July 20, 2020

Assistant Secretary Preston Rutledge
EBSA
Department of Labor
200 Constitution Ave, NW, Ste S-2524
Washington DC 20210

RE: RIN 1210-AB95 **NPRM: Financial Factors in Selecting Plan Investment**

Dear Assistant Secretary Rutledge,

We have the strongest possible objections to the proposed rule on the appropriate consideration of ESG or any other non-traditional factors for plan investments, which fails as a matter of process, substance, cost-benefit analysis, regulatory policy, economics, consistency with other Administration policy, and clarity. It addresses a "problem" that is never documented based on claims and assertions of costs and benefits that are recklessly unsubstantiated. Most dangerously, it departs from every previous precedent in the history of EBSA and its predecessor, PWBA, which one of this comment's signatories headed in the Reagan administration. We have already submitted a comment with Jon Lukomnik and a distinguished group of co-signatories. This comment is a supplement to the earlier filing, and we may file further if other comments require a response or other relevant information becomes available.

The rule does not meet the minimum requirements of the Administrative Procedures Act, the Paperwork Reduction Act, OIRA guidelines, or cost-benefit standards and could not withstand a challenge in court on any of those grounds. It is also being promulgated without the underlying report required in President Trump's April 10, 2019 Executive Order on Energy Infrastructure/Rulemaking, which directed EBSA to:

> within 180 days of the date of this order, complete a review of available data filed with the Department of Labor by retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) in order to identify whether there are discernible trends with respect to such plans' investments in the energy sector. Within 180 days of the date of this order, the Secretary shall provide an update to the Assistant to the President for Economic Policy on any discernable trends in energy investments by such plans. The Secretary of Labor shall also, within 180 days of the date of this order, complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plans.

As we approach a year from the deadline for providing that report to the President, we do not see any evidence in this proposal that this vital underlying information has ever been assembled and evaluated, much less reported on to the White House, made available as a public record, or relied on for this rulemaking.

Are there any "discernable trends" suggesting that ERISA fiduciaries are violating their obligation to act "for the exclusive benefit" of plan participants? If so, show us what they are and how they justify this rulemaking. If so, let us see what kinds of investigations and enforcement actions have been undertaken by EBSA to address them. But if not, why is this rulemaking even being conducted?

The absolute and fundamental requirement of any rulemaking is either an explicit statutory mandate (not present here) or evidence of an actual documented problem -- also not present here. Portions of this proposal read like they have been substantially drafted by lobbyists for the fossil fuel industry rather than the reliably meticulous and expert staff of EBSA. We call on you to make a part of the public record of this rulemaking any memoranda of contacts with outside groups and copies of any correspondence, emails, studies, or documents that were considered or relied on in drafting this proposal. We need to know everything EBSA reviewed to create this NPRM.

Given the extensive, documented record of sock puppets and dark money on these issues here and at the related rulemaking at the SEC, we would like to make clear up front that no one is paying us to comment and we have no financial ties to any organization affected by the rulemaking. Indeed, we could only benefit if this rule becomes final as it will be a bonanza for consultants who can help ERISA fiduciaries create a record to support ESG-related investments. Even though it might be in our financial interest to support this rulemaking, we oppose it because it is severely detrimental to ERISA fiduciaries and beneficiaries, to EBSA's own operations, and to the capital markets.

We encourage EBSA to investigate any conflicts of interest that may have influenced other filers' comments, with particular attention to dark money fake front groups and "fishy comments" problem that plagued the SEC on a similar rulemaking. We are glad to make ourselves available to answer any questions about our objectivity and trust all other commenters will make the same offer.

Each of the concerns below is sufficient in and of itself to require a complete overhaul or withdrawal of this proposal:

EBSA has failed to prove that current law is inadequate: First and foremost, this rulemaking is literally baseless in that EBSA fails to provide a single example of any ERISA fiduciary allocating any investment on the basis of "non-pecuniary" criteria, much less any investigations or enforcement based on these concerns.

If there is a problem of "non-pecuniary" asset allocation, it is on the supply side of capital, not the demand side. In 2019, the Business Roundtable announced with some grandiosity and without regard to federal or state law or its members' own IPO commitments, articles of incorporation, or by-laws that it was "re-defining the purpose of the corporation" away from shareholder primacy and in favor of a vaguely defined concept of "stakeholders."

If EBSA is properly concerned about this fundamental threat to accountability through market economics, the essence of capitalism and the sole foundation for a strong, sustainable economy, then its focus should be on bolstering the responsibility of ERISA fiduciaries to insist on "pecuniary" objectives -- long-term, sustainable growth -- as the primary focus of corporate enterprise. The strictest "fiduciary plus" standards should be enforced, with particular scrutiny of the conflicts in commercial relationships with portfolio companies. And EBSA should reiterate, through a rulemaking if necessary, that share ownership rights are a plan asset that must be managed with the same fiduciary attention given to buy-sell-hold decisions. That includes not just proxy voting but also shareholder proposals and litigation, if the benefits outweigh the costs. This NPRM, on the contrary, is drafted to support the notion that it is a dog whistle response to the multi-million-dollar dark money lobbying campaign by fossil fuel companies and other corporations to limit any market-based shareholder response to genuine investment risk.

This is an unprecedented, unnecessary, and dangerous reversal of EBSA policy: Since their creation, EBSA and its predecessor agency PWBA have wisely refrained from imposing substantive requirements on asset allocation beyond the statutory requirement of diversification. Understanding that pension money is managed by financial professionals who are at the top of their field, that even financial professionals will disagree about securities analysis, with some buying while others are selling, and no one can predict the future, DOL has focused on process. The question is not whether, in hindsight, the investment decision was "correct" but whether it was undertaken with due diligence and prudence, based on objective expertise with no conflicts of interest and intended "for the exclusive benefit" of plan participants. This is consistent with the long tradition of common law and legislative requirements for fiduciaries. This proposal would for the first time reverse the burden of proof and force investment professionals to justify their investments without any indication of a single actual "wrong" choice by any ERISA fiduciary ever.

This fundamental flaw and even more fundamental overturning of decades of policy and procedure in this proposal should at the very least be discussed in public hearings and not rushed through in a hyper-fast rulemaking with an expedited comment period in the middle of a pandemic at the end of a Presidential term.

The cost-benefit analysis is inadequate and misleading: The NPRM concludes that the "Department estimates that this requirement would not result in a substantial cost burden." On what basis? Show your work. Mere assertion without underlying documentation is inadequate. This rule would provide one and possibly several more layers of review and substantial unprecedented justification for this one asset class, not only creating additional costs but distorting efficient market responses by diverting pension assets to consultants and superfluous documentation and record-keeping. The estimated "benefit" of the proposal is equally useless, also lacking any documentation. Of course, this would be difficult since EBSA has failed to come up with a single example of an investment decision that does not meet its standard, so coming up with a legitimate calculation of either costs or benefits is probably impossible. That in and of itself means that this rule could not withstand the inevitable court challenge. The NPRM does not meet the requirements of the Paperwork Reduction Act and has failed to calculate for those purposes or for the non-existent cost-benefit calculus what the additional paperwork burden of requiring additional justification for this one category of investment would be.

EBSA overlooks the vast literature and data on the benefits of ESG investing:

If EBSA has reviewed the extensive academic and other literature on ESG investing, it is not reflected in this proposal. We note here just a very brief sample of the kind of information that has been overlooked or disregared. If EBSA has contrary information, let's hear it. If not, this kind of data has to underly any action taken by the Department on ESG criteria for investing. We note that while at times the term "non-financial" has been used to describe the criteria for evaluating ESG investments, the record shows that a more appropriate term is "non-GAAP." While ESG is an emerging field and the value of its various measures are still evolving, every ESG measure that has been used to evaluate an investment opportunity has been directly related to investment risk, as the data below and the vastly greater information overlooked in this rulemaking make clear. EBSA has failed to show otherwise, thus invalidating the entire basis for this rulemaking.

Over the past few years, the market has become much more sensitive to the impact of climate change, for example, on both risks and opportunities for portfolio companies. This is reflected by the fastest growing sector in the investment world, ESG (environment, social, governance, sometimes collectively known as sustainability), a market-driven response from every major financial institution, not just in the US but throughout the world. This rule would put American pension beneficiaries at a significant disadvantage.

There is a great deal of evidence about the increasing sophistication of institutional investors in using ESG indicators to evaluate risk and return and the increasing importance of those factors. For example:

1. The Environmental Protection Agency published a 150-page document about coping with the debris from natural disasters across the country, which said, "Start planning for the fact that climate change is going to make these catastrophes worse. This is an essential issue for every element of corporate strategy, from supply chain issues to core operations and risk management."

2. A study published in *Sustainability Accounting, Management and Policy Journal* by Michael Magnan and Hani Tadros found that better disclosure of environmental performance correlated with better performance at the 78 companies in environmentally sensitive industries that they examined.

> In this paper, we aim to bridge the gap in the literature about the association between environmental disclosure and environmental performance by analyzing the motivation of firms with high or low environmental performance to disclose proprietary environmental information that could compromise the firm's competitive position or have direct impact on its cash flow. Consistent with some prior research, we argue that economic- and legitimacy-based incentives both drive a firm's environmental disclosure. However, revisiting prior research, we put forward the view that a firm's environmental performance (either high or low) moderates the effects of these incentives on environmental disclosure in a differential fashion.

Of course, you do not have to be an economist to conclude that companies will be more transparent when there is good news to report. What matters here is what investors can conclude from the level of transparency in these disclosures, and what it means about the potential – or necessity – for engagement. We point the EBSA staff to the work of Tensie Whelan of NYU Stern Center for Sustainable Business on ESG data as a key indicator of supply chain risk, relating to the State Department release cited below.

3. The Bank of England takes note of climate-related investment risk:

> [A] speech by Sarah Breeden, head of international banks supervision, suggests...that time is running out to prevent catastrophic climate change and previous efforts to combat the problem have been nowhere near vigorous enough.
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> Breeden's message to the financial sector was that they need to incorporate climate change into their corporate governance, their risk management analysis, their forward planning and their disclosure policies or face the prospect of losing a heck of a lot of money.

> The financial markets have a term for a sudden drop in assets prices known as a Minsky moment (after the economist Hyman Minsky). Breeden said a climate Minsky moment was possible, in which losses could be as high as $20tn (£15.3tn).

If the Bank of England is calling on companies to address the risks of climate change, then the Department of Labor should recognize that pension fund managers' similar assessment of risk is consistent with their obligation as fiduciaries.

4. A July 2020 report from GAO documents the financial/"pecuniary" priority of institutional investors use of ESG factors in calculating investment risk. We incorporate that entire report by reference in this document. An excerpt:

> Institutional investors with whom we spoke generally agreed that *ESG issues can have a substantial effect on a company's long-term financial performance*. All seven private asset managers and representatives at five of seven public pension funds said they seek ESG information *to enhance their understanding of risks* that could affect companies' value over time. Representatives at the other two pension funds said that they generally do not consider ESG information relevant to assessing companies' financial performance. While investors with whom we spoke primarily used ESG information to assess companies' long-term value, other investors also use ESG information to promote social goals. A 2018 US SIF survey found that private asset managers and other investors, representing over $3.1 trillion (of the $46.6 trillion in total U.S. assets under professional management), said they consider ESG issues as part of their mission or in order to produce benefits for society....
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> These investors added that they use ESG disclosures to monitor companies' management of ESG risks, inform their vote at shareholder meetings, or make stock purchasing decisions. Most of these institutional investors noted that they seek additional ESG disclosures to address gaps and inconsistencies in companies' disclosures that limit their usefulness. [emphasis added, footnotes omitted]

GAO has done the kind of thorough analysis EBSA should be doing to better understand the way investors are looking at ESG factors. And what we learn is that not one of the investors surveyed made any "pecuniary" trade-offs and the overwhelming majority look at ESG exclusively in financial terms.

5. Pensions and Investments reported on an ISS study:

> A link exists between a company's ESG performance and its financial performance, according to a study published from ISS ESG, the responsible investment arm of Institutional Shareholder Services.
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> Firms with high or favorable ISS ESG corporate ratings tend to be more profitable through an economic value-added lens, the study found.
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> "While one can argue that the relationship between ESG and financial performance is perhaps due to the fact that more profitable firms have the resources to invest in areas that positively influence ESG, it could also be that profitability rises as a result of a company better managing its material ESG risks, or it could be a little bit of both," the study said. "If it is a little bit of both, then this means that good-ESG initiatives drive up financial performance, which then provides the monetary resources to invest to be an even better ESG firm, which then drives up performance again, and so on."
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> Moreover, companies with better ESG ratings are also less volatile, noted Anthony Campagna, global head of fundamental research at ISS EVA.

6. Corporations are increasingly providing ESG disclosures to respond to investor demand and to assist in their own strategic planning, and those that do tend to outperform. Whether that is cause or effect is not clear, but for investment risk assessment purposes, that makes little difference.

> Since July 2017, following the release of the Task Force on Climate Related Disclosure (TCFD) guidelines, more than 500 large businesses, investors and industry groups have signed on to provide this type of forward-looking financial disclosure. Companies in the financial services industry are leading the way in their support of the TCFD recommendations, including BlackRock, State Street and S&P Global, along with the Association of Chartered Certified Accountants.
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> It is not limited to the financial services industry. Other sectors are signing on, including Statoil and Shell in the energy sector, consumer product companies such as H&M and Nestlé, materials companies such as BASF and DowDuPont, as well as industrial companies such as Saint-Gobain and Ingersoll Rand.

7. On July 1, 2020 the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Homeland Security issued a business advisory to caution businesses about the risks of supply chain links to entities that engage in human rights abuses, including forced labor, in the Xinjiang Uyghur Autonomous Region (Xinjiang) and elsewhere in China. DOL/EBSA should not issue a rule that fundamentally undermines this critical policy advisory from four other Departments. It is the very essence of regulatory reform that Cabinet agencies coordinate with each other to avoid confusion over inconsistent policies and

procedures and EBSA should work with these four Departments and EPA, as noted above, to ensure that pension fiduciaries are not discouraged from making the appropriate calculations about supply chain risk.

EBSA's proposal is not based in any documented evidence that a problem exists and needs to be addressed. It fails in its unsupported assertion of costs and benefits. It unnecessarily duplicates current requirements. It is vague and inconsistent and thus creates unnecessary confusion that will require further clarification. It is contrary to the findings of GAO, EPA, and the advisory issued by four other Cabinet Departments weeks after it was issued. It will benefit no one but corporate insiders and providers of unnecessary consulting services to fiduciaries.

Most important, as noted, EBSA has failed to document the problem this proposed rule is ostensibly trying to solve. The NPRM begins with an assertion that begs the question and is contrary to the facts, referring to investment choices "selected because of the non-pecuniary objectives such as those relating to environment, social and public policy goals." We must emphasize yet again that EBSA has failed to show a single instance of any such investment choice being made or why, if there is any evidence, they have not conducted an investigation or enforcement action. The proposal goes on to summarize the current rule: "Each Interpretive Bulletin has emphasized that the focus of plan fiduciaries must be on the plan's financial returns and that furthering the interest of plan participants and beneficiaries in financial benefits under the plan must be paramount. Each Interpretive Bulletin, while restating the "all things being equal" test, also cautioned that fiduciaries violate ERISA if they accept expected reduced returns or greater risks to secure social, environmental, or other public policy goals." EBSA has shown no evidence that this standard is not being met or that it is in any way inadequate for covering all current fiduciaries and investment options.

As EBSA knows better than anyone, ERISA funds are the ultimate patient capital. They are not just entitled but required as fiduciaries to invest for the long term. What EBSA is wrong about here is that what they seem to be claiming to be a difference between "pecuniary" objectives and "non-pecuniary" objectives is the difference between short-term and long-term financial goals. What investors have learned in the decades since the passage of ERISA and the rise of unprecedented percentages of investor capital being managed by intermediaries is that GAAP, much of which is still based on 19th century concepts about asset valuation, fall short when it comes to 21st century risk assessment. This is why sophisticated financial investors who are acting as fiduciaries increasingly look to a wider range of indicators of investment risk and opportunities for enhanced returns. FASB/GAAP reporting has value. Sarbanes-Oxley and Dodd-Frank have made important improvements. But massive frauds and failures including Wirecard and Luckin Coffee continue despite auditor-approved GAAP disclosures. And we have seen wide variation in the way companies have responded to the unforeseen challenges of the pandemic, #metoo, and #BlackLivesMatter protests, variation with a direct impact on shareholder value. The data EBSA characterizes as "non-pecuniary" is exactly what we need to help us better understand the value of portfolio companies. The entire premise of this rulemaking is contrary to the evidence and EBSA has provided no justification for the claim that any investment influenced by ESG factors is made for any reason other than "the exclusive benefit of plan participants."

It is especially troubling that this poorly conceived NPRM comes just as President Trump has proudly announced his progress in reducing regulatory burdens he described as "a merciless avalanche of wasteful and expensive and intrusive federal regulation. These oppressive, burdensome mandates were a stealth tax on our people."

The signatories of this letter met while working on the predecessor effort, Ronald Reagan's Task Force on Regulatory Relief. This vague, duplicative, ineffective and costly NPRM, with a cost-benefit analysis so sketchy it does not even qualify as inadequate, would never have been approved by our team. Once again, EBSA has been unable to show any evidence that ERISA fiduciaries are in violation of the current rule, which proves that it is more than adequate to make clear that all asset allocation decisions should be based solely on financial risk and return calculus. Beyond that, there is no evidence that any benefits of this NPRM exceed the considerable costs or that it will accomplish anything other than overturning decades of EBSA policy on deferring to the expertise of investment professionals as long as their procedures prevent conflicts of interest and diverting what should be plan assets to a bunch of consultants.

Like ERISA fiduciaries, EBSA is responsible for acting "for the exclusive benefit" of plan participants. This proposed rulemaking operates as a subsidy to corporate insiders at fossil fuel and other establishment corporations who are trying to thwart the very market forces they like to extoll as the essence of capitalism. That is bad for the economy and bad for pension plan participants. The most important point remains this: EBSA has failed to document even a single investment decision contrary to its own current rules, which already make the obligations of fiduciaries to act only on the basis of financial calculus of investment risk and return. This proposal is fatally flawed in every respect and should be withdrawn.

We would be happy to meet with staff or provide any addition information that may be of use in developing a record or analysis of ESG investments.

Sincerely,

Robert A.G. Monks, Chairman (and former Administrator of PWBA)

Nell Minow, Vice Chair

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