

Via Email

May 26, 2021

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

**Re: Council of Institutional Investors Perspectives on ESG and Proxy Voting**

Dear Acting Assistant Secretary Khawar,

I write on behalf of the Council of Institutional Investors (“CII”), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds and defined contribution plans with more than 15 million participants – true “Main Street” investors through their funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.<sup>1</sup>

The purpose of this letter is to follow-up on our February 16, 2021 meeting, at which you requested we provide our perspective on environmental, social and corporate governance (“ESG”) investing, proxy voting, and shareholder engagement. We also hope these comments are helpful in carrying out President Biden’s directive to the Department of Labor (“DOL” or “Department”) to consider a proposed rule to suspend, revise, or rescind the rules on “Financial Factors in Selecting Plan Investments” (“ESG Rule”) and “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” (“Proxy Voting Rule”).<sup>2</sup> CII is a broad tent and our members

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<sup>1</sup> For more information about CII, including its board and members, please visit CII’s website at <http://www.cii.org>.

<sup>2</sup> See The White House, Executive Order on Climate-Related Financial Risk (May 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>; Final Rule, Financial Factors in Selecting Plan Investments, RIN 1210–AB95, 85 Fed. Reg. 72,846 (Dep’t of Labor Nov. 13, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf>; Final Rule, Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210–AB91, 85 Fed. Reg. 81,658 (Dep’t of Labor Dec. 16, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf>.

have varying views; however they agree across the board that these issues are important and can enhance long-term value.

First, we applaud the DOL's March 10, 2021 statement that it will not enforce the ESG Rule and the Proxy Voting Rule. We agree with you that, "[t]hese rules have created a perception that fiduciaries are at risk if they include any environmental, social and governance factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights . . . ."<sup>3</sup> They represent unnecessary skepticism of ESG investing and shareholder engagement.

From our perspective, one of the most important things that DOL can do is to create a regulatory environment upon which fiduciaries can reasonably rely from one administration to the next. We recognize that there will always be some changes between administrations, but we urge you to consider that this back and forth on issues like the ESG and Proxy Voting Rules interjects unnecessary confusion and cost for fiduciaries and plans. Every time there is a change to, or re-interpretation of, the rules, our members have to expend time and resources to evaluate the impact DOL's actions could have on their investment practices. Typically, the changes have little to no impact on day-to-day operations, but the back-and-forth creates a significant amount of uncertainty and confusion. We urge you to end the cycle once and for all.

In that regard, we ask that you consider simply repealing the ESG and Proxy Voting Rules as they are entirely unnecessary. Investors, plans and fiduciaries went without regulations on these issues for decades without negative consequences, and the rules were not designed to fix an actual problem. Yet, the unintended consequences of drafting choices and churn between administrations has a real cost to retirement plans and savers. This can be more detrimental than not having a rule because, as noted, even incremental shifts necessitate a complete review of process and procedure.

To the extent DOL determines it is necessary to issue new rules or interpretations, it would be helpful if the guidance is a simple, straightforward reiteration of DOL's historic positions. With regard to ESG, DOL has addressed the issues several times, including in Interpretive Bulletin 94-1, Interpretive Bulletin 2008-1, and Interpretive Bulletin 2015-01, and throughout the years, DOL's position has largely remained the same.<sup>4</sup>

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<sup>3</sup> News Release, U.S. Department of Labor, US DEPARTMENT OF LABOR RELEASES STATEMENT ON ENFORCEMENT OF ITS FINAL RULES ON ESG INVESTMENTS, PROXY VOTING BY EMPLOYEE BENEFIT PLANS (Mar. 10, 2021), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310>.

<sup>4</sup> Interpretive Bulletin 94-1, 59 Fed. Reg. 36,206 (Dep't of Labor June 23, 1994), *available at* [https://s3.amazonaws.com/archives.federalregister.gov/issue\\_slice/1994/6/23/32485-32611.pdf#page=122](https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1994/6/23/32485-32611.pdf#page=122); Interpretive Bulletin Relating to Investing in Economically Targeted Investments, RIN 1210-AB29, 73 Fed. Reg. 61,734 (Dep't of Labor Oct. 17, 2008), <https://www.govinfo.gov/content/pkg/FR-2008-10-17/pdf/E8-24552.pdf>; Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, RIN 1210-AB73, 80 Fed. Reg. 65,135 (Dep't of Labor Oct. 26, 2015), <https://www.federalregister.gov/documents/2015/10/26/2015-27146/interpretive-bulletin-relating-to-the-fiduciary-standard-under-erisa-in-considering-economically>.

Interpretative Bulletin 2015-01 succinctly stated DOL's position that the Employee Retirement Income Security Act of 1974 ("ERISA") does not prohibit fiduciaries from incorporating ESG factors in investment policies as it explained that these factors "may have a direct relationship to the economic value of the plan's investment."<sup>5</sup> Further, it reiterated the Department's longstanding position on the "all things being equal' test".<sup>6</sup>

*[T]he Department has consistently recognized that fiduciaries may consider such collateral goals as tie-breakers when choosing between investment alternatives that are otherwise equal with respect to return and risk over the appropriate time horizon. ERISA does not direct an investment choice in circumstances where investment alternatives are equivalent, and the economic interests of the plan's participants and beneficiaries are protected if the selected investment is in fact, economically equivalent to competing investments.*<sup>7</sup>

DOL noted that the standards set forth in sections 403 and 404 of ERISA governing fiduciary investment decisions apply to both ESG and non-ESG investments. In either approach, fiduciaries must be focused on protecting participants and beneficiaries. With those existing protections in mind, we urge you to restore the status quo on these issues rather than focus on minutia.

We note that the prohibition in the ESG Rule on investments applying certain ESG factors from being designated as Qualified Default Investment Alternatives is inconsistent with decades of precedent and unwarranted. Consequently, the prohibition should be repealed. As previously stated, ESG investments should be treated and evaluated the same as other types of investments. In our opinion, DOL has historically taken the right tact in not opining on particular investments.

Similarly, DOL has largely been consistent over the years in its positions on proxy voting and shareholder engagement. As stated in Interpretative Bulletin 2016-10, "the fiduciary act of managing plan assets which are shares of corporate stock includes decisions on the voting of proxies and other exercises of shareholder rights."<sup>8</sup> Further, fiduciaries should consider whether the plan's vote, either alone or together with votes of other shareholders, is expected to have an effect on the value of the plan's investment, versus the additional cost of voting shares. It would be helpful for DOL to reiterate these points and also clarify that, when considering whether the cost of voting shares would prohibit a plan fiduciary from taking action, plan fiduciaries need not consider whether the plan's individual exercise of its voting rights would affect the value of the

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<sup>5</sup> 80 Fed. Reg. at 65,136.

<sup>6</sup> *Id.* at 65,135.

<sup>7</sup> *Id.* at 65,136 (emphasis added).

<sup>8</sup> Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, RIN 1210-AB78, 81 Fed. Reg. 95,879, 95,880 (Dep't of Labor Dec. 29, 2016), <https://www.federalregister.gov/documents/2016/12/29/2016-31515/interpretive-bulletin-relating-to-the-exercise-of-shareholder-rights-and-written-statements-of>.

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plan's investment but rather whether the votes of all shareholders would affect the value of the plan's investment.

Finally, DOL should clarify a fiduciary's duty of loyalty does not require a fiduciary to consider the individual preferences of participants. This would be a Sisyphean task that detracts from a fiduciary's focus on plan performance and the interests of participants and beneficiaries.

Opinions on specific investments, such as ESG related investments, vary widely, and there is simply no way to accommodate every participant's preference. Moreover, a fiduciary owes a duty of loyalty to the plan, participants, and beneficiaries only so far as necessary to ensure that the benefits promised are delivered. Fiduciaries generally are not bound to accommodate or even consider each individual's policy or investment preferences.

Thank you for considering our views on these matters. We would be pleased discuss them further with you at your convenience.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney". The signature is written in black ink and is positioned above the typed name.

Jeffrey P. Mahoney  
General Counsel