

**PRUDENCE AND LOYALTY IN SELECTING PLAN INVESTMENTS AND  
EXERCISING SHAREHOLDER RIGHTS  
OMB CONTROL NUMBER 1210-0162**

**This ICR seeks a revision of an existing collection of information under OMB Control Number 1210-0162.**

**A. JUSTIFICATION**

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.**

In late 2020, the Department published two final rules dealing with the selection of plan investments and the exercise of shareholder rights, including proxy voting. The Department published those rules to provide clarity and certainty to plan fiduciaries regarding their legal duties under ERISA section 404 in connection with making plan investments and for exercising shareholder rights. The Department was also concerned that some investment products may be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance. Before issuing the rules, the Department had periodically considered and issued guidance pertaining to the application of ERISA’s fiduciary rules to plan investment decisions that are based, in whole or part, on factors unrelated to financial performance. Confusion with respect to these factors persisted, perhaps due in part to varied statements the Department had made on the subject over the years in non-regulatory guidance. Accordingly, the 2020 rules were intended to interpret ERISA and provide clarity and certainty regarding the scope of fiduciary duties surrounding such issues.

Responses to the 2020 rules, however, suggest that the new rules may have inadvertently caused more confusion than clarity. Many interested stakeholders have told the Department that the terms and tone of the final rules and preambles have increased concerns and uncertainty about the extent to which plan fiduciaries may consider environmental, social and governance factors in their investment decisions, and that the final rules have chilling effects contrary to the interests of participants and beneficiaries. Consequently, on March 10, 2021, the Department announced that it would stay enforcement of the 2020 rules pending a complete review of the matter. Subsequently, on May 20, 2021, the President issued Executive Order 14030, entitled “Executive Order on Climate-Related Financial Risk.” Section 4 of the Executive Order directs the Department to consider suspending, revising, or rescinding any rules from the prior administration that would have barred plan fiduciaries (and their investment-firm service providers) from considering environmental, social and governance factors, including climate-related risks, in their investment decisions related to workers’ pensions. In light of the foregoing, the Department concluded that additional notice and comment rulemaking was necessary to safeguard the interests of participants and beneficiaries in their retirement and welfare plan benefits.

The proposed rule includes a proposed revision to currently approved ICR 1210-0162. This proposed revision includes elements of the information collection currently approved under OMB Number 1210-0165 (Fiduciary Duties Regarding Proxy Voting and Shareholder Rights). After the revision to 1210-0162 has been approved, 1210-0165 will be discontinued.

The proposal states that if a fiduciary prudently concludes that competing investment choices, or investment courses of action, equally serve the financial interests of the plan, a fiduciary can select the investment, or investment course of action, based on collateral benefits other than investment returns. In the case of a designated investment alternative for an individual account plan, including a QDIA, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries. A fiduciary, however, may not accept expected reduced returns or greater risks in selecting such an investment or investment course of action.

- 2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.**

The proposed rule requires that if a fiduciary prudently concludes that competing investments or investment courses of action equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the investment, or investment course of action, based on collateral benefits other than investment returns. In the case of a designated investment alternative for an individual account plan, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries. This new disclosure is expected to be useful to participants and beneficiaries in deciding how to invest their plan accounts.

- 3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.**

Use of electronic methods of compliance is neither required nor precluded by the terms of this IC. The Department has assumed that the tasks involved with meeting the requirements of the IC generally will be performed by regulated financial services entities acting on behalf of employee benefit plans in connection with the proper management and voting of securities, and that the plans and financial services entities involved will establish and maintain recordkeeping systems, and comply with the IC requirements, by electronic means. The Department's estimates, therefore, take account of the use of electronic recordkeeping in establishing the burden associated with this IC.

**4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.**

For the requirements relating to investment practices, the Department is issuing this proposal under sections 404(a)(1)(A) and 404(a)(1)(B) of Title I under ERISA. The Department has sole jurisdiction to interpret these provisions as they apply to plan fiduciaries' consideration in selecting plan investment funds. Therefore, there are no duplicate, overlapping, or relevant federal rules. For the requirement included in this IC, the Department believes such disclosures are already commonplace for many regulated investment products. As such, the Department assumes that existing disclosures, with minor modifications or clarifications, could be sufficient to satisfy the disclosure element of the tie-breaker provision.

**5. If the collection of information impacts small businesses or other small entities describe any methods used to minimize burden.**

The clarifications in the proposed amendment would affect small ERISA-covered plans and their participants and beneficiaries: ERISA-covered plans whose fiduciaries consider or will begin considering environmental, social and governance factors when selecting investments and the participants in those plans.

The Department believes that many plan fiduciaries for small plans already conduct themselves in a manner that would comport, in whole or in part, with the requirements in these provisions. The Department, therefore, estimates that the incremental costs of the proposal would be minimal on a per-plan basis. The proposed rule seeks to provide clarity and certainty regarding the scope of fiduciary duties surrounding investment and proxy voting policies. These standards apply to all affected entities, both large and small; therefore, the Department's ability to craft specific alternatives for small plans is limited.

**6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.**

The proposed rule requires that, in the case of a designated investment alternative for an individual account plan, including a QDIA, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries. The requirement serves as a protection to plan participants as it alerts them that an investment alternative offered by the plan was selected based partly on collateral-benefit characteristics of the fund.

7. **Explain any special circumstances that would cause an information collection to be conducted in a manner:**
- **requiring respondents to report information to the agency more often than quarterly;**
  - **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
  - **requiring respondents to submit more than an original and two copies of any document;**
  - **requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;**
  - **in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
  - **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
  - **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
  - **requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

8. **If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 C.F.R. § 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.**

**Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.**

**Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.**

DOL published a Notice of Proposed Rulemaking that proposes amendments to the Investment Duties regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to clarify the application of ERISA's fiduciary duties of prudence and loyalty to selecting investments and investment courses of action, including selecting qualified default investment alternatives, exercising shareholder rights, such as proxy voting, and the use of written proxy voting policies and guidelines. The notice published October 14, 2021 (86 FR 57272). Comments on the proposal are due by December 13, 2021. In addition to requesting public comment on the proposed regulation, the NPRM solicits public comment on the paperwork burden of the proposed regulation. The Office of Management and Budget has 60 days to review the information, but must allow at least 30 days for public comment. Therefore, the PRA section of the proposed rule requests the public to send comments within 30 days to ensure their consideration. (5 CFR 1320.11(c); 5 CFR 1320.11(e)).

**9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.**

No payments or gifts are provided to respondents.

**10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.**

There is no assurance of confidentiality provided to respondents.

**11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.**

There are no questions of a sensitive nature.

**12. Provide estimates of the hour burden of the collection of information. The statement should:**

- **Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.**
- **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item**

12.

- **Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.**

The Department anticipates that all plans using ESG would be affected in some way by the proposal. With respect to participant-directed individual account plans, a small fraction offer at least one ESG-themed option among their designated investment alternatives. According to the Plan Sponsor Council of America, about three percent of 401(k) and/or profit sharing plans offered at least one ESG-themed investment option in 2019. Vanguard's 2018 administrative data show that approximately nine percent of DC plans offered one or more "socially responsible" domestic equity fund options. In a comment letter, Fidelity Investments reported that 14.5 percent of corporate DC plans with fewer than 50 participants offered an ESG option, and that the figure is higher for large plans with at least 1,000 participants. Considering these sources together, the Department estimates that nine percent of participant-directed individual account plans have at least one ESG-themed designated investment alternative. This represents 53,000 participant-directed individual account plans.

According to a 2018 survey by the NEPC, approximately 12 percent of private pension plans have adopted ESG investing. 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. Both of these estimates are calculated from samples that include both defined benefit and defined contribution plans. For purposes of this analysis, the Department assumes that 19 percent of defined benefit plans and nonparticipant-directed defined contribution plans use ESG investing, which represents 25,300 defined benefit and nonparticipant-directed defined contribution plans.

As a result, the Department estimates as a lower bound that approximately 11 percent of retirement plans, or 78,300 plans, would be affected by paragraph (c) of the proposal. This is the weighted average of nine percent for participant-directed defined contribution plans and 19 percent for other plans and is the Department's best approximation of the number of plans that were using ESG under the prior non-regulatory guidance. The estimate is a lower bound because it is likely that more plans will start to use ESG. The proposal and its clarification of how to employ climate change and other ESG considerations in investing appropriately in an ERISA plan may provide reassurance to some plan fiduciaries that will make them feel more at ease to begin incorporating climate change and other ESG factors. Furthermore, ESG investing is generally increasing in popularity, and that may well carry over to ERISA plans and participants.

The proposed rule requires that if a fiduciary prudently concludes that competing investments or investment courses of action equally serve the financial interests of the plan over the appropriate time horizon, the fiduciary is not prohibited from selecting the

investment, or investment course of action, based on collateral benefits other than investment returns. Further, in the case of a designated investment alternative, including a QDIA, for an individual account plan, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries. A fiduciary, however, may not accept expected reduced returns or greater risks in selecting such an investment or investment course of action.

The proposed rule provides flexibility in how plans may fulfill this requirement. One likely way is using the required disclosure under 29 CFR 2550.404a-5 covered under OMB Control Number 1210-0090. The burden associated with the information collection includes updating information on the investment options annually.

The Department estimates that it will take a legal professional twenty minutes on average per year to update existing disclosures to meet this requirement. If each of the approximately 53,000 participated-directed individual account plans estimated to have at least one ESG-themed designated investment alternative used the tie-breaker provision in paragraph (c)(3) of the proposal, the result would be a cost of \$2.4 million annually. This estimate takes into account that following factors: 1) each such plan is unlikely to use the tie-breaker provision and because the ongoing costs of the disclosure requirement in paragraph (c)(3) of the proposal would be approximately zero absent changes to an affected designated investment alternative. 2) the extent that more plans use climate change and other ESG criteria in the future and to the extent such plans have multiple designated investment options subject to paragraph (c)(3) of the proposed rule.

In summary, the total annual hour burden associated with this information collection is 17,655 hours with an equivalent cost of \$2,443,629.

**Estimated Annualized Respondent Cost and Hour Burden**

<b>Activity</b>	<b>No. of Respondents</b>	<b>No. of Responses per Respondent</b>	<b>Total Responses</b>	<b>Average Burden (Hours)</b>	<b>Total Burden (Hours)</b>	<b>Hourly Wage Rate</b>	<b>Monetized Value of Respondent Time</b>
Lawyer updates existing disclosures for collateral benefits (Annually)	52,965	1	52,965	0.33	17,655	\$138.41	\$2,443,629

- 13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information.**

- **The cost estimate should be split into two components: (a) a total capital and start up cost component (annualized over its expected useful life); and (b) a total operation and maintenance and purchase of service component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.**
- **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.**
- **Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

There are no other costs than the costs associated with the hour burden discussed in Question 12.

- 14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.**

There are no ongoing costs to the Federal government.

- 15. Explain the reasons for any program changes or adjustments reporting in Items 13 or 14.**

On March 10, 2021, the Department announced that it would stay enforcement of the 2020 rules pending a complete review of the matter. Subsequently, on May 20, 2021, the President issued Executive Order 14030, entitled “Executive Order on Climate-Related Financial Risk.” Section 4 of the Executive Order directs the Department to consider suspending, revising, or rescinding any rules from the prior administration that would



have barred plan fiduciaries (and their investment-firm service providers) from considering environmental, social and governance factors, including climate-related risks, in their investment decisions related to workers' pensions. In light of the foregoing, the Department concluded that additional notice and comment rulemaking was necessary to safeguard the interests of participants and beneficiaries in their retirement and welfare plan benefits.

- 16. For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.**

This is not a collection of information for statistical use, and there are no plans to publish the results of this collection.

- 17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.**

Not applicable.

- 18. Explain each exception to the certification statement.**

There are no exceptions to the certification statement.

**B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS**

Not applicable. The use of statistical methods is not relevant to this collection of information.