investors are not materially different from those impacting other retail investors. Accordingly, the SEC, whose mission is to protect all investors, maintain fair, orderly, and efficient markets, and to facilitate capital formation, is particularly well placed to evaluate all investors' needs. Ultimately, IRA investors can, just like other individual investors, find and receive information about climate-related financial risk, and other risks, and can consider them if they choose in making IRA

⁶ *Chamber of Commerce v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018)

investment decisions. Alternatively, IRA investors, just like other individual investors, can seek the assistance of a professional in making investment decision, who can educate or advise the individual about climate-related financial risk and other risks. IRA investors have the same risks and ability to mitigate those risks as other retail investors. The Department should not add another layer of regulation that could inadvertently disadvantage IRA investors relative to other investors.

The Department asks about standards to protect these individuals invested in non-ERISA accounts. There are federal standards including the newly enacted Regulation Best Interest.⁷ If there are legal or regulatory impediments, the SEC will work on addressing those impediments. In fact, IRA owners might be more effectively able to protect against any perceived risks than participants in employer sponsored plans, because they are not limited in their menu of investment options.

We would also suggest that adding any new legal standards or requirements could chill the addition of climate-related financial risk mitigating options within a financial institution's menu. If the goal is to encourage more individuals to consider these particular factors relating to climate-related financial risk, then it would be helpful to allow flexibility for such offerings.

Finally, we strongly disagree with the Department's view that there is no prudence and loyalty protection for these individual investors. Merely because the Department does not have jurisdiction, does not mean the rules of prudence and loyalty do not exist. Not only does state law include prudence and loyalty standards, but SEC and brokerage rules do as well.

In terms of providing education materials, the SEC should be setting the standards in this space, with the Department potentially adding materials specifically targeted to retirement plan participants to the extent there are gaps. Under ERISA, a prudent fiduciary should be able to look at various sources and use the information they find most compelling. As referenced earlier, the SEC has put forth a proposal. The standard that the SEC issues will broadly impact all investors, as opposed to just the retirement investors covered under ERISA.

Conclusion

We appreciate this opportunity to provide comments to the Department on climate-related financial risks. We believe the Department should focus on ensuring that plan fiduciaries have a prudent process in place. The Department should only take any further action on climate-related financial risk if they determine there is a unique situation for retirement investors that is not covered by anticipated new regulatory action that will address all investors.

Please feel free to reach out if we can help any further.

Sincerely,

Lisa J. Bleier

Lisa J. Bleier
Managing Director, Associate General Counsel

⁷ 17 CFR Sec. 240.151-1