the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2019–0484.

(2) For more information about this AD, contact Vladimir Ulyanov, Aerospace Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3229; email *vladimir.ulyanov@faa.gov.*

Issued on June 23, 2020.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2020–14018 Filed 6–29–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–112339–19]

RIN 1545–BP42

Credit for Carbon Oxide Sequestration; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking.

SUMMARY: This document contains a correction to a notice of proposed rulemaking that was published in the **Federal Register** on June 2, 2020. The proposed regulations regarding the credit for carbon oxide sequestration under section 45Q of the Internal Revenue Code (Code).

DATES: Written or electronic comments and requests for a public hearing are still being accepted and must be received by August 3, 2020.

ADDRESSES: Send submissions to Internal Revenue Service, CC:PA: LPD:PR (REG–112339–19), Room 5205, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submission of comments electronically is strongly suggested, as the ability to respond to mail may be delayed. It is recommended that comments and requests for a public hearing be submitted electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–112339–19).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries) at (202) 317–6853; concerning submissions of comments and/or requests for a public hearing, Regina L. Johnson at (202) 317–5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

The proposed regulations that are the subject of this correction are under section 45Q of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking (REG–112339–19) contains errors that needs to be corrected.

Correction of Publication

Accordingly, the notice of proposed rulemaking (REG–112339–19) that was the subject of FR Doc.2020–11907, published at 85 FR 34050 (June 2, 2020), is corrected as follows:

1. On page 34058, third column, the ninth line of the fourth paragraph, the language ‘‘date the’’ is corrected to read ‘‘date of’’.

2. On page 34061, first column, the sixth line from the bottom from the first partial paragraph, the language ‘‘three years’’ is corrected to read ‘‘five years.’’

3. On page 34062, first column, the eleventh through the twelfth lines of the first full paragraph, the language ‘‘section 45Q(f)(3)(B)’’ is corrected to read ‘‘new election’’.

4. On page 34062, the first column, the fifth through the sixth lines from the bottom of the last paragraph, the language ‘‘after the date of issuance of this proposed regulation’’ is corrected to read ‘‘after June 2, 2020.’’.

5. On page 34062, second column, the thirteenth through the fourteenth lines from the bottom of the first full paragraph, the language ‘‘before the date of issuance of this proposed regulation’’ is corrected to read ‘‘before June 2, 2020’’.

6. On page 34062, third column, the sixth line from the bottom of the first full paragraph, the language ‘‘F Federal’’ is corrected to read ‘‘Federal’’.

7. On page 34063, third column, the second line from the bottom of the first full paragraph, the language ‘‘serval’’ is corrected to read ‘‘several’’.

Martin V. Franks,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2020–14033 Filed 6–29–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB95

Financial Factors in Selecting Plan Investments

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Proposed rule.

SUMMARY: The Department of Labor (Department) in this document proposes amendments to the ‘‘Investment duties’’ regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to confirm that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.

DATES: Comments on the proposal must be submitted on or before July 30, 2020.

ADDRESSES: You may submit written comments, identified by RIN 1210–AB95 to either of the following addresses:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* 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: Financial Factors in Selecting Plan Investments Proposed Regulation.

Instructions: All submissions received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge, online at *www.regulations.gov* and *www.dol.gov/agencies/ebsa* and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N–1513, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Jason A. DeWitt, Office of Regulations and Interpretations, Employee Benefits

Security Administration, (202) 693–8500. This is not a toll-free number.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Background and Purpose of Regulatory Action

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards that govern the operation of private-sector employee benefit plans, including fiduciary responsibility rules. Section 404 of ERISA, in part, requires that plan fiduciaries act prudently and diversify plan investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Sections 403(c) and 404(a) also require fiduciaries to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to their participants and beneficiaries and defraying reasonable expenses of administering the plan.

Courts have interpreted the exclusive purpose rule of ERISA section 404(a)(1)(A) to require fiduciaries to act with ''complete and undivided loyalty to the beneficiaries,'' [1] observing that their decisions must ''be made with an eye single to the interests of the participants and beneficiaries.'' [2] The Supreme Court as recently as 2014 unanimously held in the context of ERISA retirement plans that such interests must be understood to refer to ''*financial*'' rather than ''nonpecuniary'' benefits,[3] and federal appellate courts have described ERISA's fiduciary duties as ''the highest known to the law.'' [4] The Department's longstanding and consistent position, reiterated in multiple forms of sub-regulatory guidance, is that plan fiduciaries when making decisions on investments and investment courses of action must be focused solely on the plan's financial returns and the interests of plan participants and beneficiaries in their plan benefits must be paramount.

The Department has been asked periodically over the last 30 years to consider the application of these principles to pension plan investments selected because of the non-pecuniary benefits they may further, such as those relating to environmental, social, and corporate governance considerations. Various terms have been used to describe this and related investment behaviors, such as socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, impact investing, and economically targeted investing. The terms do not have a uniform meaning and the terminology is evolving.[5]

The Department's first comprehensive guidance addressing ESG investment issues was in Interpretive Bulletin 94–1 (IB 94–1).[6] There, the term used was ''economically targeted investments'' (ETIs). The Department's stated objective in issuing IB 94–1 was to state that ETI investments [7] are not inherently incompatible with ERISA's fiduciary obligations. The preamble to IB 94–1 explained that the requirements of sections 403 and 404 of ERISA do not prevent plan fiduciaries from investing plan assets in ETI investments if the investment has an expected rate of return commensurate to rates of return of available alternative investments with similar risk characteristics, and if the investment vehicle is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan. Some commentators have referred to this as the ''all things being equal'' test or the ''tie-breaker'' standard. The Department stated in the preamble to IB 94–1 that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such non-pecuniary considerations as the deciding factor for an investment decision.

The Department's sub-regulatory guidance then went through an iterative process. In 2008, the Department replaced IB 94–1 with Interpretive Bulletin 2008–01 (IB 2008–01).[8] In 2015, the Department replaced IB 2008–01 with Interpretive Bulletin 2015–01 (IB 2015–01),[9] which is codified at 29 CFR 2509.2015–01. Each Interpretive Bulletin has consistently stated that the paramount focus of plan fiduciaries must be the plan's financial returns and risk to participants and beneficiaries. The Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and beneficiaries as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives. Thus, each Interpretive Bulletin, while restating the ''all things being equal'' test, also cautioned that fiduciaries violate ERISA if they accept reduced expected returns or greater risks to secure social, environmental, or other policy goals.

[1] *Donovan* v. *Mazzola,* 716 F.2d 1226, 1238 (9th Cir. 1983) (quoting *Freund* v. *Marshall & Ilsley Bank,* 485 F. Supp. 629, 639 (W.D. Wis. 1979)).

[2] *Donovan* v. *Bierwirth,* 680 F.2d 263,271 (2d. Cir. 1982).

[3] *Fifth Third Bancorp* v. *Dudenhoeffer,* 573 U.S. 409, 421 (2014) (the ''benefits'' to be pursued by ERISA fiduciaries as their ''exclusive purpose'' does not include ''nonpecuniary benefits'') (emphasis in original).

[4] See, *e.g., Tibble* v. *Edison Int'l,* 843 F.3d 1187, 1197 (9th Cir. 2016).

[5] For a concise history of the current ESG movement and the evolving terminology, see Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee,* 72 Stan. L. Rev. 381, 392–97 (2020).

[6] 59 FR 32606 (June 23, 1994) (appeared in Code of Federal Regulations as 29 CFR 2509.94–1). Interpretive Bulletins are a form of sub-regulatory guidance that are published in the **Federal Register** and included in the Code of Federal Regulations. Prior to issuing IB 94–1, the Department had issued a number of letters concerning a fiduciary's ability to consider the non-pecuniary effects of an investment and granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce non-pecuniary benefits. See Advisory Opinions 80–33A, 85–36A and 88–16A; Information Letters to Mr. George Cox, dated Jan. 16, 1981; to Mr. Theodore Groom, dated Jan. 16, 1981; to The Trustees of the Twin City Carpenters and Joiners Pension Plan, dated May 19, 1981; to Mr. William Chadwick, dated July 21, 1982; to Mr. Daniel O'Sullivan, dated Aug. 2, 1982; to Mr. Ralph Katz, dated Mar. 15, 1982; to Mr. William Ecklund, dated Dec. 18, 1985, and Jan. 16, 1986; to Mr. Reed Larson, dated July 14, 1986; to Mr. James Ray, dated July 8, 1988; to the Honorable Jack Kemp, dated Nov. 23, 1990; and to Mr. Stuart Cohen, dated May 14, 1993; PTE 76–1, part B, concerning construction loans by multiemployer plans; PTE 84–25, issued to the Pacific Coast Roofers Pension Plan; PTE 85–58, issued to the Northwestern Ohio Building Trades and Employer Construction Industry Investment Plan; PTE 87–20, issued to the Racine Construction Industry Pension Fund; PTE 87–70, issued to the Dayton Area Building and Construction Industry Investment Plan; PTE 88–96, issued to the Real Estate for American Labor A Balcor Group Trust; PTE 89–37, issued to the Union Bank; and PTE 93–16, issued to the Toledo Roofers Local No. 134 Pension Plan and Trust, et al. In addition, one of the first directors of the Department's benefits office authored an influential article on this topic in 1980. See Ian D. Lanoff, *The Social Investment of Private Pension Plan Assets: May It Be Done Lawfully Under ERISA?,* 31 Labor L.J. 387, 391–92 (1980) (stating that ''[t]he Labor Department has concluded that economic considerations are the only ones which can be taken into account in determining which investments are consistent with ERISA standards,'' and warning that fiduciaries who exclude investment options for non-economic reasons would be ''acting at their peril'').

[7] IB 94–1 used the terms ETI and economically targeted investments to broadly refer to any investment or investment course of action that is selected, in part, for its expected non-pecuniary benefits, apart from the investment return to the employee benefit plan investor.

[8] 73 FR 61734 (Oct. 17, 2008).

[9] 80 FR 65135 (Oct. 26, 2015).

The preamble to IB 2015–01 explained that if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from ESG factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote. In 2018, the Department clarified in Field Assistance Bulletin 2018–01 (FAB 2018–01) that, in making its observation in IB 2015–01, the Department merely recognized that there could be instances when ESG issues present material business risk or opportunities to companies that company officers and directors need to manage as part of the company's business plan and that qualified investment professionals would treat as economic considerations under generally accepted investment theories. In such situations, the issues are themselves appropriate economic considerations, and thus should be considered by a prudent fiduciary along with other relevant economic factors to evaluate the risk and return profiles of alternative investments. In other words, in these instances the factors are not ''tie-breakers,'' but pecuniary (or ''risk-return'') factors affecting the economic merits of the investment. The Department cautioned, however, that ''[t]o the extent ESG factors, in fact, involve business risks or opportunities that are properly treated as economic considerations themselves in evaluating alternative investments, the weight given to those factors should also be appropriate to the relative level of risk and return involved compared to other relevant economic factors.'' [10] The Department further emphasized in FAB 2018–01 that fiduciaries ''must not too readily treat ESG factors as economically relevant to the particular investment choices at issue when making a decision,'' as ''[i]t does not ineluctably follow from the fact that an investment promotes ESG factors, or that it arguably promotes positive general market trends or industry growth, that the investment is a prudent choice for retirement or other investors.'' Rather, ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits and ''[a] fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.'' [11]

Available research and data show a steady upward trend in use of the term ESG among institutional asset managers, an increase in the array of ESG-focused investment vehicles available, a proliferation of ESG metrics, services, and ratings offered by third-party service providers, and an increase in asset flows into ESG funds. This trend has been underway for many years, but recent studies indicate the trajectory is accelerating. For example, according to Morningstar, the amount of assets invested in so-called sustainable funds in 2019 was nearly four times larger than in 2018.[12]

As ESG investing has increased, it has engendered important and substantial questions and inconsistencies, with numerous observers identifying a lack of precision and rigor in the ESG investment marketplace.[13] There is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts.[14] Moreover, ESG funds often come with higher fees, because additional investigation and monitoring are necessary to assess an investment from an ESG perspective.[15] Currently the examination priorities of the Securities and Exchange Commission (SEC) for 2020 include a particular interest in the accuracy and adequacy of disclosures provided by registered investment advisers offering clients new types or emerging investment strategies, such as strategies focused on sustainable and responsible investing, which incorporate ESG criteria.[16] The SEC also is soliciting public comment on the appropriate treatment for funds that use terms such as ''ESG'' in their name and whether these terms are likely to mislead investors.[17]

ESG investing raises heightened concerns under ERISA. Public companies and their investors may legitimately and properly pursue a broad range of objectives, subject to the disclosure requirements and other requirements of the securities laws. Pension plans covered by ERISA are statutorily-bound to a narrower objective: management with an ''eye single'' to maximizing the funds available to pay retirement benefits.[18] Providing a secure retirement for American workers is the paramount,

[10] Field Assistance Bulletin No. 2018–01 (Apr. 23, 2018).

[11] Id.

[12] See Jon Hale, *The ESG Fund Universe Is Rapidly Expanding* (March 19, 2020), *www.morningstar.com/articles/972860/the-esg-fund-universe-is-rapidly-expanding.* This trend is most pronounced in Europe, where authorities are actively promoting consideration of ESG factors in investing. See, *e.g.,* Principles for Responsible Investment (PRI), *Fiduciary Duty in the 21st Century* (Oct. 2019), *www.unpri.org/download?ac=9792,* at 34–35 (quoting official from EU securities regulator that ''ESG is part of [their] core mandate.''); Emre Peker, *What Qualifies as a Green Investment? EU Sets Rules,* Wall Street Journal (Dec. 17, 2019), *www.wsj.com/articles/eu-seals-deal-to-create-regulatory-benchmark-for-green-finance-11576595600* (''European officials have been racing to set the global benchmark for green finance''); Principles for Responsible Investment, *Investor priorities for the EU Green Deal* (April 30, 2020), *www.unpri.org/sustainable-markets/investor-priorities-for-the-eu-green-deal/5710.article* (discussing proposal to require ESG data to be disclosed alongside traditional elements of corporate and financial reporting, including a core set of mandatory ESG key performance indicators).

[13] See, *e.g.,* Ogechukwu Ezeokoli et al., *Environmental, Social, and Governance (ESG) Investment Tools: A Review of the Current Field* (Dec. 2017), *www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf,* at 11–13; *Scarlet Letters: Remarks of SEC Commissioner Hester M. Peirce before the American Enterprise Institute* (June 18, 2019), *www.sec.gov/news/speech/speech-peirce-061819;* Paul Brest, Ronald J. Gilson, & Mark A. Wolfson, *How Investors Can (and Can't) Create Social Value,* European Corporate Governance Institute, Law Working Paper No. 394 (Mar. 29, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3150347,* at 5.

[14] See, *e.g.,* Feifei Li & Ari Polychronopoulos, *What a Difference an ESG Ratings Provider Makes!* (Jan. 2020), *www.researchaffiliates.com/documents/770-what-a-difference-an-esg-ratings-provider-makes.pdf;* Florian Berg, Julian Kölbel, & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings* (Aug. 2019), MIT Sloan Research Paper No. 5822–19, *https://ssrn.com/abstract=3438533;* Schroders, *2018 Annual Sustainable Investment Report* (March 2019), *www.schroders.com/en/insights/economics/annual-sustainable-investment-report-2018,* at 22–23 (majority of passive ESG funds rely on a single third party ESG rating provider that ''typically emphasize tick-the-box policies and disclosure levels, data points unrelated to investment performance and/or backward-looking negative events with little predictive power'').

[15] See, *e.g.,* Principles for Responsible Investment, *How Can a Passive Investor Be a Responsible Investor?* (Aug. 2019), *www.unpri.org/download?ac=6729,* at 15 (ESG passive investing strategies likely result in higher fees compared to standard passive funds); Wayne Winegarden, *ESG Investing: An Evaluation of the Evidence,* Pacific Research Institute (May 2019), *www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf,* at 11–12 (finding average expense ratio of 69 basis points for ESG funds compared to 9 basis points for broad-based S&P 500 index fund). In recent years, the asset-weighted expense ratio for ESG funds has decreased as ESG funds with lower expense ratios have attracted more fund flows than ESG funds with higher expense ratios. See Elisabeth Kashner, *ETF Fee War Hits ESG and Active Management* (Jan. 22, 2020), *https://insight.factset.com/etf-fee-war-hits-esg-and-active-management.*

[16] See Office of Compliance Inspections and Examinations, U.S. Securities and Exchange Commission, *2020 Examination Priorities,* at 15, *www.sec.gov/about/offices/ocie/national-examination-program-priorities-2020.pdf.*

[17] See Request for Comment on Fund Names, Release No. IC–33809 (Mar. 2, 2020) [85 FR 13221 (Mar. 6, 2020)].

[18] *Donovan* v. *Bierwirth,* supra, 680 F.2d at 271.

and eminently-worthy, ''social'' goal of ERISA plans; plan assets may not be enlisted in pursuit of other social or environmental objectives.

The Department is concerned, however, that the growing emphasis on ESG investing may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan. The Department is also concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance.[19] For example, the Department understands that in the case of some ESG investment funds being offered to ERISA defined contribution plans, fund managers are representing that the fund is appropriate for ERISA plan investment platforms, while acknowledging in disclosure materials that the fund may perform differently or forgo certain opportunities, or accept different investment risks, in order to pursue the ESG objectives.

This proposed regulation is designed in part to make clear that ERISA plan fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-pecuniary objectives. The duty of loyalty—a bedrock principle of ERISA, with deep roots in the common law of trusts—requires those serving as fiduciaries to act with a single-minded focus on the interests of beneficiaries.[20] And the duty of prudence prevents a fiduciary from choosing an investment alternative that is financially less beneficial than an available alternative. These fiduciary standards are the same no matter the investment vehicle or category.

The Department believes that confusion with respect to these investment requirements persists, perhaps due in part to varied statements the Department has made on the subject over the years in sub-regulatory guidance. Accordingly, the Department intends, by this proposal, to reiterate and codify long-established principles of fiduciary standards for selecting and monitoring investments, and thus to provide clarity and certainty regarding the scope of fiduciary duties surrounding non-pecuniary issues. The Department's longstanding and consistent position, reiterated in multiple forms of guidance and based on the explicit language of ERISA itself, is that plan fiduciaries when making decisions on investments and investment courses of action must be focused solely on the plan's financial risks and returns, and the interests of plan participants and beneficiaries in their plan benefits must be paramount. The fundamental principle is that an ERISA fiduciary's evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the plan's funding policy and investment policy objectives. The corollary principle is that ERISA fiduciaries must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals.

As the Department has recognized in its prior guidance, there may be instances where factors that sometimes are considered without regard to their pecuniary import—such as environmental considerations—will present an economic business risk or opportunity that corporate officers, directors, and qualified investment professionals would appropriately treat as material economic considerations under generally accepted investment theories. For example, a company's improper disposal of hazardous waste would likely implicate business risks and opportunities, litigation exposure, and regulatory obligations. These would be appropriate economic considerations that qualified investment professionals would treat as material under generally accepted investment theories. Dysfunctional corporate governance can likewise present pecuniary risk that a qualified investment professional would appropriately consider on a fact-specific basis.

The purpose of this action is to set forth a regulatory structure to assist ERISA fiduciaries in navigating these ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment risk to promote non-pecuniary benefits or objectives. The Department believes that providing further clarity on these issues in the form of a notice and comment regulation will help safeguard the interests of participants and beneficiaries in the plan benefits. This proposed rule is considered to be an Executive Order (E.O.) 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the proposal's economic analysis.

B. Provisions of the Proposed Rule

The proposed rule builds upon the core principles provided by the original ''Investment duties'' regulation on the issue of prudence under section 404(a)(1)(B) of ERISA, at 29 CFR 2550.404a–1, which the regulated community has been relying upon for more than 40 years.[21] For example, it remains the Department's view that (1) generally the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed investment or investment course of action plays within the overall plan portfolio. It also remains the Department's view that an investment reasonably designed—as part of the portfolio—to further the purposes of the plan, and that is made with appropriate consideration of the relevant facts and circumstances, should not be deemed to be imprudent merely because the investment, standing alone, would have a relatively high degree of risk. The Department also believes that appropriate consideration of an investment to further the purposes of the plan must include consideration of the characteristics of the investment itself and how it relates to the plan portfolio.

Thus, the proposed rule does not revise the requirements that the fiduciary give appropriate consideration to a number of factors concerning the composition of the plan portfolio with respect to diversification, the liquidity and current return of the portfolio relative to the anticipated cash flow needs of the plan, and the projected

[19] See, *e.g.,* James MacKintosh, *A User's Guide to the ESG Confusion,* Wall Street Journal (Nov. 12, 2019), *www.wsj.com/articles/a-users-guide-to-the-esg-confusion-11573563604* (''It's hard to move in the world of investment without being bombarded by sales pitches for running money based on 'ESG' ''); Mark Miller, *Bit by Bit, Socially Conscious Investors Are Influencing 401(k)'s,* New York Times (Sept. 27, 2019), *www.nytimes.com/2019/09/27/business/esg-401k-investing-retirement.html.*

[20] See Unif. Prudent Inv. Act § 5 cmt. (1995) (''The duty of loyalty is perhaps the most characteristic rule of trust law.''); see also Susan N. Gary, George G. Bogert, & George T. Bogert, *The Law of Trusts and Trustees: A Treatise Covering the Law Relating to Trusts and Allied Subjects Affecting Trust Creation and Administration* § 543 (3d ed. 2019) (quoting Justice Cardozo's classic statement in *Meinhard* v. *Salmon,* 249 N.Y. 458, 464 (1928) that ''[a] trustee is held to something stricter than morals of the market place. . . . Uncompromising rigidity has been the attitude of the courts of equity when petitioned to undermine the rule of undivided loyalty.'').

[21] 44 FR 37255 (June 26, 1979).

return of the portfolio relative to the funding objectives of the plan.

Rather, the proposed rule elaborates upon the core principles provided in the ''Investment duties'' regulation by making clear that fiduciaries may never subordinate the interests of plan participants and beneficiaries in their retirement income to non-pecuniary goals. Application of this corollary principle and the nature of the fiduciary's duties will, of course, depend on the facts and circumstances, which take into account the scope of investment duties the fiduciary knows or should know are relevant to the particular investment decision that a prudent person having similar duties and familiar with such matters would consider relevant.

Paragraph (a) of the proposed rule includes a restatement of the statutory language of the exclusive purpose requirements of ERISA section 404(a)(1)(A), in addition to the restatement in the existing regulation of the prudence duty of ERISA section 404(a)(1)(B). As stated above, the application of these requirements is context-specific.

Paragraph (b)(1) provides that the loyalty and prudence requirements of ERISA section 404(a)(1)(A) and 404(a)(1)(B) are satisfied in connection with an investment decision if, in addition to the requirements in the existing paragraph (b)(1), the fiduciary has selected investments and/or investment courses of action based solely on their pecuniary factors and not on the basis of any non-pecuniary factor. To round out the requirements of the duty of loyalty, the proposed rule includes in paragraph (b)(1) a requirement that fiduciaries not act to subordinate the interests of participants or beneficiaries to the fiduciary's or another's interests, and has otherwise complied with the duty of loyalty.

Paragraph (b)(2) of the proposal adds to the original regulation a requirement that appropriate consideration of an investment or investment course of action includes a requirement to compare investments or investment courses of action to other available investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C). Facts and circumstances relevant to a comparison of investments or investment courses of action would include consideration of the level of diversification, degree of liquidity, and potential risk and return in comparison to available alternative investments. Clarifying that an investment or investment course of action must be compared to available alternatives is an important reminder that fiduciaries must not let non-pecuniary considerations draw them away from an alternative option that would provide better financial results. The paragraph also clarifies that the listed factors are not necessarily the only factors that need to be considered in order to emphasize that the paragraph is intended to specify the central obligations associated with the ''appropriate consideration'' requirement for proper management of an investment portfolio but should not be read to more broadly address the requirements in paragraph (b)(1)(ii) or paragraph (b)(1)(iii), or to otherwise modify the statutory standards set forth in section 404(a)(1)(A) or 404(a)(1)(B) of ERISA.

Paragraph (c) is entirely new and is intended to expound upon the consideration of pecuniary versus non-pecuniary factors in practice in both defined benefit and defined contribution plans.

Paragraph (c)(1) directly provides that a fiduciary's evaluation of an investment must be focused only on pecuniary factors. The paragraph explains that it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other non-pecuniary goal. Paragraph (c)(1) is careful to acknowledge, however, that ESG factors and other similar considerations may be economic considerations, but only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The proposed rule emphasizes that such factors, if determined to be pecuniary, must be considered alongside other relevant economic factors to evaluate the risk and return profiles of alternative investments. The weight given to pecuniary ESG factors should reflect a prudent assessment of their impact on risk and return—that is, they cannot be disproportionately weighted. The paragraph further emphasizes that fiduciaries' consideration of ESG factors must be focused on their potential pecuniary elements by requiring fiduciaries to examine the level of diversification, degree of liquidity, and the potential risk-return profile of the investment in comparison with available alternative investments that would play a similar role in their plans' portfolios.

The Department's current guidance provides that if, after such an evaluation, alternative investments appear economically indistinguishable, a fiduciary may then, in effect, ''break the tie'' by relying on a non-pecuniary factor. The Department expects that true ties rarely, if ever, occur. To be sure, there are highly correlated investments and otherwise very similar ones. Seldom, however, will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition. Even then, moreover, those two alternatives would remain two different investments that may function differently in the overall context of the fund portfolio, and which going forward may perform differently based on external economic trends and developments.[22] The Department also recognizes that the ''all things being equal'' test could invite fiduciaries to find ties without a proper analysis, in order to justify the use of non-pecuniary factors in making an investment decision. Nonetheless, because ties may theoretically occur and the Department does not presently have sufficient evidence to say they do not, the Department proposes to retain the current guidance's ''all things being equal'' test. As explained below, the Department specifically requests comment on this test, including whether true ties exist and how fiduciaries may appropriately break ties.

Paragraph (c)(2) guides application of the ''all things being equal'' test by requiring fiduciaries to adequately document any such occurrences. If, after completing an appropriate evaluation, alternative investments appear economically indistinguishable, and one of the investments is selected on the basis of a non-pecuniary factor or factors such as environmental, social, and corporate governance considerations (notwithstanding the requirements of paragraph (b) and paragraph (c)(1)), the fiduciary must document the basis for concluding that a distinguishing factor could not be found and why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the financial interests of plan participants and beneficiaries in receiving benefits from the plan. The Department believes this documentation requirement provides a safeguard against the risk that fiduciaries will improperly find economic equivalence and make decisions based on non-pecuniary

[22] See Schanzenbach & Sitkoff, *supra* note 5, at 410 (describing a hypothetical pair of truly identical investments as a ''unicorn'').

factors without a proper analysis and evaluation. As discussed in the Regulatory Impact Analysis below, the proposal may result in costs on fiduciaries whose current documentation and recordkeeping are insufficient to meet the new requirement, but, because the Department believes that truly economically indistinguishable alternatives are rare, the Department estimates that this requirement would not result in a substantial cost burden.

Paragraph (c)(3) describes the requirements for the prudent consideration of designated investment alternatives for defined contribution individual account plans that include one or more environmental, social, and corporate governance-oriented assessments or judgments in their investment mandates (*e.g.,* ''ESG investment mandates'') or that include these parameters in the fund name (hereinafter ''ESG-themed funds''). As the Department has previously explained, the standards set forth in sections 403 and 404 of ERISA apply to a fiduciary's selection of an investment fund as a plan investment or, in the case of an ERISA section 404(c) plan or other individual account plan, a designated investment alternative under the plan.

Paragraph (c)(3) does not, however, supersede paragraph (c)(1). Rather, paragraph (c)(3) includes provisions that are intended to apply those principles in the context of the selection of designated investment alternatives for participant-directed individual account plans. Thus, paragraph (c)(3) provides in general that, in such a case, a prudently selected, well managed, and properly diversified fund with ESG investment mandates could be added to the available investment options on a 401(k) plan platform without requiring the plan to forgo adding other non-ESG-themed investment options to the platform, consistent with the standards in ERISA sections 403 and 404. Adding such a fund is permissible only if: (i) The fiduciary uses only objective risk-return criteria, such as benchmarks, expense ratios, fund size, long-term investment returns, volatility measures, investment manager tenure, and mix of asset types (*e.g.,* equity, fixed income, money market funds, diversification of investment alternatives, which might include target date funds, value and growth styles, indexed and actively managed funds, balanced and equity segment funds, non-US equity and fixed income funds) in selecting and monitoring all investment alternatives for the plan, including any ESG investment alternatives; (ii) the fiduciary documents compliance with (i) above; and (iii) the environmental, social, corporate governance, or similarly oriented alternative is not added as, or as a component of, a qualified default investment alternative (QDIA as described in 29 CFR 2550.404c-5) that participants are automatically defaulted into as opposed to a fund added to the menu from which they are free to choose. Under paragraph (c)(3), a fiduciary could, for example, adopt an investment policy statement with prudent criteria for selection and retention of designated investment alternatives for an individual account plan that were based solely on pecuniary factors, and apply the criteria to all investment options in similar asset classes or funds in the same category, including potential ESG-themed funds.[23] While the proposal would allow a plan fiduciary to include a prudently selected ESG-themed investment alternative on a 401(k) plan investment platform if the fiduciary uses objective risk-return criteria in selecting and monitoring all investment alternatives for the plan, including any ESG investment alternatives, the Department has consistently expressed the view that fiduciaries who are willing to accept expected reduced returns or greater risks to secure non-pecuniary benefits are in violation of ERISA. Thus, fiduciaries considering investment alternatives for individual account plans should carefully review the prospectus or other investment disclosures for statements regarding ESG investment policies and investment approaches.[24]

The Department has not proposed to apply the provision in paragraph (c)(2) on ''economically indistinguishable alternative investments'' to the selection of investment options for individual account plans, but has rather included a distinct documentation requirement for such investment decisions in paragraph (c)(3)(ii). The Department believes that the concept of ''ties'' may have little relevance in the context of fiduciaries' selection of menu options for individual account plans, as such investment options are often chosen precisely for their varied characteristics and the range of choices they offer plan participants. As the Department explained in FAB 2018–01, in the case of an investment platform that allows participants and beneficiaries in an individual account plan an opportunity to choose from a broad range of investment alternatives, adding one or more funds to a platform, unlike fiduciary decisions to select individual investments for a plan, does not necessarily result in the plan forgoing the placement of one or more other non-ESG-themed investment alternatives on the platform. In this connection, however, the Department reiterates fiduciaries' obligation to comply with the objective standards set forth in paragraph (c)(3), and not to sacrifice returns or increase investment risk compared to other similar asset classes or funds in the same category in order to achieve non-pecuniary goals.

With respect to the proposed paragraph (c)(3)(ii) documentation requirement, fiduciaries already commonly document and maintain records about their investment choices, since that is a prudent practice and a potential shield from litigation risk. The proposed paragraph (c)(3)(ii) is intended simply to confirm that general fiduciary practice applies to the selection and monitoring of ESG investment options for individual account plans and to provide a safeguard against the risk that fiduciaries will select investment options based on non-pecuniary factors without a proper analysis and evaluation.

The Department requests comments on whether the language in paragraph (c)(3)(i) adequately reflects the same principles articulated in paragraph (c)(1). The Department also requests comments on whether it would be appropriate to expressly incorporate the provisions in paragraph (c)(2) on choosing among indistinguishable investment alternatives into paragraph (c)(3).

With respect to the QDIA provision in paragraph (c)(3)(iii) of the proposal, QDIAs are intended to help ensure that the retirement savings of plan participants who have not provided affirmative investment directions for their individual accounts, *e.g.,* because they may not be comfortable making such investment decisions, are put in a single investment capable of meeting the participant's long-term retirement savings needs. The relevant provisions of ERISA and the Department's implementing regulations encourage plans to offer QDIAs by providing fiduciaries with relief from liability for investment outcomes by deeming a participant to have exercised control over assets in his or her account if, in the absence of investment direction

[23] See, *e.g.,* ''The Morningstar Category Classifications (for portfolios available for sale in the United States),'' Morningstar Methodology Paper (April 29, 2016), *https://morningstardirect.morningstar.com/clientcomm/Morningstar_Categories_US_April_2016.pdf.*

[24] In that regard, fiduciaries should also be skeptical of ''ESG rating systems''—or any other rating system that seeks to measure, in whole or in part, the potential of an investment to achieve non-pecuniary goals—as a tool to select designated investment alternatives, or investments more generally.

from the participant, the plan fiduciary invests the assets in a QDIA.[25] Thus, selection of an investment fund as a QDIA is not analogous to merely offering participants an additional investment alternative as part of a prudently constructed lineup of investment alternatives from which participants may choose.

The Department does not believe that investment funds whose objectives include non-pecuniary goals—even if selected by fiduciaries only on the basis of objective risk-return criteria consistent with paragraph (c)(3)—should be the default investment option in an ERISA plan. ERISA is a statute whose overriding concern relevant here has always been providing a secure retirement for American workers and retirees, and it is inappropriate for participants to be defaulted into a retirement savings fund with other objectives absent their affirmative decision. Furthermore, in the QDIA context a fiduciary's decision to favor a particular environmental, social, corporate governance, or similarly oriented investment preference—and especially a decision to favor the fiduciary's own personal policy preferences—would raise questions about the fiduciary's compliance with ERISA's duty of loyalty. The QDIA regulation describes the attributes necessary for an investment fund, product, model portfolio, or managed account to be a QDIA. Each of the QDIA categories requires that the investment fund, product, model portfolio, or investment management service apply generally accepted investment theories, be diversified so as to minimize the risk of large losses, and be designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures. It is already the case that a QDIA may not invest participant contributions directly in employer securities. Thus, this requirement in the proposal is intended to help ensure that the financial interests of plan participants and beneficiaries in retirement benefits remain paramount by removing ESG considerations in cases in which participant's retirement savings in individual accounts designed for participant direction are being automatically invested by a plan fiduciary.

Paragraph (d) repeats a paragraph in the current regulation which states that an investment manager appointed pursuant to the provisions of section 402(c)(3) of the Act to manage all or part of the assets of a plan may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of the proposal, rely on, and act upon the basis of, information pertaining to the plan provided by or at the direction of the appointing fiduciary, if such information is provided for the stated purpose of assisting the manager in the performance of the manager's investment duties, and the manager does not know and has no reason to know that the information is incorrect.

Paragraph (e) is reserved for possible further clarification of the requirements under section 403 and 404 of ERISA with respect to fiduciary investment duties.

Paragraph (f) provides definitions. The term ''investment duties'' is unchanged from the current regulation and means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act. The term ''investment course of action'' is amended to mean any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and the proposed rule adds an additional provision to specify that the definition includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated alternative under the plan. The term ''pecuniary factor'' means a factor that has a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(a)(1) of ERISA. Finally, the term ''plan'' is unchanged from the current regulation and means an employee benefit plan to which Title I of ERISA applies.

Paragraph (g) provides for the effective date for the proposed rule. Under paragraph (g), the proposed rule would be effective on a date sixty days after the date of the publication of the final rule. The Department requests comment on paragraph (g), including whether any transition or applicability date provisions should be added to for any of the provisions of the proposal.

Paragraph (h) provides that should a court of competent jurisdiction hold any provision of the rule invalid, such action will not affect any other provision. Including a severability clause provides clear guidance that the Department's intent is that any legal infirmity found with part of the proposed rule should not affect any other part of the proposed rule.

C. Request for Public Comments

The Department invites comments from interested persons on all facets of the proposed rule. Commenters are free to express their views not only on the specific provisions of the proposal as set forth in this document, but on any issues germane to the subject matter of the proposal. Comments should be submitted in accordance with the instructions at the beginning of this document. The Department believes that 30 days will afford interested persons an adequate amount of time to analyze the proposed rule and submit comments.

D. Regulatory Impact Analysis

This section analyzes the regulatory impact of a proposed regulation concerning the legal standard imposed by sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA with respect to investment decisions involving plan assets. In particular, it addresses the selection of a plan investment or, in the case of an ERISA section 404(c) plan or other individual account plan, a designated investment alternative under the plan. This proposed rule would address the limitations that sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA impose on fiduciaries' consideration of non-pecuniary benefits and goals, including environmental, social, and corporate governance and other similarly situated factors, in making investment decisions. Thus, the rule would eliminate confusion that plan fiduciaries may currently face in the marketplace and reiterate long-established fiduciary standards of prudence and loyalty for selecting and monitoring investments. While this rule is expected to benefit plans and participants overall, it would also impose some costs. For example, some plans would incur small documentation costs. The research and analysis used to select investments may

[25] Section 404(c)(5)(A) of ERISA provides that, for purposes of section 404(c)(1) of ERISA, a participant in an individual account plan shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary of Labor. On October 24, 2007, the Department published a final regulation implementing the provisions of section 404(c)(5) of ERISA. 29 CFR 2550.404c–5. A fiduciary of a plan that complies with the final regulation will not be liable for any loss, or by reason of any breach, that occurs as a result of investment in a qualified default investment alternative but the plan fiduciaries remain responsible for the prudent selection and monitoring of the QDIA. The regulation describes the types of investments that qualify as default investment alternatives under section 404(c)(5) of ERISA.

change, but such a change is unlikely to increase the overall cost. The transfer impacts, benefits, and costs associated with the proposed rule depends on the number of plan fiduciaries that are currently not following or misinterpreting the Department's existing sub-regulatory guidance. While the Department does not have sufficient data to estimate the number of such fiduciaries, the Department believes it is small, because most fiduciaries are operating in compliance with the Department's sub-regulatory guidance. The Department expects that the benefits of the rule would be appreciable for participants and beneficiaries covered by plans with noncompliant investment fiduciaries. If the Department's assumption regarding the number of noncompliant fiduciaries is understated, the proposed rule's transfer impacts, benefits, and costs would be proportionately higher; however, even in this instance, the Department believes that the rule's benefits would exceed its costs.

The Department has examined the effects of this rule as required by Executive Order 12866,[26] Executive Order 13563,[27] the Congressional Review Act,[28] Executive Order 13771,[29] the Paperwork Reduction Act of 1995,[30] the Regulatory Flexibility Act,[31] section 202 of the Unfunded Mandates Reform Act of 1995,[32] and Executive Order 13132.[33]

1. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. It has been determined that this rule is economically significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the proposed rule's potential costs, benefits, and transfers, and OMB has reviewed this proposed rule pursuant to the Executive Order. Pursuant to the Congressional Review Act, OMB has designated this proposed rule as a ''major rule,'' as defined by 5 U.S.C. 804(2), because it would be likely to result in an annual effect on the economy of $100 million or more.

1.1. Introduction and Need for Regulation

Recently, there has been an increased emphasis in the marketplace on investments and investment courses of action that further non-pecuniary objectives, particularly what have been termed environmental, social, and corporate governance (ESG) investing.[34] The Department is concerned that the growing emphasis on ESG investing, and other non-pecuniary factors, may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defraying reasonable plan administration expenses. The Department is also concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance.

The Department has periodically considered the application of ERISA's fiduciary rules to plan investment decisions that are based, in whole or part, on non-pecuniary factors, and not simply investment risks and expected returns. Confusion with respect to these factors persists, perhaps due in part to varied statements the Department has made on the subject over the years in sub-regulatory guidance. Accordingly, this proposed rule is necessary to interpret ERISA and provide clarity and certainty regarding the scope of fiduciary duties surrounding non-pecuniary issues. The Department believes that providing further clarity on these issues in the form of a notice and comment regulation will help safeguard the interests of participants and beneficiaries in their plan benefits.

1.2. Affected Entities

The proposal would affect certain ERISA-covered plans whose fiduciaries consider non-pecuniary factors when selecting investments and the participants in those plans. For investments that are not participant directed, defined benefit (DB) plans and defined contribution (DC) plans would be required to maintain records when different investments are ''economically indistinguishable,'' documenting specifically why the investments were determined to be indistinguishable and the selected investment was chosen based on the purposes of the plan and the financial interests of plan participants and beneficiaries in receiving benefits from the plan. DC individual account plans would be affected by the proposed rule if they offer ESG options among their designated investment alternatives. As discussed below, the best data available on this topic comes from surveys of ESG investing by plans.

ESG investing approaches may consider non-pecuniary matters.[35] Riedl and Smeets' research on individual investors in the Netherlands shows that financial motives play less of a role than social preferences and social signaling in explaining decisions to invest in ''socially responsible'' mutual funds.[36] The same research also presents survey evidence that most individual investors expect socially responsible investing mutual funds to have lower returns and higher fees than conventional mutual funds. In selecting investments, some

[26] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[27] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[28] 5 U.S.C. 804(2) (1996).

[29] Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Jan. 30, 2017).

[30] 44 U.S.C. 3506(c)(2)(A) (1995).

[31] 5 U.S.C. 601 *et seq.* (1980).

[32] 2 U.S.C. 1501 *et seq.* (1995).

[33] Federalism, 64 FR 153 (Aug. 4, 1999).

[34] See Jon Hale, *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Fund Performance in 2019* (Feb. 14, 2020), *www.morningstar.com/lp/sustainable-funds-landscape-report.*

[35] See Schanzenbach & Sitkoff, *supra* note 5, at 389–90 (distinguishing between ''collateral benefits ESG'' investing—defined as ''ESG investing for moral or ethical reasons or to benefit a third party''—which is not permissible under ERISA, and ''risk-return ESG'' investing, which is).

[36] Arno Riedl & Paul Smeets, *Why Do Investors Hold Socially Responsible Mutual Funds?* 72 Journal of Finance 6 (2017). (This study included administrative data on trading of mutual funds by individual investors. They bought and sold funds only without the involvement of an intermediary.)

plans may use non-pecuniary factors that are not ESG factors, or are not perceived to be ESG factors. If survey respondents do not view them as ESG factors, these plans would not be identified by surveys.

According to a 2018 survey by the NEPC, approximately 12 percent of private pension plans have adopted ESG investing.[37] Another survey, conducted by the Callan Institute in 2019, found that about 19 percent of private sector pension plans consider ESG factors in investment decisions.[38] Both of these estimates are calculated from samples that include both DB and DC plans. Some DB plans that consider ESG factors would not be affected by the proposed rule because they focus only on the financial aspects of ESG factors, rather than on non-pecuniary objectives. In order to generate an upper-bound estimate of the costs; however, the Department assumes that 19 percent of DB plans would be affected by the proposed rule. This represents approximately 8,870 defined benefit plans.[39] The Department also assumes that 19 percent of DC plans with investments that are not participant directed would be affected; this represents an additional 18,400 plans.[40]

A small share of individual account plans offer at least one ESG-themed option among their investment alternatives. According to the Plan Sponsor Council of America, about 3 percent of 401(k) and/or profit sharing plans offered at least one ESG-themed investment option in 2018.[41] Vanguard's 2018 administrative data show that approximately nine percent of DC plans offered one or more ''socially responsible'' domestic equity fund options.[42] Considering these sources together, the Department assumes that six percent of individual account plans have at least one ESG-themed investment alternative and would be affected by the proposed rule. This represents 33,960 individual account plans with participant direction.[43] In terms of the actual utilization of ESG options, one survey indicates that about 0.1 percent of total DC plan assets are invested in ESG funds.[44] The Department seeks comments regarding its assumptions and additional information describing the prevalence of ESG investing or ESG investment options among ERISA plans, including their use as qualified default investment alternatives.

1.3. Benefits

The proposed rule would replace existing guidance on the use of ESG and similar factors in the selection of investments, including that fiduciaries must not base investment decisions on non-pecuniary factors unless alternative investment options are ''economically indistinguishable'' and such a conclusion is properly documented. The Department anticipates that the resulting benefits will be appreciable.

When fiduciaries weigh non-pecuniary considerations as required by this rule to select investments, some fiduciaries will select investments that are different from those they would have selected pre-rule. These selected investments' returns will generally tend to be higher over the long run. Also, as plans invest less in actively managed ESG mutual funds, they may instead select mutual funds with lower fees or passive index funds.

In this case, the societal resources freed for other uses due to lessened active management (minus potential upfront transition costs) would represent benefits of the rule. Furthermore, if some portion of the increased returns would be associated with ESG investments generating lower pre-fee returns than non-ESG investments (as regards economic impacts that can be internalized by parties conducting market transactions), then the new returns qualify as benefits of the rule; however, it would be important to track externalities, public goods, or other market failures that might lead to economic effects of the non-ESG activities being potentially less fully internalized than ESG activities' effects would, and thus generating costs to society on an ongoing basis. Finally, if some portion of the increased returns would be associated with transactions in which the opposite party experiences decreased returns of equal magnitude, then this portion of the rule's impact would, from a society-wide perspective, be appropriately categorized as a transfer (though it should be noted that, if there is evidence of wealth differing across the transaction parties, it would have implications for marginal utility of the assets).

To the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participant and beneficiaries' retirement investment returns, thereby compromising a central purpose of ERISA. Given the increase in ESG investing, the Department is concerned that, without rulemaking, ESG investing will present a growing threat to ERISA fiduciary standards and, ultimately, to investment returns for plan participants and beneficiaries. For the plans and participants that would be affected by a reduced use of non-pecuniary factors, the benefits they would experience from higher investment returns, compounded over many years, could be considerable. The Department seeks information that could be used to quantify the increase in investment returns.

The Department also invites comments addressing the benefits that would be associated with the proposed rule.

1.4. Costs

This proposed rule provides guidance on the investment duties of a plan fiduciary. Under this proposed rule, plans that consider ESG and similar factors when choosing investments would be reminded that they may evaluate only the investments' relevant economic pecuniary factors to determine the risk and return profiles of the alternatives. It is the Department's view that many plan fiduciaries already undertake such evaluations, though many that consider ESG and similar factors may not be treating those as pecuniary factors within the risk-return evaluation. This proposal would not impair fiduciaries' appropriate consideration of ESG factors in circumstances where such consideration is material to the risk-return analysis and advances participants' interests in their retirement benefits. The Department does not intend to increase fiduciaries' burden of care attendant to such consideration; therefore, and no additional costs are estimated for this requirement. While fiduciaries may modify the research approach they use

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[37] Brad Smith & Kelly Regan, *NEPC ESG Survey: A Profile of Corporate & Healthcare Plan Decisionmakers' Perspectives,* NEPC (Jul. 11, 2018), *https://cdn2.hubspot.net/hubfs/2529352/files/2018%2007%20NEPC%20ESG%20Survey%20Results%20.pdf?t=1532123276859.*

[38] *2019 ESG Survey,* Callan Institute (2019), *www.callan.com/wp-content/uploads/2019/09/2019–ESG-Survey.pdf.*

[39] DOL calculations are based on statistics from *Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports,* Employee Benefits Security Administration (Sep. 2019), (46,698 × 19% = 8,870 DB plans; 34,960,000 × 19% = 6,642,400, rounded to 6.6 million participants; $3,208,820,000,000 × 19% = $609,675,800,000, rounded to $610 billion in assets).

[40] Id. (96,860 × 19% = 18,403, rounded to 18,400 plans).

[41] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[42] *How America Saves 2019,* Vanguard (June 2019), *https://institutional.vanguard.com/iam/pdf/HAS2019.pdf.*

[43] DOL calculations based on statistics from *Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports,* Employee Benefits Security Administration (Sept. 2019), ((565,969) * 6% = 33,958, rounded to 33,960 individual account plans).

[44] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

to select investments as a consequence of the proposed rule, the Department assumes this modification would not impose significant additional cost.

Some fiduciaries will select investments that are different from what they would have selected pre-rule. This can happen in different ways. Fiduciaries may realize that a current investment does not conform to the rule and decide to choose a more appropriate investment, or as part of a routine evaluation of the plan's investments or investment alternatives, fiduciaries may replace an investment or investment alternative. This could lead to some disruption, particularly for DC plans with participant direction. If a plan fiduciary removes an ESG fund as a designated investment alternative and does not replace it with a more appropriate ESG fund as a result of this proposed rule, participants invested in the ESG fund would have to pick a new fund that may not be comparable from their perspective. This could be disruptive, but similar disruptions occur when plan fiduciaries routinely change designated investment alternatives.

Furthermore, the proposed rule requires plan fiduciaries who select investments based on non-pecuniary factors to document why alternative investments are ''economically indistinguishable'' in terms of their expected risk and return characteristics. The Department believes that the likelihood that two investments will be ''economically indistinguishable'' is rare, and therefore the need to document such circumstances also will be rare.[45] The Department seeks data and comments on the frequency with which plans find two investments to be ''economically indistinguishable,'' and the process plan fiduciaries use in this situation. In those rare instances, the documentation requirement could be burdensome unless fiduciaries are already documenting such decisions.

Paragraph (c)(1) of the proposal provides that a fiduciary's evaluation of an investment must be focused on pecuniary factors. The paragraph explains that it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other non-pecuniary goal. Paragraph (c)(2) provides that, if after completing an appropriate evaluation, alternative investments appear ''economically indistinguishable,'' and one of the investments is selected on the basis of a non-pecuniary factor or factors such as ESG considerations, the fiduciary must document the basis for concluding that a distinguishing factor could not be found and why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the financial interests of plan participants and beneficiaries in receiving benefits from the plan. Thus, the rule may impose costs on fiduciaries whose current documentation and recordkeeping are insufficient to meet the new requirement. Because the Department concludes that truly ''economically indistinguishable'' alternatives are rare, the Department estimates that this requirement would not result in a substantial cost burden.

The Department has not proposed to apply the provision in paragraphs (c)(1) and (c)(2) of the proposal on ''economically indistinguishable'' alternative investments for the selection of investment options for individual account plans, but rather included a documentation requirement for such investment decisions in paragraph (c)(3)(ii). Therefore, individual account plan fiduciaries will need to document their selections of investment alternatives that include one or more ESG or similarly oriented assessments or judgments in their investment mandates or that include these parameters in the fund name.

The Department assumes that the documentation requirement in paragraph (c)(3) would impose little, if any, additional cost on individual account plan fiduciaries, because they already commonly document and maintain records about their investment choices as a best practice and potential shield from litigation risk. The Department proposes to include this requirement to confirm the need to document actions taken and to provide a safeguard against the risk that fiduciaries will select investment options based on non-pecuniary factors without a proper analysis and evaluation.

The PRA section below estimates the costs of the information collection. As required by the PRA, the PRA estimates encompass the entire burden of the proposed rule's information collection as opposed to the incremental costs discussed in the regulatory impact analysis. For this reason, the incremental costs of the proposed rule are estimated to be minimal, while the PRA cost estimates are larger.

The Department invites comments addressing the costs that would be associated with the proposed rule.

1.5. Transfers

There may be a transfer from mutual fund companies that offer ESG-themed mutual funds to competing mutual fund companies that offer other types of mutual funds. Companies offering ESG-themed mutual funds would have fewer customers since ERISA plans that currently offer ESG-themed mutual funds in their DC plans would no longer be able to offer them under the proposed rule, except for any funds that would be selected based on financial considerations alone. Often the same company will offer both mutual funds with an ESG theme and mutual funds without; there may be a transfer within the company from ESG mutual funds to other mutual funds.

Moreover, as noted previously, if some portion of rule-induced increases in returns would be associated with transactions in which the opposite party experiences decreased returns of equal magnitude, then this portion of the proposed rule's impact would, from a society-wide perspective, be appropriately categorized as a transfer.

1.6. Uncertainty

It is unclear how many plans use ESG and similar factors when selecting investments. Similarly unclear is the total asset value of investments that were selected in this manner. This is particularly true for DB plans. While there is some survey evidence on how many DB plans factor in ESG considerations, the surveys were based on small samples and yielded varying results. It also is not clear whether survey information about ESG investing accurately represents the prevalence of investing that incorporates non-pecuniary factors. For instance, some non-pecuniary investing concentrates on issues that are not thought of as ESG issues. At the same time, some investing takes account of environmental factors and corporate governance in a manner that focuses exclusively on the financial aspects of those considerations.

The proposed rule would replace the existing guidance on using non-pecuniary factors while selecting investments. It is very difficult to estimate how many plans have fiduciaries that are currently using non-pecuniary factors improperly while selecting investments. Such plans would experience significant effects from the proposed rule. It is also difficult to estimate the degree to which the use of non-pecuniary factors by ERISA fiduciaries, ESG or otherwise, would expand in the future absent this rulemaking, though trends in other countries suggest that pressure for such

[45] See Schanzenbach & Sitkoff, *supra* note 5, at 410 (describing a hypothetical pair of truly identical investments as a ''unicorn'').

expansion will only continue to increase.[46] However, based on current trends the Department believes that the use of non-pecuniary factors by ERISA plans is likely to increase moderately in the future without this rulemaking, and thus on a forward basis the benefits of the proposed rule will be appreciable.

1.7. Alternatives

The Department has considered alternatives to the proposed regulation. One alternative would prohibit plan fiduciaries from ever considering ESG or similar factors. This would address the Department's concerns that some plan fiduciaries may sacrifice return or increase investment risk to promote goals that are unrelated to the financial interests of the plan or its participants. However, that approach would prohibit the use of factors even when they have pecuniary consequences.

The Department also has considered prohibiting plan fiduciaries from basing investment decisions on non-pecuniary factors and not permitting the use of non-pecuniary factors where the alternative investment options are indistinguishable. But if the alternative investment options truly are ''economically indistinguishable,'' it is not clear what would be available to a plan fiduciary to base the decision on other than a non-pecuniary factor. Regardless, the Department believes that truly indistinguishable alternative investment options occur very rarely in practice, if at all. Accordingly, this proposed rule retains the ''all things being equal'' test from the Department's previous guidance with a specific requirement to document applications of that test. However, the Department requests comment regarding whether any variation of an ''all things being equal'' approach should be retained, or should be abandoned as inconsistent with the fiduciary duties of ERISA section 404. The Department also requests comment on how, assuming ''ties'' do occur, they might be broken based on different considerations than set forth in the proposed rule.

With respect to the requirements concerning individual account plans in paragraph (c)(3), the Department considered expressly incorporating paragraph (c)(1), which explains a fiduciary's obligation to only focus on pecuniary factors. The Department decided it was unnecessary to expressly incorporate paragraph (c)(1) into paragraph (c)(3), because the latter already requires fiduciaries to focus on only objective risk-return criteria. The Department requests comment on whether paragraph (c)(1) should be expressly incorporated in paragraph (c)(3).

Similarly, the Department considered whether to apply the documentation requirement for indistinguishable investments contained in paragraph (c)(2) of the proposal to fiduciaries' selection of designated investment alternatives for individual account plans. For the reasons set forth earlier in the preamble, Department decided not to carry that requirement into paragraph (c)(3). Rather, as explained above, investment options for individual account plans are often chosen precisely for their varied characteristics. Still, the proposed rule would require fiduciaries to document the selection and monitoring of ESG-themed funds as designated investment alternatives. The Department requests comment on whether it should apply the requirements in paragraph (c)(2) to the selection of ESG-themed funds for individual account plans.

The Department believes that the approach reflected in the proposal best reflects the statutory obligations of prudence and loyalty, appropriately ensures that fiduciaries' decisions will be guided by the financial interests of the plans and participants to whom they owe duties of prudence and loyalty, and is the easiest to apply and enforce. Nevertheless, the Department solicits comments on all alternatives, including any alternatives that the Department has not identified in this NPRM.

1.8. Conclusion

The Department believes that the proposed rule would provide clarity to fiduciaries in fulfilling their responsibilities by describing when and how fiduciaries can factor in ESG and similar considerations as they select and monitor investments, and when they may not.

While this proposed rule is expected to benefit plans and participants, some costs would be incurred as well. Some plans would have to modify their processes for selecting and monitoring investments. While some plans would need to document selections where the alternative investment options are indistinguishable, and individual account plans would need to document their decisions for selecting ESG-themed funds as designated investment alternatives, the Department does not expect these requirements to impose a significant increase in hourly burden or cost because the Department believes that truly indistinguishable alternative investment options should occur very rarely in practice, if at all and defined contribution plans are already documenting their decisions when selecting investment alternatives for their participant directed investment platforms.

Although the proposed rule would replace previous guidance, the Department believes that there is significant overlap; thus, this would not result in substantial benefits or costs. Overall, the proposed rule would assist fiduciaries in carrying out their responsibilities, while promoting the financial interests of current and future retirees.

2. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA).[47] This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Financial Factors in Selecting Plan Investments ICR. To obtain a copy of the ICR, contact the PRA addressee shown below or go to *www.RegInfo.gov.*

The Department has submitted a copy of the proposed rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that address the following:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

[46] See generally Government Accountability Office Report No. 18–398, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful* (May 2018), at 25–27; Principles for Responsible Investment, *Fiduciary Duty in the 21st Century, supra* note 12, at 21–22, 50–51.

[47] 44 U.S.C. 3506(c)(2)(A) (1995).

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Comments should be sent by mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503 and marked ''Attention: Desk Officer for the Employee Benefits Security Administration.'' Comments can also be submitted by fax at 202–395–5806 (this is not a toll-free number), or by email at *OIRA_submission@omb.eop.gov.* OMB requests that comments be received within 30 days of publication of the proposed rule to ensure their consideration.

PRA Addresses: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210. The PRA Addressee may be reached by telephone, (202) 693–8410, or by fax, (202) 219–5333. These are not toll-free numbers. ICRs also are available at *www.RegInfo.gov* (*www.reginfo.gov/public/do/PRAMain*).

In prior guidance, the Department has encouraged plan fiduciaries to appropriately document their investment activities, and the Department believes it is common practice. The proposed rule expressly requires only that, where a plan fiduciary determines that alternative investments are ''economically indistinguishable,'' the fiduciary further document the basis for concluding that a distinguishing factor could not be found and the reason that the investment was selected based on non-pecuniary factors. Nevertheless, the Department believes that the likelihood that two investments options which are truly economically indistinguishable is very rare.

While the incremental burden of the proposed regulations is small, the full burden of the requirements will be included below to allow for evaluation of the requirements in the required information collection.

According to the most recent Form 5500 data, there are 8,870 DB plans and 18,400 DC plans with ESG investments that are not participant directed that could be affected by the proposed rule.[48] While the Department does not have data regarding the frequency of the rare event of alternatives being indistinguishable and requiring documentation, the Department models the burden using one percent of plans with ESG investments as needing to provide the documentation.

While DB plans may change investments at least annually, DC plans may do so less frequently. For this analysis, DC plans are assumed to review their service providers and investments about every three years. Therefore, the Department estimates that 89 DB plans and 61 DC plans with ESG investments that are not participant directed will encounter economically indistinguishable alternatives in a year.[49]

2.1. Maintain Documentation

The proposed rule requires ESG plan fiduciaries to maintain documentation if alternative investments appear to be ''economically indistinguishable.'' While much of the documentation needed to fulfill this requirement is generated in the normal course of business, plans may need additional time to ensure records are properly maintained and are up to the standard required by the Department. The Department estimates that plan fiduciaries and clerical staff will each expend, on average, 2 hours of labor to maintain the needed documentation. This results in an annual burden estimate of 600 hours, with an equivalent cost of $56,818 for DB plans and DC plans with ESG investments that are not participant directed.[50]

The proposal also would require individual account plan fiduciaries to document their selections of ESG-themed funds as designated investment alternatives for their participant-directed investment platforms. As explained above, fiduciaries selecting investment options for DC plans already commonly document and maintain records about their investment choices, since that is a best practice and a potential shield from litigation risk. Therefore, the Department assumes this documentation requirement will impose little, if any, additional cost. The requirement is included to confirm the need to document actions taken and to provide a safeguard against the risk that fiduciaries will select investment options based on non-pecuniary factors without a proper analysis and evaluation.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Financial Factors in Selecting Plan Investments.

OMB Control Number: 1210–NEW.

Affected Public: Businesses or other for-profits.

Estimated Number of Respondents: 11,470.

Estimated Number of Annual Responses: 11,470.

Frequency of Response: Occasionally.

Estimated Total Annual Burden Hours: 600.

Estimated Total Annual Burden Cost: $0.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[51] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act[52] and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis of the proposed rule.

For purposes of analysis under the RFA, the Employee Benefits Security Administration (EBSA) continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[53] The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for exemptions or simplified annual reporting and disclosure for

[48] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ''Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports,'' (Sep. 2019), (46,698 DB plans × 19% = 8,870 DB plans; 96,860 DC Plans × 19% = 18,400 DC plans).

[49] 8,870 DB plans * 0.01 = 89 DB plans; 18,400 DC plans * 0.01 * 0.33 = 61 DC plans.

[50] The burden is estimated as follows: (8,870 DB plans * 0.01 * 2 hours) + (18,400 DC plans * 0.01 * 2 hours * 0.33) = 300 hours for both a plan fiduciary and clerical staff. A labor rate of $134.21 is used for a plan fiduciary and a labor rate of $55.14 for clerical staff ((8,870 DB plans * 0.01 * 2 * $134.21) + (18,400 DC plans * 0.01 * 2 hours* 0.33 * $134.21) + (8,870 DB plans * 0.01 * 2 * $55.14) + (18,400 DC plans * 0.01 * 2 hours* 0.33 * $55.14) = $56,818.)

[51] 5 U.S.C. 601 *et seq.* (1980).

[52] 5 U.S.C. 551 *et seq.* (1946).

[53] The Department consulted with the Small Business Administration before making this determination, as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c).

welfare benefit plans. Pursuant to the authority of section 104(a)(3), the Department has previously issued—at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10—certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans. Such plans include unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements. Further, while some large employers may have small plans, in general small employers maintain small plans. Thus, EBSA believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA)[54] pursuant to the Small Business Act.[55] Therefore, EBSA requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

The Department has determined that this proposed rule could have a significant impact on a substantial number of small entities. Therefore, the Department has prepared an Initial Regulatory Flexibility Analysis that is presented below.

3.1. Need for and Objectives of the Rule

The proposed rule confirms that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action. This would help ensure that fiduciaries are protecting the financial interests of participants and beneficiaries.

3.2. Affected Small Entities

The proposed rule has documentation provisions that would affect small ERISA-covered plans, which have fewer than 100 participants. It also has some provisions about the improper use of non-pecuniary factors when plan fiduciaries select and monitor investments. These provisions would affect only plans and participants that are improperly incorporating non-pecuniary factors into their investment decisions. The proposed rule would affect small plans that have ESG-type investments that are not in compliance with the proposed regulation.

As discussed in the affected entities section above, surveys suggest that 19 percent of DB plans and DC plans with investments that are not participant directed and 6 percent of DC plans with participant directed individual accounts have ESG or ESG-themed investments and could be affected by the proposed rule. The distribution across plan size is not available in the surveys. This represents approximately 8,870 defined benefit plans and 52,360 DC plans. It should be noted that 83 percent of all DB plans and 88 percent of all DC are small plans.[56] Particularly for DB plans, it is likely that most plans with ESG investments are large. In terms of the actual utilization of ESG options, about 0.1 percent of total DC plan assets are invested in ESG funds.[57] One survey found that among 401(k) plans with fewer than 50 participants, approximately 1.7 percent offered an ESG option.[58]

A large majority of participants in small pension plans do not have an ESG fund in their portfolio. As previously mentioned, about 0.1 percent of total assets held by DC plans are invested in ESG funds.[59]

3.3. Impact of the Rule

While the rule is expected to affect small pension plans, it is not likely that there would be a significant economic impact on many of these plans. The proposed regulation provides guidance on how fiduciaries can comply with sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA when investing plan assets. The Department believes most plans are already fulfilling the requirements in the course of following prior guidance. Plans would need to document selections of investments based on non-pecuniary factors where the alternative investment options are ‘‘economically indistinguishable.’’ The Department believes that truly ‘‘economically indistinguishable’’ alternative investment options should occur very rarely in practice, if at all. The Department estimates a cost of less than $380 per affected plan for plan fiduciaries and clerical professionals to fulfill the documentation requirement, see Table 1.

TABLE 1—DOCUMENTATION REQUIREMENT

Affected entity	Labor rate	Hours	Cost
Plans: Plan Fiduciary	$134.21	2	$268.42
Plans: Clerical workers	55.14	2	110.28
Total			378.70

Source: DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports, (September 2019).

Participant directed individual account plans will need to document their selections of ESG-themed funds as designated investment alternatives. As described above, fiduciaries in such plans already commonly document and maintain records about their choices of investment funds as designated investment alternatives, since that is the best practice and a potential shield from litigation risk. Therefore, the Department concludes that this documentation requirement would impose little, if any, additional cost. While the costs associated with the rule are small, its benefits could be significant for plans that are heavily invested in underperforming ESG funds and would be required to change their current ESG investments in response to the proposed rule. The Department does not have sufficient data to estimate the number of such plans and; therefore, welcomes comments and data that could help it make this determination.

[54] 13 CFR 121.201.

[55] 15 U.S.C. 631 *et seq.*

[56] DOL calculations based on statistics from U.S. Department of Labor, Employee Benefits Security Administration, ‘‘Private Pension Plan Bulletin: Abstract of 2017 Form 5500 Annual Reports,’’ (Sep. 2019).

[57] *62nd Annual Survey of Profit Sharing and 401(k) Plans,* Plan Sponsor Council of America (2019).

[58] Id.

[59] Id.

3.4. Alternatives

The Department considered the following alternatives to the proposed regulation: (1) Prohibiting plan fiduciaries from considering ESG or similar factors; (2) prohibiting plan fiduciaries from basing investment decisions on non-pecuniary factors and the use of non-pecuniary factors when the alternative investment options are economically indistinguishable; (3) requiring fiduciaries of individual account plans to comply with paragraph (c)(1) of the proposal, which explains a fiduciary's obligation to only focus on pecuniary factors; and (4) applying the documentation requirement for indistinguishable investments contained in paragraph (c)(2) of the proposal to fiduciaries' selection of designated investment alternatives for individual account plans. For a discussion of the Department's rationale for not adopting these alternatives, please see Section 1.7, Alternatives, above.

The Department believes that the approach taken in the proposal best reflects the statutory obligations of prudence and loyalty, appropriately ensures that fiduciaries' decisions would be guided by the financial interests of the plans and participants to whom they owe duties of prudence, and loyalty, and is the most efficient to apply and enforce. Nevertheless, the Department solicits comments on other alternatives, particularly those that would reduce the burden on small entities.

3.5. Duplicate, Overlapping, or Relevant Federal Rules

The Department is issuing this proposal under sections 404(a)(1)(A) and 404(a)(1)(B) of Title I under ERISA. The Department is charged with interpreting the ERISA provisions regarding the consideration of non-pecuniary factors in investment funds, and therefore, there are no duplicate, overlapping, or relevant Federal rules.

4. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments.

5. Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.[60] Federal agencies promulgating regulations that have federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department's view, these proposed regulations would not have federalism implications because they would not have direct effects on the states, the relationship between the national government and the states, or on the distribution of power and responsibilities among various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the states as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the proposed rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the states or the relationship or distribution of power between the national government and the states.

The Department welcomes input from states regarding this assessment.

Statutory Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Parts 2509 and 2550

Employee benefit plans, Employee Retirement Income Security Act, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Reporting and Recordkeeping requirements, Securities.

[60] Federalism, 64 FR 153 (Aug. 4, 1999).

For the reasons set forth in the preamble, the Department is proposing to amend parts 2509 and 2550 of subchapters A and F of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER A—GENERAL

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§ 2509.2015–01 [Removed]

■ 2. Remove § 2509.2015–01.

SUBCHAPTER F—FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 3. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor's Order No. 1–2011, 77 FR 1088 (January 9, 2012). Sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 727 (2012). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–1 also issued under sec. 657, Pub. L. 107–16, 115 Stat 38. Sec. 2550.404a–2 also issued under sec. 657 of Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550. 404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

4. Revise § 2550.404a–1 to read as follows:

§ 2550.404a–1 Investment duties.

(a) *In general.* Section 404(a)(1)(A) and 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) provide, in part, that a fiduciary shall discharge that person's duties with respect to the plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of

administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

(b) *Investment duties.* (1) With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the requirements of section 404(a)(1)(A) and 404(a)(1)(B) of the Act set forth in paragraph (a) of this section are satisfied if the fiduciary:

(i) Has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties;

(ii) Has evaluated investments and investment courses of action based solely on pecuniary factors that have a material effect on the return and risk of an investment based on appropriate investment horizons and the plan's articulated funding and investment objectives insofar as such objectives are consistent with the provisions of Title I of ERISA;

(iii) Has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives, or sacrificed investment return or taken on additional investment risk to promote goals unrelated to those financial interests of the plan's participants and beneficiaries or the purposes of the plan;

(iv) Has not otherwise acted to subordinate the interests of the participants and beneficiaries to the fiduciary's or another's interests and has otherwise complied with the duty of loyalty; and

(v) Has acted accordingly.

(2) For purposes of paragraph (b)(1) of this section, ''appropriate consideration'' shall include, but is not necessarily limited to,

(i) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action, and

(ii) Consideration of the following factors as they relate to such portion of the portfolio:

(A) The composition of the portfolio with regard to diversification;

(B) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan;

(C) The projected return of the portfolio relative to the funding objectives of the plan; and

(D) How the investment or investment course of action compares to available alternative investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C) of this section.

(c)(1) *Consideration of Pecuniary vs. Non-Pecuniary Factors.* A fiduciary's evaluation of an investment must be focused only on pecuniary factors. Plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or any other non-pecuniary goals. Environmental, social, corporate governance, or other similarly oriented considerations are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. The weight given to those factors should appropriately reflect a prudent assessment of their impact on risk and return. Fiduciaries considering environmental, social, corporate governance, or other similarly oriented factors as pecuniary factors are also required to examine the level of diversification, degree of liquidity, and the potential risk-return in comparison with other available alternative investments that would play a similar role in their plans' portfolios.

(2) *Economically indistinguishable alternative investments.* When alternative investments are determined to be economically indistinguishable even after conducting the evaluation described in paragraph (c)(1), and one of the investments is selected on the basis of a non-pecuniary factor or factors such as environmental, social, or corporate governance considerations (notwithstanding the requirements of paragraph (b) and paragraph (c)(1)), the fiduciary should document specifically why the investments were determined to be indistinguishable and document why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries in receiving benefits from the plan.

(3) *Investment Alternatives for Individual Account Plans.* The standards set forth in sections 403 and 404 of ERISA and paragraphs (b)(1) and (b)(2) of this regulation apply to a fiduciary's selection of an investment fund as a designated investment alternative in an individual account plan. In the case of investment platforms for defined contribution individual account plans, including platforms with bundled administrative and investment services, that allow plan participants and beneficiaries to choose from a broad range of investment alternatives as defined in 29 CFR 2550.404c-1(b)(3), a fiduciary's addition (for the platform) of one or more prudently selected, well managed, and properly diversified investment alternatives that include one or more environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name, would not violate the standards in section 403 and 404 provided:

(i) The fiduciary uses only objective risk-return criteria, such as benchmarks, expense ratios, fund size, long-term investment returns, volatility measures, investment manager investment philosophy and experience, and mix of asset types (*e.g.,* equity, fixed income, money market funds, diversification of investment alternatives, which might include target date funds, value and growth styles, indexed and actively managed funds, balanced and equity segment funds, non-U.S. equity and fixed income funds), in selecting and monitoring all investment alternatives for the plan including any environmental, social, corporate governance, or similarly oriented investment alternatives;

(ii) the fiduciary documents its selection and monitoring of the investment in accordance with paragraph (c)(3)(i) of this section; and

(iii) the environmental, social, corporate governance, or similarly oriented investment mandate alternative is not added as, or as a component of, a qualified default investment alternative described in 29 CFR 2550.404c-5.

(d) An investment manager appointed, pursuant to the provisions of section 402(c)(3) of the Act, to manage all or part of the assets of a plan, may, for purposes of compliance with the provisions of paragraphs (b)(1) and (2) of this section, rely on, and act upon the basis of, information pertaining to the

plan provided by or at the direction of the appointing fiduciary, if –

(1) Such information is provided for the stated purpose of assisting the manager in the performance of the manager's investment duties, and

(2) The manager does not know and has no reason to know that the information is incorrect.

(e) [Reserved]

(f) *Definitions.* For purposes of this section:

(1) The term ''*investment duties*'' means any duties imposed upon, or assumed or undertaken by, a person in connection with the investment of plan assets which make or will make such person a fiduciary of an employee benefit plan or which are performed by such person as a fiduciary of an employee benefit plan as defined in section 3(21)(A)(i) or (ii) of the Act.

(2) The term ''*investment course of action*'' means any series or program of investments or actions related to a fiduciary's performance of the fiduciary's investment duties, and includes the selection of an investment fund as a plan investment, or in the case of an individual account plan, a designated alternative under the plan.

(3) The term ''*pecuniary factor*'' means a factor that has a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(a)(1) of ERISA.

(4) The term ''*plan*'' means an employee benefit plan to which Title I of the Act applies.

(g) *Effective date.* This section shall be effective on [60 days after date of publication of final rule].

(h) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this subpart to be invalid, such action will not affect any other provision of this subpart.

Signed at Washington, DC, June 22, 2020.

Jeanne Wilson,

Acting Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2020–13705 Filed 6–26–20; 4:15 pm]

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LIBRARY OF CONGRESS

U.S. Copyright Office

37 CFR Part 201

[Docket No. 2020–10]

Modernizing Recordation of Notices of Termination

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking; notification of inquiry; extension of comment period.

SUMMARY: The U.S. Copyright Office is extending the deadline for the submission of written comments in response to its June 3, 2020, notice of proposed rulemaking and notification of inquiry regarding recordation of notices of termination.

DATES: The comment period for the proposed rule published June 3, 2020, at 85 FR 34150, is extended. Written comments must be received no later than 11:59 p.m. Eastern Time on August 5, 2020.

ADDRESSES: For reasons of government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions for submitting comments are available on the Copyright Office website at *https://www.copyright.gov/rulemaking/termination-modernization/.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Regan A. Smith, General Counsel and Associate Register of Copyrights, *regans@copyright.gov;* Kevin R. Amer, Deputy General Counsel, *kamer@copyright.gov;* or Nicholas R. Bartelt, Attorney-Advisor, *niba@copyright.gov.* They can be reached by telephone at (202) 707–8350.

SUPPLEMENTARY INFORMATION: On June 3, 2020, the U.S. Copyright Office issued a notice of proposed rulemaking and notification of inquiry (the ''NPRM'') regarding recordation of notices of termination.[1] The NPRM requested public comments on proposed updates to the regulatory framework for notices of termination before features permitting electronic submission of notices are developed for the online recordation system. The Office also solicited comments on two additional subjects: (1) Whether the Office should develop an optional form or template to assist remitters in creating and serving notices of termination; and (2) whether the Office should consider regulatory updates to address concerns about third-party agents failing to properly serve and file notices on behalf of authors.

To ensure that members of the public have sufficient time to comment, and to ensure that the Office has the benefit of a complete record, the Office is extending the deadline for submission of comments to 11:59 p.m. Eastern Time on August 5, 2020.

[1] 85 FR 34150 (June 3, 2020).

Dated: June 26, 2020.

Regan A. Smith,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2020–14208 Filed 6–29–20; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2019–0616; FRL–10010–57-Region 6]

Air Plan Approval; Arkansas; Infrastructure for the 2015 Ozone National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is proposing to approve elements of a State Implementation Plan (SIP) submission from the State of Arkansas (State) for the 2015 Ozone (O_3) National Ambient Air Quality Standards (NAAQS). This submittal addresses how the existing SIP provides for implementation, maintenance, and enforcement of the 2015 O_3 NAAQS (infrastructure SIP or i-SIP). The i-SIP ensures that the Arkansas SIP is adequate to meet the state's responsibilities under the CAA for this NAAQS. We are also proposing to approve changes to the State's regulations to bring the State's rule up to date and consistent with the 2015 O_3 NAAQS.

DATES: Written comments must be received on or before July 30, 2020.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2019–0616, at *http://www.regulations.gov* or via email