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July 29, 2020

Employee Benefits Security Administration, Department of Labor
Attention: RIN 1210-AB95; Financial Factors in Selecting Plan Investments Proposed Regulation
200 Constitution Avenue NW
Room N-5655
Washington, DC 20210

RE: RIN 1210-AB95; Comments on Proposed Rule on Financial Factors in Selecting Plan Investments

These comments are submitted on behalf of the Northwest Environmental Defense Center (NEDC), concerning the proposed rule on financial factors in selecting plan investments. NEDC has serious concerns about the potential negative impact the rule will have on future retirees, our national security interests, and tax-privileged retirement saving.

NEDC is an independent, nonprofit environmental organization established in 1969 by a group of professors, law students, and attorney alumni at Lewis & Clark Law School. The organization's members include citizens, attorneys, law students, and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy, and litigation independently and in conjunction with other environmental groups.

DISCUSSION

The proposed rule hurts future retirees while hindering American innovation and leadership to address the climate change crisis. It is outdated and does not incorporate commonly accepted advancements in finance or scientific understanding to protect long term investors. This problematic rule undermines ERISA's primary objective, to protect employee pensions and retirement savings plans, for four primary reasons:

1) The rule fails to consider how the total and comprehensive long-term environmental impacts of investments materially harms and imperils future retirees, especially those who do not plan to retire for several decades.

2) Every branch of government has a duty and obligation to protect US citizens from excessive threats to national security, to work in unison with other branches of government to protect national security interests, and to mitigate factors that undermine US sovereignty. The rule would place US national security assets and interests in continued and increased peril by diverting significant investment away from considering climate change impact, a well-established threat to global stability.

3) Fiduciaries should be empowered to appropriately assess and review risks and to allocate investments according to the best interest of beneficiaries. This process should be driven by scientific analysis and modernized financial forecasts, unhindered by counterproductive government interference that overinflates investments which are less beneficial in the long-term and may undervalue strategies that are more beneficial in the long-term. The proposed rule also creates burdensome administrative costs and liabilities that undercut the value of investments for plan participants.

4) This proposed rule will cause U.S. financial regulations to fall behind other jurisdictions, which risks putting investors and American workers at a competitive disadvantage.

Instead of looking backward into the past, I urge the Employee Benefits Security Administration and the Department of Labor to consider the pending catastrophic impact and broad scope of climate change. For our nation and our investments to remain competitive we must adapt. Change must happen to ensure a future that is worthy of the hard work and sacrifice retirement investing demands. It is absolutely essential for the USA to shift toward industry, infrastructure, and innovation that takes a proactive approach to mitigating climate change. This shifts the balance of what is a prudent and reasonable investment, particularly in long-term contexts, towards a more complex and nuanced approach that is problematically precluded and/or strongly discouraged by the proposed rule. Instead of being disregarded and marginalized, Environmental, Social, and Governance ("ESG") factors should be standardized to improve consistency, reduce administrative burden, and enable quality modernized financial analysis for pension plans covered under ERISA, as ESGs are an increasingly recognized to be an important component of the contemporary understanding of fiduciary duty.

I. The Proposed Rule Fails to Protect the Comprehensive Best Interests of Long-term Investors by Under-Evaluating Externalities Currently Existing in the Marketplace.

> "Climate change presents real financial risks to our economy, putting millions of lives and livelihoods at risk. This is not a political issue. It's a scientific issue, it's a human issue, and it's a financial issue. Financial regulators must incorporate climate change across their mandate, and protect this country from mounting risk."

- Bob Inglis[1]

Historically, the basic and simplified definition of a prudent investment has been one which most likely results in the desired financial returns. This remains a solid rudimentary foundation on which to make sound investment decisions. However, environmental factors shift and complicate this analysis considerably when looking at long-term investments, the very sort of investment that many retirement plans are necessarily planning for.

As an example, consider the meat and dairy industry in California, which consumes 47% of the state's water footprint.[2] California is also particularly vulnerable to water-supply constraints.[3] On average, a single gallon of milk takes as much water to produce as taking 27 typical showers.[4] Not eating a pound of beef saves more water than not showering for six months.[5] One highly effective way to conserve water is to transition from water intensive cattle-produced dairy to plant-based dairy alternatives, which are often much more efficient with water use. For this reason, and many others, market demand for plant-based dairy alternatives is booming. Additionally, the meat and dairy industries are heavily subsidized by problematic government policies which may not be prudent to depend on as the public becomes less supportive of corporate farming subsidies. Production of animal food products is estimated to

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[1] *40 Investors With Nearly $1 Trillion Join Other Leaders to Urge U.S. Financial Regulators to Act on Climate Change as a Systemic Financial Risk*, CERES (July 21, 2020), https://www.ceres.org/news-center/press-releases/40-investors-nearly-1-trillion-join-other-leaders-urge-us-financial.
[2] Julian Fulton, Heather Cooley, & Peter Gleick, *California's Water Footprint*, PACIFIC INST. (Dec. 2012), https://pacinst.org/wp-content/uploads/2012/12/ca_ftprint_full_report3.pdf.
[3] *See, e.g.*, *California Drought Early Warning System*, NAT'L INTEGRATED DROUGHT INFO. SYS., https://www.drought.gov/drought/dews/california ("Drought in California is a common occurrence that can last for multiple years").
[4] *Fight Climate Change with Diet Change*, FACTORY FARMING AWARENESS COALITION (Updated 2018), https://veganoutreach.org/wp-content/uploads/FC.pdf.

[5] *Fight Climate Change with Diet Change*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, https://www.peta.org/features/fight-climate-change-with-diet-change/.

generate up to 78% of greenhouse gas emissions generated from agriculture, making them a serious cause for concern in terms of climate impact.[6] Analysis of purely financial returns overvalues an investment in dairy from the perspective of a long-term investor and might undervalue investments in a plant-based alternative, assuming that a safe and stable water supply remains an important interest of future retirees and consumers.

The plant-based milk market is expected to reach 21.52 billion dollars by 2024.[7] The industry had an estimated value of 11.9 billion dollars in 2017.[8] The U.S. National Library of Medicine estimates that 65% of people have difficulty digesting lactose after infancy and dairy consumption is associated with various other health concerns.[9] 50% of Americans are now purchasing some dairy alternatives.[10] With a surge in popularity, oat milk saw a 425% growth in the year of 2019.[11] Sale of oat milk in the USA spiked by nearly 480% for a week in March of 2020.[12] All of this results in a potentially very attractive retirement investment by balancing both the forecasted financial performance in addition to considering the environmental impact that will benefit long-term investors.

Animal agriculture provides another concerning example of inaccurate pricing and cost analysis. Farmed animals raised in concentrated animal feeding operations (CAFOs) are often

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[6] Lisa Drayer, *Change Your Diet to Combat Climate Change in 2019*, CABLE NEWS NETWORK (Updated Jan. 2, 2019 6:57 AM), https://www.cnn.com/2018/10/18/health/plant-based-diet-climate-change-food-drayer/index.html.

[7] *Global Plant Based Milk Market is Expected to Reach US$21.52 Billion in 2024, Growing at a CAGR of 10.18%*, BUS. WIRE (Mar. 5, 2020, 6:27 AM), https://www.businesswire.com/news/home/20200305005398/en/Global-Plant-Based-Milk-Market-Expected-Reach.

[8] Brian Kateman, *Non-Dairy Milk Alternatives Are Experiencing A 'Holy Cow!' Moment*, FORBES (Aug. 19, 2019, 12:15 PM), https://www.forbes.com/sites/briankateman/2019/08/19/non-dairy-milk-alternatives-are-experiencing-a-holy-cow-moment/#2394acb84c44.

[9] *Id*.

[10] *Canadian Sustainable Plant Milk Company 'Happy Planet' Donates 100,000 Servings of Food to Food Banks Each Year*, VEGCONOMIST (May 9, 2019), https://vegconomist.com/companies-and-portraits/canadian-sustainable-plant-milk-company-happy-planet-donates-100000-servings-of-food-to-food-banks-each-year/.

[11] *Id*.

[12] Anna Starostinetskaya, *US Vegan Oat Milk Sales Surge by Nearly 480 Percent in One Week*, VEG NEWS (Mar. 25, 2020), https://vegnews.com/2020/3/us-vegan-oat-milk-sales-surge-by-nearly-480-percent-in-one-week.

given a large amount of antibiotics. This rampant use of antibiotics in animal agriculture leads to antibiotic-resistant pathogens.[13] The Centers for Disease Control and Prevention (CDC) website states: "Antibiotic resistance is one of the biggest public health challenges of our time. Each year in the U.S., at least 2.8 million people get an antibiotic-resistant infection, and more than 35,000 people die."[14] Antibiotic use in animal agriculture plays a critical role in the emerging health care crisis of antibiotic-resistant strains of pathogens.[15] There is increasingly widespread recognition that routine antibiotic use in industrially raised animals is an important contributor to human infections with antibiotic-resistant bacteria.[16] These pathogens represent a critical health risk to everyone but also could substantially cut short the opportunity to benefit from a retirement plan. Dr. Margaret Chan, Director-General of the World Health Organization (WHO) stated in a keynote address in 2012:

> "Worldwide, the fact that greater quantities of antibiotics are used in healthy animals than in unhealthy humans is a cause for great concern... The pharmaceutical industry lacks incentives to bring new antimicrobials to market for many reasons, some of which fall on the shoulders of the medical and public health professions. Namely, our inability to combat the gross misuse of these medicines. From an industry perspective, why invest considerable sums of money to develop a new antimicrobial when irrational use will accelerate its ineffectiveness before the R&D investment can be recouped? A post-antibiotic era means, in effect, an end to modern medicine as we know it. Things as common as strep throat or a child's scratched knee could once again kill. Some sophisticated interventions, like hip replacements, organ transplants, cancer chemotherapy, and care of preterm infants, would become far more difficult or even too dangerous to undertake. At a time of multiple calamities in the world, we cannot allow

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[13] See, e.g., Aysha Akhtar et al., *Stress and Zoonotic Diseases*, ANIMAL LEG. DEF. FUND (June 23rd, 2020), https://aldf.org/article/stress-and-zoonotic-diseases/ (Commander of the US Public Health Service Commissioned Corps discusses risks of such zoonotic diseases from common CAFO practices during a free public awareness webinar).

[14] *Antibiotic/ Antimicrobial Resistance (AR/ AMR)*, CENTERS FOR DISEASE CONT. AND PREVENTION, https://www.cdc.gov/drugresistance/index.html.

[15] Timothy F. Landers et al., *A Review of Antibiotic Use in Food Animals: Perspective, Policy, and Potential*, 127 PUB. HEALTH REP. 4-22 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3234384/.

[16] *Id*.

> the loss of essential antimicrobials, essential cures for many millions of people, to become the next global crisis."[17]

Even if a plan beneficiary's future physical health in unaffected, an antibiotic resistant pandemic could crash markets and in turn imperil investment portfolios. Due to COVID-19 the Dow Jones Industrial Average logged the largest point drop in its 123-year history on March 9th, 2020.[18] This new record was then shattered later that week on March 12th.[19] A similar crash could occur in the future as a result of a zoonotic disease created by the unhealthy conditions in CAFOs and industry overuse of antibiotics. The health risk and financial risk of investing in animal agriculture is insufficiently factored into a financial analysis without ESG considerations.

Market hunger for products derived from cattle is also responsible for 80% of clearing in the Amazon rainforest.[20] About 200 million heads of cattle are raised within Brazil, and rainforest the size of California, Massachusetts, and New Jersey combined have been converted to cattle pasture over recent decades.[21] The Amazon produces about 20% of the world's dioxygen, essential for human life,[22] and is an important factor in regulating climate.[23] The plants

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[17] Margaret Chan, *Antimicrobial Resistance in the European Union and the World*, WHO (Mar. 14, 2012) https://www.who.int/dg/speeches/2012/amr_20120314/en/.

[18] Sean Williams, *Stock Market Crash 2020: Everything You Need to Know*, THE MOTLEY FOOL (Mar. 10, 2020), https://www.fool.com/investing/2020/03/10/stock-market-crash-2020-everything-you-need-to-kno.aspx.

[19] Sean Burch, *Black Thursday: Dow Suffers Biggest Point Drop Ever, as Disney and Apple Fall Hard*, THE WRAP (Updated Mar. 13, 2020, 1:18 PM), https://www.thewrap.com/dow-biggest-point-drop-ever-disney-apple/.

[20] Clifford Krauss, David Yaffe-Bellany, & Mariana Simões, *Why Amazon Fires Keep Raging 10 Years After a Deal to End Them*, N.Y. TIMES (Oct. 18, 2019), https://www.nytimes.com/2019/10/10/world/americas/amazon-fires-brazil-cattle.html.

[21] *Id*.

[22] Eliza Mackintosh, *The Amazon is Burning Because the World Eats so Much Meat*, CABLE NEWS NETWORK (Aug. 23, 2019), https://www.cnn.com/2019/08/23/americas/brazil-beef-amazon-rainforest-fire-intl/index.html.

[23] *Inside the Amazon*, WORLD WIDE FUND FOR NATURE, https://wwf.panda.org/knowledge_hub/where_we_work/amazon/about_the_amazon/;

themselves help regulate climate in complex and unexpected ways.[24] The Amazon rainforest itself, which generates its own weather system, might be an important weather regulator as it's vegetation discharges water into the atmosphere at an estimated 20 trillion liters per day.[25] Half or more of the rainfall over continental interiors comes from plants processing water into the atmosphere in this manner.[26] The region hosts 40% of the world's remaining rainforest, 25% of our terrestrial biodiversity, and more types of fish than any other river system.[27] Beef production also requires 20 times more land and produces 20 times more greenhouse gas emissions per gram of edible protein than crops such as lentils, beans, or peas.[28] Investing in beef or industry that supports or depends on beef production is harmful to long term interests, but that harm is not adequately considered without looking at ESG factors.

All of this makes investments in CAFOs and industry dependent on animal agriculture less prudent than their return-on-investment yields otherwise appear for future retirees under the proposed rule. Likewise, this might undervalue innovative businesses and products, like plant-based meat alternatives.

The Vital Links Between the Amazon Rainforest, Global Warming and You, WORLD WIDE FUND FOR NATURE, https://wwf.panda.org/knowledge_hub/where_we_work/amazon/about_the_amazon/why_amazon_important/.

[24] Gabriel Popkin, *Forests Emerge as a Major Overlooked Climate Factor*, QUANTA MAG. (Oct. 9, 2018), https://www.quantamagazine.org/forests-emerge-as-a-major-overlooked-climate-factor-20181009/.

[25] *Id*.

[26] *Id*.

[27] *Why the Amazon's Biodiversity is Critical for the Globe: An Interview with Thomas Lovejoy*, THE WORLD BANK (May 22, 2019), https://www.worldbank.org/en/news/feature/2019/05/22/why-the-amazons-biodiversity-is-critical-for-the-globe.

[28] Janet Ranganathan & Richard Waite, *Sustainable Diets: What You Need to Know in 12 Charts*, WORLD RES. INST. (Apr. 20, 2016), https://www.wri.org/blog/2016/04/sustainable-diets-what-you-need-know-12-charts.

Business Wire, a Berkshire Hathaway Company that focuses on press release and regulatory disclosure for investors[29], estimates that the global plant-based meat alternative market is valued at approximately 12.1 billion dollars in 2019 and is likely to reach 27.9 billion dollars by 2025, growing at a compound annual growth rate of 15.0% during this forecast period.[30] They further anticipate animal food product market disruptions from an increased demand for plant-based foods in the near future.[31] This sector of the market is an ideal place for long term investment, however part of what makes it a great investment for retirement planning is not fully factored by financial forecasts that do not consider the environmental impact that plant-based meat manufacturers help offset.

Animal agriculture is not the only industry with inaccurately reflected market costs. 100 companies cause roughly 70% of the world's greenhouse gas emissions and more than half of global industrial emissions since 1988 can be traced back to 25 corporate or state-owned entities.[32] The CDP Carbon Majors Report of 2017 notes:

> "Fossil fuels are the largest source of anthropogenic greenhouse gas emissions in the world. The fossil fuel industry and its products accounted for 91% of global industrial GHGs in 2015, and about 70% of all anthropogenic GHG emissions. If the trend in fossil fuel extraction continues over the next 28 years as it has over the previous 28, then global average temperatures would be on course to rise around 4ºC above preindustrial levels by the end of the century. This would entail substantial species extinction, large risks of regional and global food scarcity, and could cross multiple tipping points in the Earth's climate system, leading to even more severe consequences."[33]

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[29] *About Us*, BUS. WIRE, https://services.businesswire.com/about-us.
[30] *Plant-Based Meat Market, 2025*, BUS. WIRE (July 9, 2019, 4:58 AM), https://www.businesswire.com/news/home/20190709005395/en/Plant-based-Meat-Market-2025-Source-Soy-Wheat.
[31] *Id*.
[32] Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions study says*, THE GUARDIAN (July, 10th 2017), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change.

[33] Paul Griffin, *CDP Carbon Majors Report 2017*, CDP (July, 2017), https://6fefcbb86e61af1b2fc4-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772.

Without factoring in the severe and well-established impact fossil fuel has on the environment, this industry appears to be a more prudent investment opportunity than it really is from the prospective of those retiring in several decades. Likewise, investment in fossil fuel alternatives will provide systemic environmental benefits, as well as investor and consumer interest, that should be considered in deciding what is prudent.

Ignoring a systemic risk and vulnerability seriously undermines the welfare of future retirees. If other threats to pension savings were ignored, it would be considered scandalous and a disregard of the high fiduciary standards ERISA statutorily requires. It is equally improper to largely disregard climate change impact. Managing risk, including climate change impact, should be considered an essential component of fiduciary duty. Climate change is a risk to both the quality of life for future retirees and a risk to the long-term stability of every investment.

II. ESG Factors Have Substantial Interplay With National Security Interests.

> "The rising demand for resources, rapid urbanization of littoral regions, the effects of climate change, the emergence of new strains of disease, and profound cultural and demographic tensions in several regions are just some of the trends whose complex interplay may spark or exacerbate future conflicts."
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> - The Quadrennial Defense Review Report of 2010[34]

For over a decade, the national security agencies of the federal government have consistently recognized climate change as a serious threat to national security, with the Pentagon

[34] DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT (2010), https://archive.defense.gov/qdr/QDR%20as%20of%2029JAN10%201600.pdf.

publishing at least 35 documents explicitly addressing this concern.[35] Since at least 1988, the security community has been expressing increasing concern about the global security risks of climate change.[36] Climate change will result in multiple chronic conditions occurring globally and at the same time frame.[37] Food production will become more difficult, diseases will increase, clean water will become increasingly scarce, and large populations will move in search of resources as the impact of climate change becomes more acute. [38] Governments weakened by these factors foster the conditions for internal conflicts, escalating racial antagonism, and movement toward increased authoritarianism and violent extremist ideologies.[39] Managing the security impacts of climate change requires immediate measures to reduce climate-related impacts, in addition to adapting to the inevitable climate-related changes which are already taking place around the world.[40]

In contrasting the tactical outlook of climate change with the Cold War, former Chief of Staff, U.S. Army, General Gordon R. Sullivan states,

> "The situation, for much of the Cold War, was stable, and the challenge was to keep it stable, to stop the catastrophic event from happening. We spent billions on that strategy. Climate change is exactly the opposite. We have a catastrophic event that appears to be inevitable. And the challenge is to stabilize things—to stabilize carbon in the atmosphere. Back then, the challenge was to stop a particular action. Now, the challenge is to inspire a

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[35] Michelle Melton, *Climate Change and National Security, Part I: What is the Threat, When's It Coming, and How Bad Will It Be?*, LAW FARE BLOG (Nov. 19, 2018, 8 AM), https://www.lawfareblog.com/climate-change-and-national-security-part-i-what-threat-whens-it-coming-and-how-bad-will-it-be.

[36] *A Security Threat Assessment of Global Climate Change: How Likely Warming Scenarios Indicate a Catastrophic Security Future*, THE NAT'L SEC., MIL. AND INTELLIGENCE PANEL ON CLIMATE CHANGE (Feb. 2020), https://climateandsecurity.files.wordpress.com/2020/03/a-security-threat-assessment-of-climate-change.pdf.

[37] *National Security and the Threat of Climate Change*, THE CNA CORP (2007), https://www.cna.org/CNA_files/pdf/National%20Security%20and%20the%20Threat%20of%20Climate%20Change.pdf.

[38] *Id*.

[39] *Id*.

[40] *Id*.

particular action. We have to act if we're to avoid the worst effects."[41]

Without leadership and swift action to mitigate the destructive impact of climate change, American interests are currently in extreme peril of high-to-catastrophic threats to national security from plausible climate change trajectories.[42] Addressing climate change requires people to act now to redress consequences that will not occur until far into the future, which in turn requires the kind of thinking and decision making in which people often do not naturally engage.[43]

Regarding the costs of this threat, General Anthony C. "Tony" Zinni, USNC (Ret.), former Commander-in-Chief of U.S. Central Command (CENTCOM), contemplates,

> "We will pay for this one way or another. We will pay to reduce greenhouse gas emissions today, and we'll have to take an economic hit of some kind. Or we will pay the price later in military terms. And that will involve human lives. There will be a human toll. There is no way out of this that does not have real costs attached to it. That has to hit home." [44]

Regarding the pending environmental crisis Ambassador Richard Kauzlarich states "The negative consequences of continued climate change across the next century will affect security institutions and infrastructure. We must recognize the resulting dire implications for global stability. Without leadership and swift action to prepare for and prevent these scenarios,

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[41] *Id*.

[42] *A Security Threat Assessment of Global Climate Change*: *A Product of the National Security, Military and Intelligence Panel on Climate Change*, THE CENTER FOR CLIMATE & SEC. (Feb 24, 2020), https://climateandsecurity.org/a-security-threat-assessment-of-global-climate-change/.

[43] Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, https://www.lawschool.cornell.edu/research/cornell-law-review/upload/Lazarus.pdf.

[44] *A Security Threat Assessment of Global Climate Change: How Likely Warming Scenarios Indicate a Catastrophic Security Future*, THE NAT'L SEC., MIL. AND INTELLIGENCE PANEL ON CLIMATE CHANGE (Feb. 2020), https://climateandsecurity.files.wordpress.com/2020/03/a-security-threat-assessment-of-climate-change.pdf.

American interests are at risk."[45] Climate change is already impacting military assets like roadways and waterfront infrastructure.[46]

The Pentagon further strategizes that, "Climate and environmental resilience efforts span all levels and lines of effort, and are not framed as a separate program."[47] The proposed rule, which makes it more difficult for businesses and investors to respond to and address climate change, is adverse to the national security interests of the USA. In adopting this rule, the safety of future retirees is put at significantly greater risk and works directly against the warning of our top military experts. The future risk of climate change is dependent on the actions we take today.[48] I urge you to not frame ESG factors as an issue divorced from our imminent national security interests and our need to mitigate the impact of climate change, especially given the incredible impact that business and investment decisions will ultimately have on the environment in the decades ahead.

III. The Market Should be Free to Invest According to the Best Interest of Beneficiaries Using Scientific Analysis and Modernized Financial Forecasts.

U.S. Securities and Exchange Commissioner Allison Herren Lee notes that investors need consistent, reliable, and comparable disclosures of the risks and opportunities related to climate change.[49] ESG factors are often an essential part of sound investment decision making in

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[45] *A Security Threat Assessment of Global Climate Change*, THE CENTER FOR CLIMATE & SEC. (Feb. 24, 2020), https://climateandsecurity.org/a-security-threat-assessment-of-global-climate-change/.

[46] *Fourth National Climate Assessment, Chapter 16: Climate Effects on U.S. International Interests*, U.S. GLOB. CHANGE RES. PROGRAM, https://nca2018.globalchange.gov/chapter/16/.

[47] DEP'T OF DEF., REPORT ON EFFECTS OF A CHANGING CLIMATE TO THE DEPARTMENT OF DEFENSE (2019), https://climateandsecurity.files.wordpress.com/2019/01/sec_335_ndaa-report_effects_of_a_changing_climate_to_dod.pdf.

[48] *Fourth National Climate Assessment, Volume 2: Impacts, Risks, and Adaptation in the United States*, U.S. GLOB. CHANGE RES. PROGRAM, https://nca2018.globalchange.gov/.

[49] Allison Herren Lee, *"Modernizing" regulation S-K: Ignoring the Elephant in the Room*, SEC (Jan. 30, 2020), https://www.sec.gov/news/public-statement/lee-mda-2020-01-30.

modern practice. Towards that end, many large public companies now voluntarily provide some of this critical information. However, improvement in consistency and accountability would help investors make the best decisions. The better government regulation is to standardize and require disclosure on climate change impact and to allow investors, on the free market, to allocate their investments appropriately.[50]

Making the reasonable and prudent financial process of considering ESG factors more difficult and cumbersome hinders, not assists, ERISA's primary goal to protect retirement plan beneficiaries by forcing fiduciaries to invest in the dark with a competitive disadvantage relative to those who use modernized and comprehensive investment strategies. The onerous additional recordkeeping and reporting requirements alone robs a tremendous amount of value from plan beneficiaries with minimal foreseeable benefits.

One problem associated with ESG factors has been in reporting. Lacking a set standardization has led to inconsistent information being disclosed by issuer to issuer and, within one issuer, from year to year. This inconsistency and excessive complexity, exacerbated by a confusing myriad of third-party ESG firm-to-firm discrepancies, create a reasonable apprehension. [51] One law firm notes, "In our view, ESG will continue to evolve and proliferate, while also garnering the attention of both the DOL and SEC on a number of levels. ESG is, in essence, entirely fluid and will continue to present business opportunities and compliance challenges."[52] One survey shows that 45% of institutional investors feel it is difficult to measure and

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[50] *See, e.g.*, *Addressing Climate Change as a Systemic Risk, Executive Summary*, CERES https://www.ceres.org/sites/default/files/2020-05/Financial%20Regulator%20Executive%20Summary%20FINAL.pdf (Recommending that government should "Make clear that consideration of material environmental, social and governance (ESG) risk factors, such as climate change, is consistent with investor fiduciary duty.").

[51] Christine Giordano, *SEC Recommends Creating Disclosure Framework for ESG Investment*, CHIEF INV. OFF. (May 22, 2020), https://www.ai-cio.com/news/sec-recommends-creating-disclosure-framework-esg-investments/.

[52] John Manganaro, *2019 Could Be Banner Year for ESG in ERISA Plan*s, PLANSPONSOR (Jan. 16, 2019), https://www.plansponsor.com/in-depth/2019-banner-year-esg-erisa-plans/.

understand financial versus nonfinancial performance considerations when establishing ESG programs and that this factor is holding back greater adoption.[53] There is some legitimate hesitation to embracing ESGs in that corporations might be attempting to "greenwash" to enhance their appeal to prospective ESG investors.[54] Some initiatives, such as the Sustainable Stock Exchanges Initiative, are seeking to improve ESG disclosure and transparency to address these and other concerns.[55] Greater clarity is needed, both in reporting of ESG factors and fiduciary responsibilities relating to those factors.

To address this and many other concerns related to ESGs, in May 2020 the SEC Investor Advisory Committee recommended a standardized framework for ESG disclosures.[56] This is in response to the 2,300 global asset owners and managers, collectively representing over 80 trillion dollars, who have signed the United Nations Principles for Responsible Investment and committed to incorporate ESG factors into their investment decisions.[57] Anne Sheehan, formerly of the California State Teachers' Retirement system stated "the SEC is best-placed to set the framework for issuers to disclose material information upon which investors can rely to make investment and voting decisions."[58] Regarding this standardization, Anne Simpson, director of board governance and strategy at the California Public Employees Retirement System states "…we genuinely think this is both going to be a benefit for the corporate community as well as us as long-term investors."[59] Around a quarter of the largest pension funds already include a

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[53] *Id*.
[54] *Id*.
[55] *Environmental, Social, and Governance Issues in Investing*, CFA INST. (2015), https://www.cfainstitute.org/-/media/documents/article/position-paper/esg-issues-in-investing-a-guide-for-investment-professionals.ashx.
[56] *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, SEC (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf.
[57] Giordano *Supra* note 52.
[58] Giordano *Supra* note 52.
[59] Giordano *Supra* note 52.

fiduciary duty to consider climate risk in their investment decisions, with 11 of the largest leading pension funds having released public statements on fiduciary duty and climate risk.[60]

Should an ESG standard be developed by the SEC concurrent with the strict near-exclusion of ESG considerations under ERISA, those retirement plan beneficiaries will stagger even further behind other investors, both domestic and abroad, unable to benefit from this long-needed modernization of market regulation. The intent of ERISA is to protect, not to disadvantage, retirement investors. A mandate, largely, to ignore a growing and significant investment factor will only hurt those ERISA is intended to protect.

Generally speaking, fiduciaries are seasoned and dedicated professionals who dutifully manage the funds under their care. Restricting them to antiquated and increasingly outdated tools, as well as burdening them with onerous, expensive, and potentially litigious reporting requirements, is an unreasonable and unhelpful impediment to the free market that impairs their ability to function optimally. This proposed rule diminishes the value and intent of ERISA. Instead, we should welcome the SEC's lead and standardize ESGs to enable more meaningful and more consistent financial analysis.

IV. This Proposed Rule Will Cause U.S. Financial Regulations to Fall Behind Other Jurisdictions, Which Risks Putting American Interests at a Competitive Disadvantage.

As a longstanding trend, financial markets are becoming more and more interwoven in a global context. Business decisions can have large impacts, both locally and around the world. The proposed rule could potentially harm U.S. competitiveness in the global marketplace with an increasingly outdated and overly restrictive regulatory scheme. This, in turn, would be

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[60] Pavel Kirjanas et al., *Pensions in a Changing Climate, Part 2: Governance & Communications*, ASSET OWNERS DISCLOSURE PROJECT (2018), https://aodproject.net/changing-climate-part-2/.

detrimental to domestic workers and future retirees. International business cooperation, trade, and regulatory consistency helps ensure mutual prosperity and better investment outcomes.

A 2015 amendment to the South Korean National Pension Service Act requires the National Pension Service (NPS), the world's third largest fund, to account for ESG issues in investment choices or otherwise explain why not.[61] This is the opposite of the currently proposed rule for the USA. Like in the USA, practical implementation in South Korea has run into some issues with ESG factors being unsystematic.[62] However, NPS is seeking to increase overseas investments.[63] This could be a potentially excellent opportunity for sustainably-minded businesses if a consistent international framework for ESG factors could be negotiated.

The non-financial reporting directive (NFRD) of the European Union now requires that large companies disclose certain information on the way they operate and manage social and environmental challenges from 2018 onwards.[64] The NFRD covers approximately 6,000 large companies and groups across Europe and requires published reporting on environmental protection and other non-financial topics. In June of 2020, the European Securities and Markets Authority (ESMA) recommended standardizing disclosure requirements, increasing the number of companies required to report, and making efforts to ensure greater consistency.[65]

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[61] *National Pension Service Act (2015)*, SUSTAINABLE STOCK EX. INITIATIVE, https://sseinitiative.org/securities-regulator/national-pension-service-act-2015/.

[62] *Investor Obligations and Duties in Six Asian Markets*, UNEP, https://www.unepfi.org/fileadmin/documents/Investor_obligations_and_duties_in_six_asian_markets.pdf.

[63] *Korea's NPS to Raise Foreign Equity Allocation to 35% by 2025*, ASIA ASSET MGMT. (May 22, 2020), https://www.asiaasset.com/post/23404-korea-nps-0521; Edward White, *South Kora Pension Fund Turns Focus Abroad After Cleaning House*, FIN. TIMES (Aug. 19, 2019), https://www.ft.com/content/12d76fc6-bfee-11e9-89e2-41e555e96722.

[64] EUR. COMM'N, NON-FINANCIAL REPORTING, https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en.

[65] *ESMA Responds to European Commission Consultation on Revision of NFRD*, EUR. SEC. MKTS. AUTH. (June 11, 2020), https://www.esma.europa.eu/press-news/esma-news/esma-responds-european-commission-consultation-revision-nfrd.

As of May 2018, the Brazilian National Monetary Council requires that, whenever possible, pension fund asset managers should consider ESG risks as part of their investment decision making process.[66] This helped align the country with the EU and helps attract intentional liquidity into the Brazilian capital market.[67]

The United Kingdom also implemented regulations in 2018 and 2019 to further integrate ESG factors and disclosure into standard pension reporting requirements as key non-financial considerations.[68]

Most Canadian institutional investors have also adjusted their voting and engagement policies to focus more on ESG risks. In 2018, *Benefits Canada* reported, "Canadian institutional investors are measuring companies not only on their financial returns, but also on their contribution to social issues shaping business and political environments."[69] Also, as of 2016 in Ontario, "… a plan's statement of investment policies and procedures (SIPP) is required to include information as to whether environmental, social, and governance (ESG) factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated."[70]

Likewise, South Africa's Pension Funds Act states "prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term

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[66] *Brazilian Monetary Authority Approves New ESG Requirements in The Investment Rules of Occupational Pension Funds*, UNEP (July 10, 2018), https://www.unepfi.org/news/industries/investment/brazilian-monetary-authority-approves-new-esg-requirements/.

[67] *Fiduciary Duty in the 21st Century: Brazil Roadmap*, UNEP, https://www.unepfi.org/wordpress/wp-content/uploads/2016/10/Fiduciary-duty-in-the-21st-century-Brazil-roadmap.pdf.

[68] *ESG Factors Spur Changes in UK Pension Scheme Disclosure Requirements*, LANTHAM & WATKINS LLP (Aug. 2, 2019), https://www.globalelr.com/2019/08/esg-factors-spur-changes-in-uk-pension-scheme-disclosure-requirements/.

[69] *Most Canadian Institutional Investors Engaging in ESG Issues: Survey,* BEN. CAN. (Dec. 19, 2018), https://www.benefitscanada.com/news/most-canadian-institutional-investors-engaging-in-esg-issues-123391.

[70] Environmental, Social and Governance (ESG) Factors, IGN-004 (Can.) (Effective Jan. 1, 2016), http://www.fsco.gov.on.ca/en/pensions/policies/active/documents/ign-004.pdf.

performance of a fund's assets, including factors of an ESG nature".[71] In South Africa these ESG considerations were introduced in 2011 and have been incrementally strengthened since.

The UNEP also has recommended that the China Securities Regulatory Commission introduce regulation to clarify the importance of ESG factors and that a standardized set of ESG indicators would contribute useful information to Chinese and international investors.[72]

Embracing ESGs as an essential mainstream financial analysis tool and being part of the international dialogue that shapes it will strengthen the USA's market position and, in turn, help future retirees. Exclusion of this global trend harms U.S. pension plans and leaves American interests isolated out of the global regulatory dialogue. This is an important area of law and finance that the USA should take a more active part in helping to shape as part of the international securities community.

CONCLUSION

Consideration of ESG factors is quickly becoming a clear requirement for fiduciary duty. Rather than embracing this inevitable evolution in finance and working towards making ESG factors more reliable and consistent, the proposed rule evades the obligation to serve the best interests of pension plan holders. It disregards the pivotal role investment has in our shared national security interests. The rule also restrains and restricts financial professionals from best serving their clients and goes against current global investment trends. The proposed rule should

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[71] David Geral, *SA Retirement Funds Are Ahead of the Pack with ESG Investing*, BUS. DAY (Oct. 23, 2019), https://www.businesslive.co.za/bd/opinion/2019-10-23-sa-retirement-funds-are-ahead-of-the-pack-with-esg-investing/.

[72] *ESG Data in China: Recommendations for Primary ESG Indicators*, UNEP (June 12, 2019), https://www.unpri.org/fiduciary-duty/esg-data-in-china-recommendations-for-primary-esg-indicators/4345.article.

not go into effect. Instead, ESGs should become a larger part of fiduciary duty as they become more standardized and integrated as an essential component in modern risk analysis.

Thank you for your time in considering these and other concerns about the proposed rule. I appreciate your efforts and hope you will make the decision that protects the best interests of future retirees, national security, and our planet.

Sincerely,

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