July 28, 2020

Submitted Electronically to www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
United States Department of Labor (DOL)
200 Constitution Ave, N.W.
Washington, DC 20210

Re: Financial Factors in Selecting Plan Investment
Proposed Regulation RIN 1210-AB95

Ladies and Gentlemen:

In October 1981, as Chair of the California Governor's Public Investment Task Force, our 31-member statewide group released the Final Report recommending numerous regulatory and legislative policy changes to improve California's ability to meet it's fiduciary responsibilities to maximize benefits to its retirees and active pension plan participants at the state and local levels.

Our Task Force addressed and issued a recommendation to codify the Prudent Expert Rule of PERISA for use by state retirement systems including CALPERS, CALSTRS, and California's 1937 Act Counties. The recommendation was incorporated into Senate Constitutional Amendment 21 (SCA21) which was enacted by the California Legislature and adopted by voters in June 1982.

Since that time, as a Registered Investment Advisor (RIA), I have managed individual and institutional assets based upon fiduciary standards, including maximizing benefits for my clients consistent with my firm's ethical standards, encompassing environmental, social, and governance (esg) criteria.

My investment management firm's operations for over 38 years are aligned with the exclusive benefit rule relative to ERISA as an adopted fiduciary standard and as a fiduciary retaining moral autonomy and personal responsibility consistent with the morality of

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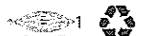

obligation. Fiduciary law has secularized religious tradition and applied it to commercial pursuits, as the biblical good shepherd is a fiduciary, transcending selfishness.[1]

In other words, fiduciary duty is law based upon moral duty, consistent with undivided loyalty to beneficiaries.

Roman and civil law, including English Common Law and American Jurisprudence, recognized contractual relationships with individuals fulfilling obligations to others free of conflicts and financial entanglements. More important than a legal obligation, early fiduciary obligations were based upon an ethical relationship of trust and confidence. Historically, based on England's Court of Chancery, fiduciary duty became usable in common law courts.

Whether an RIA is acting as an agent for an owner, or for multiple shareholders and stakeholders, a fiduciary must rely on both subjective self-interested information as well as relatively objective data. A fiduciary must take all factors into consideration when making an investment decision, recognizing materiality, proximity and timeliness of such data related to all possible outcomes. Risk and return scenarios must also be analyzed related to specific environmental, social and governance (esg) information available.

In the case of climate change, its impact is multigenerational. Specific investment opportunities will be impacted based upon variable data measured over time, combined with naturally unique or recurring circumstances also measured over time, often providing inconsistent or contradictory results. On the other hand, however, climate change is material, and many, if not most investment decisions, will be impacted by this environmental catastrophic change.

Because climate change is multigenerational, investment decisions must be judged over specific periods of time, and not unlike corporate board decisions made by fiduciaries, the courts have ruled, pursuant to the "Business Judgment Rule" that they will not second guess corporate board decisions, as the outcome of such decision may be positive or negative based upon when, or at what point in time, the decision is judged. Timeliness makes a difference in prudent fiduciary performance related to appropriate risk and return parameters.

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[1] Stephen B. Young, "Fiduciary Duties as a Helpful Guide to Ethical Decision-Making in Business," Journal of Business Ethics (2007) 74; pp. 1-15

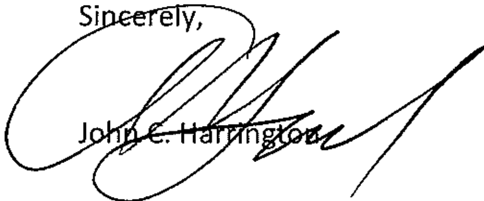
No less relevant are human rights concerns related to long-term performance objectives for both risk and return. Corporate human rights violations and other social injury has a substantial negative impact on equity performance, risk, and especially related to long-term reputational risk, violations of law, notwithstanding.

Bad or good, corporate governance practices also make a difference in stock performance, as the overall reputational risk increases with authoritarian board room conduct, discriminatory hiring, promotion, and board representation and the lack of ethical business practices. It is the actual conduct, not what is vaguely described on a website or in an executive officer's public statement that is important. It is what is in the governance documents and what is revealed in a court of law pursuant to discovery in litigation, another source of esg documentation required of esg fiduciary oversight.

In conclusion, fiduciary duty is a moral and legal duty. It is the morality of obligation and already related specifically to the rule of law pursuant to ERISA. The only reason that this rule has been proposed by the Trump Administration is an attempt to intimidate responsible fiduciaries to ignore or abandon comprehensive and disciplined responsible investing practices utilizing environmental, social and governance (esg) data to supplement financial data and best practices as Registered Investment Advisors (RIAs) pursuant to the 1940 Act.

I urge you to immediately withdraw this proposal, as it is an undisguised political attempt to demean the integrity of portfolio management, harm plan participants, beneficiaries and active employees, as well as our institutional and individual clients. This action will do nothing but disadvantage your department and the credibility of your office and authority.

Sincerely,



John C. Harrington