ACORE
AMERICAN COUNCIL ON RENEWABLE ENERGY

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Acting Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Ave NW
Washington, DC 20210

Submitted via regulations.gov

Re: RIN 1210-AB95 Proposed Rule, *Financial Factors in Selecting Plan Investments*

Dear Assistant Secretary Wilson,

The American Council on Renewable Energy ("ACORE") respectfully submits these comments concerning the June 30, 2020 proposed rule from the U.S. Department of Labor Employee Benefits Security Administration ("Department"), *Financial Factors in Selecting Plan Investments*, Regulatory Identifier Number 1210-AB96 ("proposed rule").[1] ACORE is a national nonprofit organization dedicated to advancing the renewable energy sector through market development, policy changes and financial innovation.

The proposed rule is redundant to the requirements of existing law and therefore unnecessary to protect the interests of investors. Rather than providing additional clarity around fiduciary compliance, the proposed rule is instead likely to sow increased confusion and impose excessive regulatory burdens on ERISA fiduciaries. Notably, the proposed rule offers no evidence of harm to ERISA plan participants or beneficiaries due to ESG investing. To the contrary, ESG investing is a generally accepted investment theory, with a proven track record of financial success. ESG investment principles are detailed, substantive and pecuniary in nature. If the proposed rule had the effect of chilling or reducing ESG investment, it would harm America's global competitiveness by allowing foreign investors to earn comparatively higher returns. For these reasons, the Department should modify the proposed rule to clarify that ERISA's fiduciary duties compel qualified investment professionals to consider ESG investment principles as economic considerations under generally accepted investment theories. Absent such a modification, the proposed rule should be withdrawn. Finally, the unusually short 30-day comment period for this proposed rule should be extended to 120 days to allow for the full range of affected parties to express their concerns.

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[1] *See* 85 *Fed. Reg.* at 39,113.

- **The proposed rule is redundant to the requirements of existing law and therefore unnecessary to protect the interests of investors.** As the proposed rule itself makes clear, the fiduciary duty under Title 1 of the Employee Retirement Income Security Act of 1974 (ERISA) already includes the requirement that qualified investment advisors act in the best interests of plan participants and beneficiaries with the goal of maximizing risk-adjusted returns. This requirement exists today and applies to all investment options, ESG or otherwise. Accordingly, the proposed rule is not needed to create that requirement, or to have that requirement apply to ESG investments.

- **While the proposed rule adds nothing new to the existing responsibilities of fiduciary duty, its implementation would sow increased confusion and impose excessive regulatory burdens on ERISA fiduciaries.** The Department suggests that its proposed revisions to the investment duties rule would reduce confusion over those duties by "codifying long-established principles for selecting and monitoring investments."[2] In fact, the opposite is true. By casting unsubstantiated doubts on the evident materiality of ESG investing, the proposed rule would as a practical matter *increase* confusion among qualified investment professionals as they seek to balance regulatory compliance with a desire to maximize investor returns.

  Moreover, by requiring fiduciaries to "document the basis for concluding that a distinguishing factor could not be found" when selecting investments with ESG considerations over alternative options,[3] the proposed rule effectively creates a unique and unwarranted presumption against ESG investing that does not apply to any other kind of investment. The Department suggests that this documentation requirement would not result in a substantial cost burden because economically indistinguishable alternative investments are rare. However, the growing outperformance of ESG investments makes this assertion inaccurate on its face. The proposed rule's estimated compliance burden of less than $380 per plan is far too low. Moreover, this documentation burden would only be expected to increase over time as well-performing ESG investment options grow and ERISA investment professionals seek to maximize risk-adjusted financial returns. The additional burdens inherent in the proposed rule would ultimately be borne by plan participants and beneficiaries as an increasing amount of fiduciaries' time and money gets siphoned towards regulatory compliance.

- **The proposed rule offers no evidence of harm to ERISA plan participants or beneficiaries due to ESG investing**. Across sixteen pages of single-spaced text in the Federal Register, the Department makes no finding of harm to plan participants or beneficiaries under current ERISA regulations.[4] It cites no evidence of ESG investment underperformance, or requests to the Department from plan participants or beneficiaries advocating the changes in the proposed rule. Nevertheless, the Department proposes to second guess investment advisors and add to the regulatory burden borne by fiduciaries, taking time away from their primary analytical and investing obligations in order to fulfill a novel interpretation of a 46-year-old law. Part of existing law that deserves retention is

[2] *See* 85 *Fed. Reg.* 39,116.
[3] *See* 85 *Fed. Reg.* 39,122.
[4] *See* 85 *Fed. Reg.* 39,113 to 39,128.

the so-called “tie-breaker” rule that permits consideration of ESG factors for non-pecuniary reasons when competing investments would serve plan participants and beneficiaries equally well.

- **ESG investing is a generally accepted investment theory with a proven track record of financial success**. The proposed rule notes that fiduciaries must follow “generally accepted investment theories.”[5] Sustainable funds saw $20.6 billion of inflows in 2019, which is four times the $5.5 billion seen in 2018, the previous record.[6] U.S. sustainable investment assets increased by 38% between 2016 and 2018, representing approximately one in four dollars in total U.S. assets under management.[7] During the COVID-19 crisis, ESG fund managers considered their focus on ESG-related risks a significant factor in the resiliency of their portfolios despite the economic downturn.[8] Furthermore, prominent investors like BlackRock, Goldman Sachs, JP Morgan, Bank of America, among many others, increasingly adhere to ESG factors when making new investments.[9] [10] [11] [12] [13]

  By evaluating a broader spectrum of operating and financial risk, ESG investments are increasingly recognized as the best choice for realizing maximum long-term returns, generating better financial performance than non-ESG equivalents. In 2019, returns on ESG stocks outperformed the S&P by 45%.[14] According to data from BloombergNEF, companies that perform well in environmental, social and governance metrics saw stronger returns than other funds this past spring, despite the COVID-19 pandemic.[15] Specifically, the MSCI ESG World Leader Index, an index that includes companies like Microsoft, Alphabet, Johnson & Johnson and Roche Holdings, outperformed its non-ESG equivalent by 1.1 percentage points in April 2020.[16] According to S&P Global, ESG

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[5] *See* 85 *Fed. Reg.* at 39,127.
[6] Morningstar, “Sustainable Investing Interest Translating Into Actual Investments,” https://www.morningstar.com/articles/952254/sustainable-investing-interest-translating-into-actual-investments?mod=article_inline
[7] US SIF Foundation, “Report on US Sustainable Responsible and Impact Investing Trends, 2018,” https://www.ussif.org/files/Trends/ Trends%202018%20executive%20summary%20FINAL.pdf
[8] S&P Global, “Major ESG investment funds outperforming S&P 500 during COVID-19,” https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103
[9] BlackRock, "Committed to sustainability," https://www.blackrock.com/corporate/sustainability/committed-to-sustainability.
[10] Goldman Sachs, "ESG and Impact Investing," https://www.gsam.com/content/gsam/us/en/institutions/strategies/explore-by-solution/esg-and-impact-investing.html.
[11] J.P. Morgan, “Sustainable Investing,” https://am.jpmorgan.com/ch/en/asset-management/adv/investment-themes/esg/.
[12] Bank of America, "Our commitment to environmental sustainability," https://about.bankofamerica.com/en-us/what-guides-us/environmental-sustainability-governance-and-policies.html#fbid=syC66Iffa39.
[13] Morningstar, "The Sustainable Funds Landscape in 6 Charts," https://www.morningstar.com/insights/2020/03/18/sustainable-funds-in-6-charts.
[14] Forbes, https://www.forbes.com/sites/brendancoffey/2019/11/12/esg-stocks-are-having-a-fantastic-year/#1bba1cce2fbb.
[15] BloombergNEF, “ESG Funds Outshining Competitors Even in Market Turmoil,” https://www.bnef.com/shorts/7069.
[16] Ibid.

investment funds outperformed S&P Global 500 during the COVID-19 crisis.[17] A 2019 survey of senior executives revealed the majority of North American executives viewed ESG as part of their fiduciary duty.[18]

- **ESG investment principles are detailed, substantive and pecuniary in nature.** The proposed rule inaccurately asserts that ESG investment principles lack "precision and rigor."[19] The ESG scoring process consists of data disclosure, aggregation, and rating. Leading frameworks, such as the Global Reporting Initiative (GRI) and SASB, develop guidance to help corporations disclose clear, concise and material ESG information. They provide disclosure frameworks for a wide variety of industry sectors with specific instructions on what types information companies should disclose, and help companies create science-based, objective and forward-looking standards. [20] According to a survey of financial institutions, investors rely heavily on data supplied by these organizations to inform their investment decisions.[21]

  Companies voluntarily report on ESG metrics through surveys and corporate sustainability reporting. Data aggregators collect, verify and transparently share ESG data, often reflecting the recommendations of leading frameworks. For example, CDP collects sustainability data from companies and governments on electricity, climate change, water security and forests. As of 2018, nearly 7,000 companies had disclosed climate-related information to CDP. ESG rating agencies such as MSCI, Sustainalytics, Bloomberg and RobecoSam use proprietary research methodologies to monitor and score thousands of companies, with the intention of producing material investment information. Additionally, stock exchanges develop roadmaps that encourage listed companies to adopt the recommendations of leading frameworks and have the leverage to move the industry toward clearer terminologies, use of a standard taxonomy and increased transparency in ESG scoring.

  In turn, ESG investment principles enhance how companies make business decisions, increasing long-term profit and providing investors with a better risk portfolio. According to an MSCI research report, ESG factors tend to have financially material impacts on stock price performance and profitability for companies over various time periods.[22] Banks such as ING and BNP Paribas invest in sustainable finance projects due to the benefits of decreased loan prices and interest rates and increased access to financing, return on sales, sales growth, return on assets and return on equity.[23] For these reasons,

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[17] S&P Global, "Major ESG investment funds outperforming S&P 500 during COVID-19," https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103.

[18] State Street Global Advisors, "Into the Mainstream: ESG at the Tipping Point," https://www.ssga.com/library-content/pdfs/insights/into-the-mainstream.pdf.

[19] *See* 85 *Fed. Reg.* 39,115.

[20] SASB, "Materiality Map," https://www.sasb.org/standards-overview/materiality-map/.

[21] SustainAlytics, "Rate the Raters 2020," https://sustainability.com/our-work/reports/rate-raters-2020/.

[22] MSCI, "Deconstructing ESG Ratings Performance," https://www.msci.com/documents/10199/7b77de78-0c6e-0a45-f4dd-e65025552bae.

[23] Global Association of Risk Professionals, "ESG: Risks, Opportunities and Benefits," https://www.garp.org/#!/risk-intelligence/culture-governance/erm/a1Z1W000003lwfzUAA.

investors naturally consider ESG factors when evaluating potential investment opportunities, and the Department should continue to rely on the existing regulatory framework to determine whether an ESG Fund may constitute a Qualified Default Investment Alternative (QDIA) or a component of a QDIA.

- **The proposed rule would harm America's global competitiveness by allowing foreign investors to earn comparatively higher returns.** As investors who utilize ESG principles continue to outperform their less discerning counterparts, those restricted or discouraged from incorporating ESG metrics will find themselves earning lower returns than those who are free to invest for maximum risk-adjusted performance. This unintended result would have the counter-productive consequence of enabling foreign investors to reap comparatively greater rewards than U.S. investment professionals operating under the restrictions and burdens of the proposed rule, becoming richer as the United States limits its own potential.

- **The Department should modify the proposed rule to clarify that ERISA's fiduciary duties compel qualified investment professionals to consider ESG investment principles as economic considerations under generally accepted investment theories.** To the extent ESG principles enhance investment returns, ERISA compels fiduciaries to consider ESG principles in their investment decisions. Failing to modify the proposed rule to make that requirement explicit runs counter to the longstanding letter and spirit of fiduciary duty. As ESG investment opportunities constitute an ever-greater portion of financial markets, investment options configured without reference to ESG considerations will be drawn from a more limited pool, progressively limiting diversification and raising the risk of larger losses. By contrast, ESG investment principles inherently promote diversification by ensuring that evaluated companies engage in practices best suited to survive over the long term - from income streams to personnel.

- **Absent such a modification, the proposed rule should be withdrawn.**

- **Finally, the unusually short 30-day comment period for this proposed rule should be extended to 120 days to allow for the full range of affected parties to express their concerns.** Sustainable, responsible and impact investing in the United States is now a $12 trillion industry.[24] The proposed rule affects a massive amount of capital invested on behalf of millions of qualified plan participants and beneficiaries. The Department has wide latitude to establish a lengthier comment period. A review of recent Department rulemakings reveals that 30 days is an unusually short comment window.[25] The Department should extend the comment period to at least 120 days due the broad scope and significant impact of the proposed rule.

Thank you for the opportunity to submit these comments in response to the announcement of the proposed rule. ACORE stands ready discuss these comments in greater detail at any time. Please

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[24] US SIF, "Report on US Sustainable, Responsible and Impact Investing Trends: 2018,' https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf.
[25] US Department of Labor, "Regulations," https://www.dol.gov/regulations.

do not hesitate to contact me at stoff@acore.org or 202-507-4634 with any additional questions you may have.

Sincerely,

Tyler Stoff
Director of Regulatory Affairs
American Council on Renewable Energy

cc: Honorable Eugene Scalia, Secretary of Labor