July 27, 2020

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

RE: Proposed rule on Financial Factors in Selecting Plan Investments (RIN 1210-AB95)

Dear Employee Benefits Security Administration:

I write in strong opposition to the Department of Labor's proposed rule, "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposal").

Launched a quarter-century ago, the Heartland Network has worked to mainstream responsible investments. Heartland is committed to the idea that workers' capital must be invested in an America that values and supports its workers and that is sustainable over the long term. We work to make companies better employers and the economy more resilient, sustainable and responsive to the needs of ordinary people. Through our books, publications, field work, blogs and social media, webinars, research, and educational programs, the Network connects the labor, business, finance, and pension "aviators" who have led the growth of responsible capital strategies.

Over that time, Heartland has convened a unique "table" that includes pension leaders, investment consultants, asset managers, capital stewards, labor leaders, academic and policy advocates. We've built a knowledge base of responsible investment practices. Heartland has promoted this *Community of Practice* through initiatives such as the ***Responsible Investor Handbook*** **(2016, Routledge),** commissioned by the AFL-CIO (and our fourth book).

Heartland's affiliated investors have invested profitably to rebuild our cities, renew our industrial commons, grow the clean economy. They are providing high-roads jobs and other opportunities for union workers, low-wage workers, and people of color, while revitalizing communities and a cleaner environment for us all.

The Proposal seeks to up-end decades of precedent allowing ERISA-regulated retirement plans to invest responsibly under appropriately strict conditions. This precedent has its origins in DOL guidelines around economically targeted investments ("ETIs") and more recently has focused on investments guided by environmental, social, and governance ("ESG") considerations.

The Proposal is fundamentally inconsistent with the purposes of ERISA which was adopted to protect retirement savers by setting high standards for retirement plan fiduciaries, requiring them to act with due care, skill, prudence, and diligence and to avoid conflicts of interest. The ultimate goal of ERISA is to maximize retirement savings for plan participants.

The overwhelming majority of rigorous, peer-reviewed academic studies have concluded that ESG-guided investments have in general performed as well as or better than comparable conventional investments. This is backed up in reports by leading industry analysts such as Morningstar. Given this overwhelming evidence, issuing onerous regulations that narrowly and specifically target and burden this type of investment, as the DOL now proposes, undermines the purpose and intent of ERISA. By discouraging and deterring fiduciaries from investing in ESG-guided funds, the DOL is effectively narrowing the field of available investment options for ERISA plans which could force participants into potentially lower-performing investments resulting in lost long-term retirement savings.

For decades, the DOL has allowed fiduciaries to consider ESG factors, whether or not they can be proven to be economically material, as tiebreakers in choosing among investments that are comparable from a risk/return perspective. The use of non-financial considerations as tiebreakers has been an essential part of ERISA practice, allowing fiduciaries to take into consideration factors, including some ESG factors, that cannot be conclusively shown on an individual basis to have a positive economic effect, but whose application does not diminish financial returns.

The proposed rule would require that fiduciaries to document that investments are "economically indistinguishable" in order be considered comparable for these purposes. There is no basis in real-world investment practice that supports the proposition that investments must be economically indistinguishable in order to be considered comparable on a risk/return basis. Since all investments have distinguishable economic characteristics this change effectively eliminates the possible use of an ESG factor as a tiebreaker. While the DOL's commentary states that the use of ESG factors as tiebreakers would be continued, the threshold for risk/return comparability would be raised to an unachievable level, preventing fiduciaries from considering important factors that cannot be translated neatly into return metrics.

ESG investing has been an effective, free-market tool for producing needed change and its popularity with investors is growing rapidly. Targeting ESG investing for onerous and burdensome regulatory treatment, inconsistent with ERISA's purposes, appears political and responsive to corporate interests that have longed opposed responsible investment. Interference in the investment preferences of retirement investors by the DOL on political grounds rather than to fulfill ERISA's purposes would be arbitrary and capricious, a violation of the economic rights of those investors and a potential violation of their First Amendment rights.

For these reasons on behalf of Heartland Capital Strategies, I respectfully request that the Proposal be immediately withdrawn from further consideration.

Thank you for your consideration.

Sincerely,

Tom Croft
Managing Director of Heartland Capital Strategies
and Executive Director of the Steel Valley Authority