



# BETTER MARKETS

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW, Washington, DC 20210

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210-AC03, 86 Fed. Reg. 57,272 (Oct. 14, 2021)

To Whom It May Concern:

Better Markets<sup>1</sup> appreciates the opportunity to comment on the above-captioned release (“Proposed Rule” or “Release”).<sup>2</sup> The Proposal Rule would amend several provisions of the Investment Duties regulation issued by the Department of Labor (“Department” or “DOL”) under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

These amendments are important and necessary, as they would help reverse the harmful impact of two rules the Department promulgated in 2020, which had the effect of inhibiting the ability of retirement plan fiduciaries to consider environmental, social, and governance (“ESG”) factors<sup>3</sup> when selecting plan investments.<sup>4</sup> The Proposal would remove those constraints and inhibitions. Specifically, it would remove any doubt that an evaluation of the effects of the ESG factors on the risks and returns of an investment may be not only permissible but affirmatively required depending on the facts and circumstances. The Proposal would also rectify the similarly

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<sup>1</sup> Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

<sup>2</sup> 86 Fed. Reg. 8938 (Feb. 10, 2021).

<sup>3</sup> The ESG factors refer to a broad array of environmental, social, and corporate governance issues and challenges our society is facing. *See generally* Stephen Hall & Jason Grimes, Better Markets Report, *What Is ESG and Why Is It So Important?* (July 29, 2021), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_White\\_Paper\\_SEC\\_Why\\_Is\\_ESG\\_Important.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_White_Paper_SEC_Why_Is_ESG_Important.pdf).

<sup>4</sup> Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020); Fiduciary Duties Regarding Proxy Voting Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020) (together, the “2020 Rules”).

chilling effect of the 2020 Rules on the role of ESG factors in the selection of qualified default investment alternatives (“QDIAs”) and on a fiduciary’s exercise of the right to vote proxies.

All of this is predicated on the basic fact, supported by a persuasive and growing body of evidence, that the ESG factors are material to the financial performance of investments and that the use of the ESG factors in selecting investments for retirement savers can improve investment value and long-term investment returns.

Accordingly, Better Markets urges the Department to finalize the Proposal, without diluting its provisions, to provide needed clarity for the benefit of fiduciaries; to serve the best financial interests of plan participants and beneficiaries; and as expressed in the Release, to better promote broader economic and societal goals relating, for example, to climate change, worker productivity, and corporate manager accountability.

## **BACKGROUND**

### **The DOL has for years worked to define the appropriate role of ESG factors under ERISA.**

ERISA establishes powerful fiduciary duties that require plan fiduciaries to act prudently, to appropriately diversify plan investments, and to act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to plan participants and beneficiaries. The DOL has for nearly 30 years grappled with the challenge of appropriately defining the role of ESG considerations in the selection of retirement plan investment options in ways that are consistent with this rigorous statutory standard.

Prior to the 2020 Rule, and principally through guidance, the Department evolved a framework for ensuring that plan fiduciaries appropriately consider ESG factors when making investment choices while always adhering to the strict prudence and loyalty requirements in ERISA. On the one hand, the DOL took the position that ERISA fiduciaries may not sacrifice investment returns or assume greater investment risks simply as a means of promoting collateral social policy goals.<sup>5</sup> At the same time, the guidance appropriately recognized that ESG issues can present material business risks, as well as opportunities, to companies, and that such economic considerations should be considered by a prudent fiduciary when evaluating the risk and return profile of alternative investments.<sup>6</sup>

### **The Trump era rules, by design and in effect, stigmatized and inhibited consideration of ESG factors by plan fiduciaries.**

The Department, under the prior administration, sought to unnecessarily and materially curtail a plan fiduciary’s consideration of the ESG factors in selecting retirement plan investment options. The first of the 2020 Rules, among other things, generally required that plan fiduciaries

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<sup>5</sup> Release at 57,273.

<sup>6</sup> *Id.* at 57,274.

consider only “*pecuniary factors*” when selecting investments.<sup>7</sup> The 2020 Rule also prohibited “adding or retaining any investment fund, product, or model portfolio as a qualified default investment alternative (QDIA) . . . if the fund, product, or model portfolio reflects non-pecuniary objectives in its investment objectives or principal investment strategies.”<sup>8</sup> Finally, the first 2020 Rule imposed onerous new conditions on consideration of the collateral or nonfinancial benefits of an investment as a “tie-breaker” among multiple investment options. Specifically, it rigidly required that plan fiduciaries find that two investment options are “*indistinguishable* based on consideration of risk and return” before permitting them to consider the non-financial benefits of the investments.<sup>9</sup>

In the second 2020 rulemaking, the Trump-era DOL also adopted provisions that chill or disfavor the exercise of proxy voting rights by plan fiduciaries, in part by belittling those rights and in part by overburdening them. For example, the rule added the gratuitous statement that the fiduciary duty to manage shareholder rights does not require voting of every proxy or the exercise of every shareholder right.<sup>10</sup> The rule also imposed new requirements that plan fiduciaries must maintain records on proxy voting activities and other exercises of shareholder rights. The rule thus effectively suggested that fiduciaries need not take the proxy voting process seriously, while at the same time punishing the exercise of those rights with additional recordkeeping responsibilities. Yet the exercise of shareholder rights is important to ensuring that management is accountable to the shareholders, and it can formulate corporate policies on a wide range of matters, including the approach to the ESG risks and opportunities.

The releases accompanying the Trump-era rules further reinforced the conclusion that the rules were intended to minimize the role of the ESG factors in the selection of retirement plan investments. For example, the first rule cautioned fiduciaries against “too hastily” concluding that ESG-themed funds may be selected based on even on pecuniary factors.<sup>11</sup> The second rule actually expressed the view that many environmentally and socially focused shareholder proposals would likely have little bearing on share value or other financial interests of retirement plans.<sup>12</sup>

Feedback received from the DOL during its outreach efforts following the 2020 Rules confirmed their harmful impact. Commenters believed that the rules singled out ESG investing for heightened scrutiny or put a “thumb on the scale” against the consideration of the ESG factors.<sup>13</sup> And they voiced concern that in adopting those rules, the DOL had failed to consider the substantial and mounting evidence that the use of climate change and other ESG factors can improve investment value and long-term investment returns for retirement savers. Stakeholders

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<sup>7</sup> *Id.* at 57,272.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 57,278.

<sup>10</sup> *Id.* at 57,281.

<sup>11</sup> *Id.* at 57,275.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 57,275.

also confirmed that these rules have in fact had a chilling effect on the appropriate consideration of climate change and other ESG factors in investment decisions.<sup>14</sup>

In short, because of the unwarranted hostility displayed throughout the rulemaking process to ESG investing and the consideration of ESG factors in selecting investments, many interpreted these aspects of the 2020 Rules to be specifically targeting ESG investments, leading to concerns that *any* consideration of ESG factors by a plan fiduciary would be considered to run afoul of the 2020 Rule.<sup>15</sup>

### **Spurred by two Executive Orders, the Department has issued the Proposed Rule.**

On the day he took office, President Biden issued Executive Order 13,990, titled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.”<sup>16</sup> That order instructed agencies to review any regulations promulgated by the Trump administration that might undermine the goal of protecting the environment.<sup>17</sup> Subsequently, President Biden issued Executive Order 14030, titled “Climate-related Financial Risk,” which set forth policies to mitigate climate-related financial risk and specifically directed the DOL to consider rescinding or revising the 2020 Rule.

The Proposed Rule would make a number of important changes to the existing rules, which are necessary to reverse the chilling effects of the 2020 Rules and to ensure that ESG issues are appropriately considered in the selection of plan investments. They include the following reforms:

Elimination of the pecuniary factors test. The Proposed Rule would eliminate the existing formulation providing that plan fiduciaries must select plan investments based solely upon consideration of “pecuniary” factors.

Evaluation of ESG factors. The Proposed Rule would add new language making explicitly clear that a proper consideration of the projected return of a portfolio relative to the funding objectives of the plan “*may often require* an evaluation of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”<sup>18</sup>

Including ESG factors among traditional risk-return factors. The Proposed Rule would further make clear that a fiduciary may consider *any* factor material to a risk-return analysis, including climate change and other ESG factors. The intent is to establish that the ESG factors are no different from any other traditional risk-return factors, and to remove any “prejudice” to the contrary.<sup>19</sup> The Proposed Rule would also list specific examples of the factors bearing on the risk-return analysis that a fiduciary may consider with respect to climate change, governance, and workforce practices.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 57,272-73.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 57,276.

<sup>19</sup> *Id.* at 57,277.

Enhancing the “tie-breaker” test. The Proposed Rule would adopt a new and broader formulation of the tie-breaker test. It would rescind the current requirement that investments be “indistinguishable” in terms of risk and return. In its place, it would permit a plan fiduciary to select an investment based on benefits other than investment returns, provided the competing options “equally serve” the financial interests of the plan. The Release explains that the “indistinguishable test” is too stringent, since investments may differ in many respects yet serve the financial interests of the plan equally well. The Proposed Rule would also dispense with the provision requiring the fiduciary to specifically document its tie-breaker analysis.

Removing QDIA restrictions. The Proposed Rule would eliminate current provisions that prevent certain investment options, specifically funds that incorporate non-pecuniary factors in their investment strategies, from serving as QDIAs. As explained in the Release, that provision may deprive retirement savers of the benefits they may derive from designating certain types of investments, including ESG-related investments, as QDIAs.

Eliminating the hindrances on the exercise of proxy voting rights. Finally, the Proposed Rule would eliminate a number of provisions in the existing rule that undermine or inhibit a plan fiduciary’s participation in proxy voting. First, it would eliminate the gratuitous observation that the fiduciary duty does not require the voting of every proxy or the exercise of every shareholder right. Second, it would eliminate certain unique and burdensome monitoring requirements where the authority to vote proxies has been delegated to an investment manager. Third, it would remove two safe harbors for voting policies that tend to limit a fiduciary’s dedication of resources to the proxy voting process. And fourth, it would eliminate special recordkeeping requirements related to proxy voting, which cast proxy voting as disfavored or subject to heightened fiduciary obligations.

## **OVERVIEW OF COMMENTS**

The Proposed Rule is an important step forward not only in serving the best interests of retirement savers but also in helping solve several major social policy challenges, including climate change, economic inequality, and corporate governance failures that harm workers, communities, and other stakeholders. In our comments, we argue for and support the following conclusions:

- The Proposed Rule will better fulfill the explicit requirements and underlying purposes of ERISA, because the consideration of ESG factors by fiduciaries is in the best interest of plan participants and beneficiaries. To further strengthen the proposal, we urge the Department, in its final rule, to expand upon the examples of ESG factors that a prudent fiduciary may consider as it evaluates possible plan investments.
- The Proposed Rule will also help further the goals of ERISA by promoting participation in retirement savings plans, thereby better preparing more Americans for retirement.
- And, the Proposed Rule will help our society solve critically important policy challenges associated with climate change, economic inequities, and corporate governance failings.

Here, we also take the opportunity to urge the Department, following this rulemaking, to take some additional future steps that will strengthen the role of the ESG factors in the selection of plan options. Among those initiatives should be issuing guidance that establishes minimum standards fiduciaries should follow when considering the ESG factors or more broadly, any systemic risks that threaten retirement savings and retirement security. In addition to guidance, the Department should consider requiring fiduciaries to establish and adhere to sustainable investment policies outlining how they incorporate the ESG factors into their investment strategies. In addition, the Departments should consider requiring that participant-directed plans offer at least one investment option that accounts for and integrates the ESG factors, as part of a collection of prudently chosen plans. Finally, the Department should develop ways to further promote social justice, and to combat racial economic inequality specifically, through the rules governing the selection of retirement plan options. Among those approaches under consideration should be a requirement that plans offer at least some investment options that are managed by minorities, women, and those with diverse gender orientations.

These additional steps would serve the best interests of retirement savers, further advance solutions to the ESG-related challenges, and respond to the intense and growing demand among investors for such choices to be available in retirement plans.

## **COMMENTS**

### **I. The Proposed Rule will better fulfill the explicit requirements and underlying purposes of ERISA, because the consideration of ESG factors by fiduciaries is in the best interest of plan participants and beneficiaries.**

As noted above, ERISA requires plan fiduciaries to act prudently, to appropriately diversify plan investments, and to act solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to plan participants and beneficiaries. The 2020 Rules actually undermine these goals. They display irrational hostility to the role of ESG factors in investment selection, and indeed they were, from a legal standpoint, arbitrary capricious because they ignored substantial evidence showing that the consideration of ESG factors in making investment decisions actually leads to better financial returns.<sup>20</sup>

#### *The corrective provisions of the Proposed Rule.*

The Proposed Rule will counteract or neutralize the most harmful elements of the 2020 Rules and thereby better serve the interests of retirement savers, as required by ERISA. For

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<sup>20</sup> See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.”).

example, the Proposed Rule would expressly provide that “appropriate consideration” of the facts and circumstances surrounding an investment 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.” The Proposed Rule would further buttress this provision by emphasizing that a “prudent fiduciary may consider *any* factor in the consideration of an investment or investment course of action,” which may include climate-change related factors, governance factors, and workforce practices. The Proposed Rule describes these examples:

- (i) Climate change-related factors, such as a corporation’s exposure to the real and potential economic effects of climate change including exposure to the physical and transitional risks of climate change and the positive or negative effect of Government regulations and policies to mitigate climate change;
- (ii) Governance factors, such as those involving board composition, executive compensation, and transparency and accountability in corporate decision-making, as well as a corporation’s avoidance of criminal liability and compliance with labor, employment, environmental, tax, and other applicable laws and regulations; and
- (iii) Workforce practices, including the corporation’s progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention; its investment in training to develop its workforce’s skill; equal employment opportunity; and labor relations.

These examples helpfully illustrate the types of factors that fiduciaries can and should consider. However, we encourage the Department to expand upon them. As formulated, they do not capture the breadth of the important issues normally understood to fall under the ESG rubric. For example, while climate change may be the single most pressing environmental challenge the U.S. and the world are now facing, it is not the only “environmental” problem that requires urgent attention. Others include rainforest conservation, the protection of water resources, and threats posed by toxic pollutants in our air and water. The examples should also include references to racial justice, economic inequality, and the need for greater attention to all forms of diversity in our society. We recognize that the proposed rule language appropriately stipulates that a prudent fiduciary may consider “any factor” that is material to the risk-return analysis, but illustrations always give powerful definition and concrete meaning to such general formulations, and they are capable of influencing the interpretation and application of such provisions.

The provisions in the Proposed Rule directly advance the goals of ERISA because they will facilitate the consideration of ESG data as fiduciaries make investment decisions, and the data

make clear that consideration of the ESG factors in the investment planning process “can improve investment value and long-term investment returns for retirement investors.”<sup>21</sup>

*The potential risks and opportunities associated with the ESG factors.*

Underpinning the Proposed Rule is the growing body of credible data showing that climate change, as well as the other ESG factors, pose serious financial risks as well as opportunities to obtain attractive yields. Therefore, they are clearly appropriate factors for a fiduciary to consider when evaluating investment options. Some of the most compelling evidence relates to climate change, as the report from the Commodity Futures Trading Commission in 2020 makes clear:

Climate change is already impacting or is anticipated to impact nearly every facet of the economy, including infrastructure, agriculture, residential and commercial property, as well as human health and labor productivity . . . Risks include disorderly price adjustments in various asset classes, with possible spillovers into different parts of the financial system, as well as potential disruption of the proper functioning of financial markets.<sup>22</sup>

These effects can be especially detrimental to the projected returns of pension plan portfolios, which typically have long-term investment horizons, and the effects of climate change can correspondingly pose a threat to investments far into the future.<sup>23</sup> The Release cites to a wide variety of other sources, from the Federal Reserve Board to BlackRock, affirming that climate risk poses a variety of grave threats and involves significant investment risk.<sup>24</sup> It also points out that all of the other ESG issues can be material in the assessment of investment risks and returns.<sup>25</sup>

*The evidence showing that consideration of the ESG factors improves investment returns.*

Numerous studies support the conclusion that the use of ESG factors in selecting investments improves investment returns, especially over the long term. While the Release points out that some studies suggest ESG investing has resulted in lower returns than conventional investing, the weight of the evidence clearly counsels otherwise. The fact is that increased investor

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<sup>21</sup> Release at 57,275. We note that the Proposed Rule will also serve the explicit goals of ERISA by helping fiduciaries fulfill their duty to diversify plan investments.

<sup>22</sup> Climate-Related Market Risk Subcommittee, *Managing Climate Risk in the U.S. Financial System*, U.S. Commodity Futures Trading Commission, Market Risk Advisory Committee (2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

<sup>23</sup> Release at 57,277.

<sup>24</sup> *Id.* at 57,289.

<sup>25</sup> *Id.* at 57,290.



concern with ESG factors is rational even from purely economic and financial perspectives, as empirical research has shown that companies that do better on each of the aspects of ESG tend to outperform their peers:

- **Environmental:** The environmental factor focuses on how a company contributes to, or mitigates, degradation of the environment, with a particularly urgent focus on the threat of climate change. For example, research by Morgan Stanley demonstrated that, in 2020, sustainable funds “outperformed their traditional peer funds by a median total return of 4.3 percentage points.”<sup>26</sup> This is unsurprising. Given the unprecedented global challenge climate change alone poses, and the significant global effort that will be required to cope with the current impacts of climate change and to prevent the worst future impacts, no company can claim to be immune from the financial impact of climate change. Accordingly, those companies that focus on sustainability and seek to adapt to, and fight against, climate change, are likely to do better financially.
- **Social:** Among other things, the social factor focuses on the diversity of a company’s workforce, *i.e.*, does it reflect racial and gender diversity, and, importantly, is that diversity reflected up and down the corporate ladder? Again, research on this issue indicates that a company’s attention to diversity has a positive impact on a company’s bottom line. A recent report by McKinsey & Company, a consulting firm often seen as an avatar for the pursuit of maximal corporate efficiency,<sup>27</sup> found that “companies in the top quartile [of ethnic and cultural diversity] outperformed those in the fourth [quartile] by 36 percent in terms of profitability in 2019.”<sup>28</sup> Again, this is unsurprising, as “diverse teams have been shown to be more likely to radically innovate and anticipate shifts in consumer needs and consumption patterns—helping their companies gain a competitive edge.”<sup>29</sup>
- **Governance:** The governance factor deals with how well a company is managed by its leadership and whether the company has sufficient controls in place to ensure management serves the interests of, and is accountable to, various company stakeholders. As a 2019

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<sup>26</sup> Morgan Stanley Institute for Sustainable Investing, *Sustainable Funds Outperform Peers In 2020 During Coronavirus*, (Feb. 24, 2021), <https://www.morganstanley.com/ideas/esg-funds-outperform-peers-coronavirus>.

<sup>27</sup> Ryan Cooper, *Opinion: What McKinsey Really Suggests About Pete Buttigieg*, *The Week* (Dec. 12, 2019), <https://theweek.com/articles/883584/what-mckinsey-really-suggests-about-pete-buttigieg>.

<sup>28</sup> McKinsey & Company, *Diversity Wins: How Inclusion Matters* 4 (May 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>.

<sup>29</sup> McKinsey & Company, *Diversity Wins: How Inclusion Matters* 4 (May 2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters>.

report by S&P Global makes clear, “there is already substantial empirical evidence to suggest that the ‘G’ aspect of ESG ultimately yields better corporate returns.”<sup>30</sup>

Thus, it is beyond reasonable dispute that the ESG factors are appropriate considerations in the evaluation of investment risks and returns, and in many cases, fiduciaries would indeed be violating their duties of prudence and loyalty if they failed to consider those factors when deciding the best financial options to offer in a retirement plan. The Proposed Rule is necessary to help ensure that fiduciaries fully comply with their express statutory duties under ERISA, for the benefit of retirement savers.

## **II. The Proposed Rule would also help further the goals of ERISA by promoting participation in retirement savings plans, thereby better preparing Americans for retirement.**

The Proposed Rule will confer additional benefits. It will of course help all retirement savers by improving the overall performance of retirement plans, in accordance with the studies cited above, thus increasing the level of retirement savings and improving the quality of life for many in retirement. But the Proposed Rule will also attract more people into the retirement savings marketplace, especially those in the younger generation.

The evidence shows there is a demand for sustainable investment options and that making them more available would actually increase contribution rates. According to a Schroder’s 2021 U.S. Retirement Survey, of those investors who are aware of ESG-related investment options offered by their employer, 90% said they invested in them.<sup>31</sup> Of those who said their plans did not offer ESG investment options or of those who did not know, 69% said they would *increase their overall contribution rate if they were offered ESG options*.<sup>32</sup>

The appetite is especially strong among comparatively younger investors. Millennials fueled the growth of sustainable investing throughout the 2010s, contributing \$51.1 billion to sustainable funds in 2020, compared to less than \$5 billion five years ago, according to a CNBC report.<sup>33</sup> About 76% of older millennials indicate that climate change poses a serious threat to society, according to a survey conducted by The Harris Poll on behalf of CNBC Make It. The survey results also revealed that one-third of millennials often or exclusively use investments that

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<sup>30</sup> Kelly Tang, S&P Global, *Exploring the G in ESG: Governance in Greater Detail – Part I* (Mar. 22, 2019), <https://www.spglobal.com/en/research-insights/articles/exploring-the-g-in-esg-governance-in-greater-detail-part-i>.

<sup>31</sup> The 2021 Schroder’s U.S. Retirement Survey (2021), <https://www.schroders.com/en/us/defined-contribution/dc/retirement-survey-2021/>.

<sup>32</sup> *Id.*

<sup>33</sup> Alicia Adamczyk, *Millennials Spurred Growth in Sustainable Investing for Years. Now, All Generations Are Interested in ESG Options*, CNBC (May 21, 2021), <https://www.cnbc.com/2021/05/21/millennials-spurred-growth-in-esg-investing-now-all-ages-are-on-board.html>.

take ESG factors into account, compared to 19% of Gen Z, 16% of Gen X, and 2% of baby boomers.<sup>34</sup>

This data and others clearly indicate that one important way to increase the rate and level of overall retirement savings in this country is to increase access to ESG investing—just as the Proposed Rule will do.

**III. The Proposed Rule would help our society solve critically important policy challenges associated with climate change, economic inequities, and corporate governance failings.**

By providing clear guidance and removing constraints on the consideration of ESG factors by plan fiduciaries, the Proposed Rule also promises to help alleviate some of society's most pressing problems. The Release appropriately conveys the point by observing that if the current rule were left intact, it would continue to have a negative impact not only on fund performance and proxy voting by fiduciaries but also on broader economic and social problems such as climate change, worker productivity and engagement, and corporate manager accountability.<sup>35</sup> Racial economic inequality must also be added to the list.

By freeing fiduciaries to consider ESG factors, within the ERISA framework, the Proposed Rule will contribute to solutions to these important problems by helping to channel substantial sums of money into investments that take ESG factors into account. That in turn will help combat climate change, social injustice, and corporate governance policies that harm workers and communities.

Mechanically, the Proposed Rule will have this effect in at least three ways, mirroring the structure of the proposed rule changes: allowing fiduciaries more clarity and freedom to consider the financial impact of the ESG factors on investment returns; facilitating participation by fiduciaries in the proxy voting processes that involve ESG factors; and allowing fiduciaries more leeway, again within the ERISA parameters, to consider the social, collateral, or non-financial benefits of ESG investments when different investment options serve participants and beneficiaries equally well from a financial standpoint.

The end result will be channeling more private capital (and ultimately an immense amount of retirement money) into companies that are sensitive to and interested in ameliorating all the important problems represented by the ESG factors—in short, harnessing the retirement investment market to shape business decisions that will help solve daunting societal challenges.<sup>36</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> Release at 57,286.

<sup>36</sup> These mechanisms for effecting positive societal change through the investment of capital, in this case retirement money, will be all the more powerful as other reforms come into play, including the ESG disclosure regime for public companies anticipated from the SEC. See Stephen Hall & Jason Grimes, Better Markets Report, *How the SEC Can Address Racial Economic Inequality Through Regulation of the Securities Markets for All Americans* (Dec. 9, 2021),

There is a well-documented general trend in favor of ESG investing. Investors of all types are increasingly focused on considering environmental, social, and governance factors when choosing investments.<sup>37</sup> According to Bloomberg, investors held up to \$37.8 trillion in ESG assets at the end of 2020, a number that could grow to \$53 trillion by 2025, which would represent a third of the projected total of \$140 trillion in assets under management.<sup>38</sup> And increasingly, brokerage firms and mutual fund companies are offering exchange-traded funds (ETFs) and other financial products specifically designed to track ESG criteria.<sup>39</sup> Morningstar data shows that between 2015 and 2020, assets under management in sustainable funds increased more than *fourfold*.<sup>40</sup>

This desire for access to ESG investing is likely to intensify in the retirement marketplace specifically. The analysis in the Release supports the point. It estimates that currently, 11% of retirement plans, or 78,300, will be affected by the Proposed Rule, setting aside the proxy voting provisions. It defines those plans as the ones that have fiduciaries who now consider or will begin considering climate change and other ESG factors when selecting investments once the Proposed Rule is in place. It further observes, however, that this is a “lower bound” because “it is likely that *more plans will start to consider ESG factors*, including climate-related financial risk, as a result of the new rule.”<sup>41</sup> In fact, the increase is likely to be very substantial, as the growth of ESG-related investments and strategies grows dramatically.

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[https://bettermarkets.org/wp-content/uploads/2021/12/BetterMarkets\\_SEC\\_Steps\\_To\\_Improve\\_Racial\\_Inequality\\_Dec-2021.pdf](https://bettermarkets.org/wp-content/uploads/2021/12/BetterMarkets_SEC_Steps_To_Improve_Racial_Inequality_Dec-2021.pdf).

<sup>37</sup> Stephen Hall & Jason Grimes, *What is ESG and Why Is It So Important 1* (Jul. 14, 2021), [https://bettermarkets.org/sites/default/files/documents/Better\\_Markets\\_White\\_Paper\\_SEC\\_Why\\_Is\\_ESG\\_Important.pdf](https://bettermarkets.org/sites/default/files/documents/Better_Markets_White_Paper_SEC_Why_Is_ESG_Important.pdf).

<sup>38</sup> *ESG Assets May \$53 Trillion By 2025, A Third of Global AUM*, Bloomberg Intelligence Research and Analysis (Feb. 23, 2021), <https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/>.

<sup>39</sup> See, e.g., Press Release, *Fidelity Launches Five ESG Mutual Funds and ETFs Focused on Environment, Climate Change, Gender Diversity & Sustainability* (Jun. 16, 2021), <https://www.bloomberg.com/press-releases/2021-06-16/fidelity-launches-five-esg-mutual-funds-and-etfs-focused-on-environment-climate-change-gender-diversity-sustainability?sref=mtQ4hc2k>.

<sup>40</sup> Morningstar, *Sustainable Funds U.S. Landscape Report: More Funds, More Flows, and Impressive Returns in 2020* (Feb. 10, 2021), [https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable\\_Funds\\_Landscape\\_2021.pdf](https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_Landscape_2021.pdf)

<sup>41</sup> Release at 57286. Some evidence indicates that simply the announcement of the forthcoming Proposed Rule has already had a positive effect with respect to the role of ESG factors in proxy voting. In March 2021, the DOL announced that it would revisit, and not enforce, the 2020 Rules. Removal of this uncertainty may have contributed to the record-breaking support during the 2021 U.S. proxy season for shareholder proposals relating to environmental and social matters, with 34 ESG proposals receiving majority shareholder support, up from the previous

And, of course, the total amount of money and assets held by all types of retirement accounts in the U.S. exceeds \$37 trillion. By removing impediments as ERISA fiduciaries consider whether to include ESG investment options in retirement plans, the Proposed Rule will help channel a higher percentage of this massive corpus of wealth toward solving the huge and in some cases systemic threats our society faces.

## CONCLUSION

We hope these comments are helpful as the Department finalizes the Proposed Rule.

Sincerely,



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record of 21 supported proposals in 2020. See September 2021 Harvard Law Article "[ESG in 2021 So Far: An Update](#)"