October 5, 2020

VIA ELECTRONIC SUBMISSION

To: Employee Benefits Security Administration, Department of Labor
Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights under the Employee Retirement Income Security Act of 1974 (RIN 1210-AB91)

The Institute for Policy Integrity ("Policy Integrity") at New York University School of Law[1] and Environmental Defense Fund ("EDF") respectfully submit the following comments to the Department of Labor ("Department") regarding a proposed rule that would limit ERISA fiduciaries' ability to vote in favor of Environmental, Social and Governance ("ESG") shareholder proposals ("Proposed Rule").[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. EDF is a non-partisan, non-governmental environmental organization representing over two million members and supporters nationwide. Since 1967, EDF has linked law, policy, science, and economics to create innovative and cost-effective solutions to today's most pressing environmental problems. Our comments are focused on how the Department's Proposed Rule would disenfranchise ERISA beneficiaries, including by eliminating opportunities for fiduciaries to vote on ESG proposals that have long-term financial benefits for ERISA plans.

The Department's Proposed Rule suffers from a number of flaws and deficiencies that, if finalized, would render it arbitrary and capricious. First, the Department provides an insufficient factual basis for the Proposed Rule. Second, it fails to provide a reasonable evidentiary basis for changing its prior position on fiduciary voting and engagement. Third, contrary to the Department's assertion that "many [ESG] proposals have little bearing on share value or other relation to plan interests,"[3] research establishes that ESG issues do have material impacts on short, medium, and long-term investments. Evidence consistently demonstrates that ESG investing is a legitimate, value-seeking strategy that often outperforms traditional peers. Fiduciary voting on ESG shareholder proposals is likely to be wealth maximizing because consideration of ESG factors can reduce institutional investors' vulnerability to systemic risk. Failure to acknowledge or consider this evidence also renders the Proposed Rule arbitrary and capricious.

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[1] This document does not purport to present New York University School of Law's views, if any.
[2] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55,219 (proposed Sept. 4, 2020) [hereinafter Proposed Rule], https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19472.pdf.
[3] *Id.* at 55,229.

Under the Administrative Procedure Act ("APA"), agencies must "examine the relevant data and articulate a satisfactory explanation for their actions, including a rational connection between the facts found and the choice made."[4] When repealing or changing an existing rule, agencies must "supply a reasoned analysis"[5] and "show that there are good reasons for the new policy."[6] The Department's Proposed Rule fails to provide sufficient factual evidence to support this new rule, and fails to provide a reasonable basis for changing its prior position on ERISA proxy voting. Additionally, as Part III shows, the Department has made conclusory assertions that are contradicted by evidence that concludes that ESG investing and ESG-related proxy voting is a legitimate strategy that can achieve superior returns and reduce systemic risks.

I. The Department Provides an Insufficient Factual Basis for the Proposed Rule.

The Proposed Rule provides no factual evidence showing that the restrictions on ERISA fiduciary voting are necessary or rational, and thus fails to "articulate a satisfactory explanation for their actions, including a rational connection between the facts found and the choice made."[7] The Department states that it is concerned that "some fiduciaries and proxy advisory firms . . . *may be acting* in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments . . . and in fact may have unnecessarily increased plan expenses."[8] But, the Department provides no concrete examples of ESG shareholder voting raising such concerns. Merely speculating that fiduciaries may be voting on ESG shareholder proposals that have no connection to the financial health of the plan is not sufficient for the purposes of notice-and-comment rulemaking under the APA.[9]

Furthermore, the Department's position that ESG proposals "likely . . . have little bearing on share value or other relation to plan interests"[10] ignores the ample existing evidence to the contrary and is unsupported in the Proposed Rule. As explained in detail below, ESG shareholder proposals contribute to and are directly related to the economic interests of beneficiaries.[11] The evidence the Department does provide is insufficient to support the Proposed Rule. Of the three sources cited for its position that ESG proposals have little bearing on share value or other plan interests, the first (in footnote 41) is an outdated U.S. Department of Labor Office of Inspector General report published in 2011, which could not

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[4] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1035 (10th Cir. 2002) (agency must examine "the relevant data" and articulate "a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").
[5] *State Farm*, 463 U.S. at 42.
[6] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).
[7] *State Farm*, 463 U.S. at 43.
[8] Proposed Rule, 85 Fed. Reg. at 55,222 (emphasis added).
[9] *State Farm*, 463 U.S. at 52 ("[T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'") (internal citations omitted).
[10] Proposed Rule, 85 Fed. Reg. at 55,229.
[11] *See* Part III.

have considered the past decade's growing body of evidence on the financial benefits of ESG considerations. The second (in footnote 81) was published by the National Association of Manufactures and its conclusions are directly contradicted by, among other evidence, the Commodity Futures Trading Commission's recent report, *Managing Climate Risk in the U.S. Financial System.*[12] The third source (in footnote 81) uses market response to SEC no-action letters as a proxy for whether shareholder proposals are harmful; the study focuses only on the short-term market impacts on individual investments, and does not contradict the widely held view that ESG shareholder proposals can have long-term financial benefits for individual investments and full portfolios.[13]

The Department's other concerns are also unsupported by sufficient evidence. The Department expresses concern that "[s]ome stakeholders believe that fiduciaries must *always* vote proxies, subject to limited exceptions, in order to fulfill their obligations under ERISA."[14] Yet, the Department cites little evidence that shows that this is an actual, ongoing source of confusion. One letter cited by the Department states that "many institutional investors *historically* interpreted SEC and Department of Labor rules . . . as requiring institutional investors to vote every share on every matter on a proxy."[15] However, this same letter also notes that this historical misconception was addressed by the SEC in 2019, in a guidance document "making clear that investment advisers do not have to vote on every matter."[16] The rest of the Department's sources fail to provide any concrete evidence that investors believe that they must always vote their shares; instead the Proposed Rule contains only generalized statements that this is the case, without providing concrete evidence or examples. The Proposed Rule is thus based on a purely speculative concern.[17]

The Department next asserts that the Proposed Rule is necessary because it has "reason to believe that responsible fiduciaries may sometimes rely on third-party advice without taking sufficient steps to ensure that the advice is impartial and rigorous."[18] The Department reaches this conclusion wholly on the basis of a 2011 Performance Audit Report,[19] which found that some fiduciaries "did not document that they monitored proxy-voting decisions."[20] However, upon review of the report when it was first issued, the Department's Employee Benefits Security Administration concluded that the record was insufficient to "justify the administrative burden and expenses that would be imposed on

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[12] *See* CLIMATE-RELATED MARKET RISK SUBCOMMITTEE OF THE CFTC MARKET RISK ADVISORY COMMITTEE, MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM (2020) [hereinafter CFTC REPORT]. A copy of the Report is available on the CFTC's website at https://www.cftc.gov/About/AdvisoryCommittees/MarketRiskAdvisory/MRAC_Reports.html
[13] *See* Part III.
[14] Proposed Rule, 85 Fed. Reg. at 55,228.
[15] Business Roundtable Comment Letter on SEC Proposed Amendments to Rule 14a–8 (Feb. 3, 2020), www.sec.gov/comments/s7-22-19/s72219-6742505-207780.pdf, at 2–3.
[16] *Id*. at 3 n.3.
[17] *State Farm*, 463 U.S. at 52 ("the agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made'") (internal citations omitted).
[18] Proposed Rule, 85 Fed. Reg. at 55,228.
[19] *Id.* at 55,222 n.41.
[20] U.S. DEP'T OF LABOR, OFFICE OF INSPECTOR GENERAL, NO. 09–11–001–12–121, PROXY VOTING MAY NOT BE SOLELY FOR THE ECONOMIC BENEFIT OF RETIREMENT PLANS 2 (2011).

plans by a more expansive recordkeeping requirement."[21] The Department does not explain or provide sufficient evidence for why the onerous and expensive requirements it is imposing in the Proposed Rule are now justified.

Additionally, the Department asserts that the Proposed Rule is necessary because of the "mixed evidence on the effectiveness of shareholder voting,"[22] but fails to acknowledge the strong evidence that shareholder engagement is effective on a market-wide, long-term basis. As discussed below, the Department, without sufficient explanation, now takes the position that costs and benefits must be assessed on a vote-by-vote, investment-by-investment basis, rather than considering the financial benefits of voting to the portfolio as a whole.[23] ESG shareholder proposals address systemic risk and confer economic benefits on a portfolio-wide basis.[24] There is evidence that shareholder influence is increasing and that that shareholder voting creates accountability. Shareholder voting has "power as collective acts," and the "value of a vote goes well beyond the particular matter and particular company in ways that can broadly impact the portfolio."[25] One of the Department's own sources supports this position, noting that engagement "signals optimal governance practices *market wide*."[26] The Department provides insufficient evidence to supports its view and fails to address the breadth of evidence supporting the value and efficacy of shareholder voting and engagement, and instead, seeks to disenfranchise shareholders by imposing irrational and onerous burdens on fiduciaries that all but ensure fiduciaries will not vote on ESG proposals.

Finally, the Proposed Rule would impose new, inadequately justified documentation requirements that impose a disproportionate cost on fiduciaries' ESG proxy votes. Yet, the Department does not explain its position that costs of a more stringent recordkeeping

[21] *Id.* at 17.
[22] Proposed Rule, 85 Fed. Reg. at 55,222.
[23] *See* Part II.
[24] *See* CFTC REPORT*, supra* note 12, at 105; Emily Steinbarth & Scott Bennett, *Materiality Matters: Targeting the ESG Issues that Impact Performance*, HARV. CORP. GOV. FORUM (May 10, 2018), https://corpgov.law.harvard.edu/2018/05/10/materiality-matters-targeting-the-esg-issues-that-impact-performance/; Siobhan Riding, *Majority of ESG Funds Outperform Wider Market Over 10 Years*, FIN. TIMES, (June 14, 2020), https://www.ft.com/content/733ee6ff-446e-4f8b-86b2-19ef42da3824.
[25] Ann Lipton, *I Just Read the Department of Labor's New ERISA Voting Proposal and Boy are My Fingers Tired (from typing)*, BUS. L. PROF. BLOG (Sept. 4, 2020), https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html.
[26] Proposed Rule, 85 Fed. Reg. at 55,222 n.39 (emphasis added). Other sources cited by the Proposed Rule in footnote 39 also do not support the Proposed Rule. Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405, 407 (2017) (concluding that "shareholder activism has become more value increasing over time" and explaining that the study "document[s] how shareholder activism in the 2000s has become more associated with value improvements than in the 1980s and 1990s"); JAMES R. COPLAND, DAVID F. LARCKER & BRIAN TAYAN, THE BIG THUMB ON THE SCALE: AN OVERVIEW OF THE PROXY ADVISORY INDUSTRY (2018) (concluding that "research suggests that corporate directors pay attention to voting outcomes and, in many cases, incorporate the results of the vote in their decisions" and that "findings indicate that shareholder voting is an effective means of shaping corporate policy").

requirement for fiduciaries would be "small" or "minimal."[27] Furthermore, by preventing fiduciaries from voting on ESG proposals, the Proposed Rule will lead to foregone benefits that may have arisen from ESG-conscious voting strategies. The Department does not address this cost in its accounting of the costs and benefits of the Proposed Rulemaking. And in its discussion of the benefits of the Proposed Rule, the Department also fails to cite any concrete examples of investors or third-party proxy advisors failing to act in the economic interests of their beneficiaries. These omissions and deficiencies in the Proposed Rule's discussion of the benefits and costs of the proposal render it arbitrary and capricious.[28]

The evidentiary record shows that the animating concerns for the Department's Proposed Rule are largely speculative, unsupported by the evidence provided, and/or ignore ample contrary evidence. The Department thus fails to provide a reasonable basis for the Proposed Rule.

II. The Department Does Not Provide a Reasonable Basis for Changing its Existing Policy.

Pursuant to the APA, an agency must "supply a reasoned analysis" for repeals or changes to existing rules[29] and "show that there are good reasons for the new policy."[30] The Department's Proposed Rule fails to meet this standard for several reasons.

While repeatedly stating that the rule simply clarifies and codifies long-standing Department position, the Proposed Rule repeals without sufficient discussion the most recent previous Department guidance, published in 2016. In obfuscating this repeal, the Proposed Rule fails to acknowledge it is making a change, as a required by the APA.[31] The change in position from the previous guidance is particularly important in at least two respects.

First, the 2016 Guidance affirmatively stated that a reasonable plan fiduciary could make a general judgment that engaging in ESG strategies would add to the value of the investment.[32] This position is directly contrary to the Proposed Rule's new view that "many [ESG] proposals have little bearing on share value or other relation to plan interests."[33] The 2016 Guidance further recognized:

> the long-term financial benefits that, although difficult to quantify, can result from thoughtful shareholder engagement when voting proxies, establishing a proxy

[27] Proposed Rule, 85 Fed. Reg. at 55,232.
[28] *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) (holding failure to consider forgone benefits arbitrary).
[29] *State Farm*, 463 U.S. at 42.
[30] *Fox*, 556 U.S. at 515.
[31] *Id.* (an agency must "display awareness that it is changing position").
[32] Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 81 Fed. Reg. 95,879, 99,884 (Dec. 29, 2016).
[33] Proposed Rule, 85 Fed. Reg. at 55,229.

> voting policy, or otherwise exercising rights as shareholders. The existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on ESG issues.[34]

For example, the Department noted that 202 institutional investors or money managers representing $1.72 trillion in U.S.-domiciled assets filed or co-filed shareholder resolutions on ESG issues at publicly traded companies from 2012 through 2014.[35] The 2016 Guidance also described a number of "[o]ther market developments further substantiate the financial benefits from shareholder engagement."[36] For instance, the financial crisis of 2008 "exposed some of the pitfalls of shareholder inattention to corporate governance and highlighted the merits of shareholders taking a more engaged role with the companies."[37]

Second, the 2016 Guidance stated that any particular proxy vote would generally not incur additional expenses and that there would generally be no need to conduct a vote-by-vote cost benefit analysis.[38] Again, the Proposed Rule now takes a new position, that voting must provide benefits on a vote-by-vote, investment-by-investment basis and imposes burdensome reporting requirements that mandate that a cost-benefit analysis be completed on this basis.

The Department must acknowledge the changes being made and explain its reasoning for the proposal, including why fiduciaries must calculate the costs and benefits of individual votes. This new position would mean that long-term benefits, which are not easily quantifiable today yet crucial for retirement portfolios, will be afforded less weight. It also ignores the possibility that engagement on a portfolio-wide basis will provide economic benefits to ERISA plans. The Department fails to address these concerns and fails to acknowledge the changes being made. These deficiencies render the Proposed Rule arbitrary and capricious.

III. The Department Fails to Consider the Large and Growing Body of Evidence that ESG Strategies Are Wealth Maximizing.

The Proposed Rule does not address the significant and growing body of evidence that demonstrates that ESG factors are relevant to a legitimate, value-seeking investment strategy; in many cases, ESG investment funds have outperformed traditional peers. This evidence should lead the Department to conclude that it ought to encourage greater consideration of ESG factors, and greater participation in ESG-related shareholder voting and engagement. But at bare minimum, the failure to acknowledge or consider this information renders the Proposed Rule arbitrary and capricious.

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[34] Interpretive Bulletin Relating to the Exercise of Shareholder Rights, 81 Fed. Reg. at 95,881.
[35] *Id*.
[36] *Id*.
[37] *Id*.
[38] *Id*.

ESG investing has grown and matured significantly in recent years; investors in ESG strategies today are generally highly sophisticated and driven by expected returns. Accordingly, there is now substantial evidence that consideration of ESG factors is wealth maximizing.[39] A recent report by the Climate-Related Market Risk Subcommittee of the U.S. Commodity Futures Trading Commission ("CFTC") gathered studies on the financial performance of a variety of ESG approaches and concludes that "the physical and transition risks of climate change are increasingly material to firms, investors, and the U.S. economy."[40] Further, the Report states that "empirical evidence does not support [] collective barriers characterizing sustainable investments as inferior. Studies analyzing financial performance across a large sample of ESG approaches show that making investment decisions using ESG factors does not hurt investment performance across the sample, and, in some cases, it enhances risk-adjusted returns."[41] The Report recommended that regulators provide clarity to "confirm the appropriateness of making investment decisions using climate-related factors in retirement and pension plans covered by ERISA" and that climate-related factors—as well as ESG factors that impact risk-return more broadly—may be considered to the same extent as "traditional" financial factors, without creating additional burdens."[42] The Report is clear that federal regulators should be breaking down barriers to ESG strategies, not erecting new ones. Yet, the Department now takes a directly contrary position by concluding that "many [ESG] proposals have little bearing on share value or other relation to plan interests."[43]

Another meta-analysis of the relationship between ESG and corporate financial performance ("CFP") found that "the business case for ESG investing is empirically well founded," and that "the positive ESG impact on CFP is stable over time."[44] In June, the *Financial Times* reported that "[c]lose to six out of 10 sustainable funds delivered higher returns than equivalent conventional funds over the past decade," which "undermines claims that investing based on environmental, social and governance principles hampers performance."[45] ESG funds have similarly outperformed the market during the COVID-19 pandemic.[46]

One explanation for this phenomenon is that, for large institutional investors, diversification has strongly reduced exposure to idiosyncratic risk, and through ESG factors, investors are attempting to reduce vulnerability to systemic risk. Because the global systemic risk that climate change presents cannot be reduced through

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[39] *See* Steinbarth & Bennett, *supra* note 24; Riding, *supra* note 24; Audrey Cher, *Sustainable Funds Are Outperforming Their Peers During the Pandemic, BNP Paribas Says*, CNBC (Jun. 2, 2020), https://www.cnbc.com/2020/06/02/esg-funds-outperforming-peers-during-coronavirus-pandemic-bnp-paribas.html.
[40] CFTC REPORT*, supra* note 12, at 87.
[41] *Id. at* 105.
[42] *Id.* at 116.
[43] Proposed Rule, 85 Fed. Reg. at 55,229.
[44] Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210, 212 (2015).
[45] Riding, *supra* note 24.
[46] Madison Darbyshire, *ESG Funds Continue to Outperform Wider Market*, FIN. TIMES (APR. 3, 2020), https://www.ft.com/content/46bb05a9-23b2-4958-888a-c3e614d75199.

diversification alone, investors can vote on ESG shareholder proposals to secure their portfolios, and to signal optimal governance practices for managing systemic risk throughout the market.[47]

These systemic risks are already affecting investment portfolios. From 2015 to 2019, direct economic losses from extreme weather events in the United States have totaled more than $500 billion.[48] Even incomplete analysis, such as one conducted on 215 of the world's largest businesses, reported a total of nearly $1 trillion in potential risk from climate change, with over half of this risk "likely, very likely, or virtually certain to materialize in the short- or medium-term (around five years or earlier.)"[49] In order to adapt to these risks, companies must plan transitions that could create "major disruptions and reduced valuations for the carbon-intensive assets that underpin much of today's U.S. economy."[50] Ceres estimates that "as much as a third of all equity and fixed income assets are tied to carbon-related extraction and carbon-intensive industries," and that "between $1 trillion and $4 trillion could be removed from the global economy in fossil fuel assets alone in the next 15 years."[51] Fiduciary voting on ESG proposals can help protect ERISA beneficiaries from these risks by pushing companies to properly account for the risks associated with transitioning to a net-zero carbon economy.

Fiduciaries are already obligated to focus on the substance of investments, and to consider all material risks, including systemic risks. The Proposed Rule alleges that the growing emphasis on ESG initiatives is unrelated to investors' fiduciary duties, but the Department provides no evidentiary support for this statement. An overwhelming majority of asset managers polled in 2018 described their motivations for incorporating ESG as the desire to improve returns and minimize risk, as well as adhering to their duties as fiduciaries.[52] The Department's Proposed Rule impairs fiduciaries' ability to adhere to these duties, because its restrictions on proxy voting increase the cost of participating in systemic risk management.

In short, the Proposed Rule does not acknowledge the substantial evidence indicating that ESG initiatives are relevant to short- and long-term share value. Failure to acknowledge the substantial evidence that ESG investing and shareholder engagement is a legitimate value-seeking strategy, and in fact, often outperforms its traditional peers renders the Proposed Rule arbitrary and capricious.

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[47] Miguel A. Centeno et al., *The Emergence of Global Systemic Risk*, 41 ANN. REV. SOCIOL. 65 (2015), https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-073014-112317.
[48] Veena Ramani, *Addressing Climate Change as a Systemic Risk*, CERES (June 1, 2020), https://www.ceres.org/accelerator/regulating-climate-financial-risk.
[49] CDP, *World's Biggest Companies Face $1 Trillion in Climate Change Risks* (Jun. 4, 2019), https://www.cdp.net/en/articles/media/worlds-biggest-companies-face-1-trillion-in-climate-change-risks.
[50] Ceres, Comment Letter on Proposed Rule for Financial Factors in Selecting Plan Investments (July 30, 2020).
[51] *Id.*; *see also* Ramani, *supra* 48; J.F. Mercure, et al., *Macroeconomic Impact of Stranded Fossil Fuel Assets*, 8 NATURE CLIMATE CHANGE 588 (2018).
[52] Press Release, US SIF: The Forum for Sustainable and Responsible Investment, Statement on Department of Labor Rulemaking Related to ERISA and ESG Considerations (Jun. 24, 2020), https://www.ussif.org/blog_home.asp?Display=141.

Conclusion

In sum, the Department has failed to provide a sufficient factual basis for the Proposed Rule or a reasonable basis for changing its prior position. Additionally, the Department has failed to consider the substantial body of evidence which shows that ESG strategies, including ESG-related shareholder engagement, provide strong returns and risk reduction benefits. Contrary to the Department's claims and the Proposed Rule, fiduciaries should be encouraged to participate in ESG proxy voting in light of the potential financial gains for their beneficiaries, rather than discouraged. For all of the foregoing reasons, the Proposed Rule should not be finalized and should be deemed arbitrary and capricious if finalized in its current form.

Respectfully submitted,

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