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July 28, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB95: "Financial Factors in Selecting Plan Investments"

Dear Secretary Scalia:

The Department of Labor's effort to reinforce that "it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other nonpecuniary goal"[1] is a major step in the right direction. I appreciate all the work you, Mr. DeWitt, and your staff have done to date on this important issue.

As Prof. J.W. Verret, associate professor of law at George Mason University's law school that bears your father's name, stated recently during a Federalist Society teleforum, "ESG is a very nebulous term, to be very frank".[2] I could not agree more, and this is one reason why I support your Department's Proposed Rule. Specifically, when it comes to selecting plan investments, a fiduciary might receive ESG analysis that says a certain company has an "A" rating for governance. He might then turn to another report from a different metric provider that shows the same company has a much lower rating. This ambiguity is prevalent, and it exemplifies why this regulation is needed.

The second reason is simple: ESG funds mostly underperform traditional investments. For example, Bloomberg's Eric Balchunas explains, "Consider the iShares MSCI USA ESG Select Social Index Fund (SUSA), one of the oldest and largest ESG ETFs on the market. SUSA, which tracks the 100 stocks with the highest ESG ratings, has trailed the S&P 500 Index by 37 percentage points during the past 10 years."[3] Exposing pension fund participants to such

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[1] Employee Benefits Security Administration, U.S. Department of Labor, Proposed Rule: "Financial Factors in Selecting Plan Investments", June 30, 2020, https://www.regulations.gov/document?D=EBSA-2020-0004-0002.
[2] J.W. Verret, "New Labor Department Rule: Taking on ESG Investment Risk to American Retirement Security", Federalist Society, July 16, 2020, https://fedsoc.org/events/new-labor-department-rule-taking-on-esg-investment-risk-to-american-retirement-security.
[3] Eric Balchunas, "Socially Conscious ETFs Have Some Baffling Holes", Bloomberg, January 27, 2020, https://www.bloomberg.com/opinion/articles/2020-01-27/esg-etfs-your-socially-conscious-fund-probably-has-some-holes.

underperformance is wrong. The article also mentions that Berkshire Hathaway is excluded from many of these ESG ETFs simply because 57% of its directors are independent, versus an average of 86%. That is not a very good rationale.

Offering more insight into the examples above, I was struck by how well Christopher Burnham, president of the Institute for Pension Fund Integrity, captured the essence of this issue. In an earlier comment letter for this Proposed Rule, Burnham writes,

> "ESG investing produces less return on investment and incurs much higher costs. Those are undoubtedly pecuniary factors that should dissuade the use of the ESG investing for investment plans. The threat that pension plans will be turned into political vehicles is pernicious. If individual investors want to tilt their portfolios in an ESG direction, that is their prerogative, but fiduciaries of pension plans have "duty of loyalty" to their beneficiaries, and ESG-style investment decision-making violates that bedrock principle."[4]

Additionally, I will note what James Mackintosh wrote in one of his excellent columns for *The Wall Street Journal* earlier this month: "Even where an ESG index did beat the market, it had little to do with environmental, social, or governance issues. Instead, it came down to luck."[5] Luck, as we well know, is not part of a fiduciary's "duty of loyalty".

Speaking of the *Journal,* I was also dismayed to read Sen. Elizabeth Warren's letter-to-the-editor refuting your recent op-ed. The Senator believes that you "overlook that ESG funds routinely outperform other offerings".[6] Empirical evidence tells us that her claim – that these funds "routinely" outperform – cannot be supported.

For the past 40 years, I have been involved in the workings of pension funds. What the Department has codified in this Proposed Rule will go a long way in helping pension plan fiduciaries protect their clients' economic interests. This greater peace of mind – and wallet – for retirees is certainly welcomed. Importantly, the Proposed Rule does not seek to ignore ESG factors, and they can still be used to enhance expected financial returns.

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[4] Christopher Burnham, Department of Labor Comment Letter, July 2020, http://ipfiusa.org/wp-content/uploads/2020/07/IPFI-Chris-Burnham-Dept.-of-Labor-Rule-Comment-Letter-1.pdf.

[5] James Mackintosh, "Luck is Key to Social Investing", The Wall Street Journal, July 16, 2020, https://www.wsj.com/articles/esg-investing-in-the-pandemic-shows-power-of-luck-11594810802.

[6] The Hon. Elizabeth Warren, "Eugene Scalia Off the Mark on ESG Investing", The Wall Street Journal, July 7, 2020, https://www.wsj.com/articles/eugene-scalia-off-the-mark-on-esg-investing-11594151143?mod=searchresults&page=1&pos=4.

Thank you for this opportunity to provide you these comments. I hope this Proposed Rule will be finalized quickly. The security of retirement savings – which is even more critical given our current economic climate – will be significantly improved for it.

With best wishes,

Respectfully,

Gregory E. Lau
Former Executive Director
Global Compensation and Corporate Governance
General Motors Company