July 29, 2020

VIA ELECTRONIC FILING

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

Re: RIN 1210-AB95, Financial Factors in Selecting Plan Investments proposed rule

To whom it may concern:

I am an ERISA beneficiary opposed to this Proposed Rule. I am submitting this comment because I believe that an overly prescriptive policy singling out the documentation a plan sponsor must produce to justify choosing an ESG-focused fund, versus any other fund focused on any other financial factor, is arbitrary and capricious, and will not withstand judicial review. In addition, the Department's Proposed Rule prohibiting the choice of any ESG-oriented portfolio as a QDIA option in a defined contribution plan is arbitrary and capricious, and will not therefore withstand judicial review. This set of proposed rules will, if anything, result in lower retirement income for American savers. It will have the effect of restricting the available set of funds as investment options, and will also direct QDIA funds into options with potentially inferior risk-return profiles. The DOL has provided absolutely no evidence or analysis to support their position, in violation of the Administrative Procedure Act, which prohibits regulations that are "unsupported by substantial evidence" or "unwarranted by the facts."[1] In this regard the DOL will continue the Trump administration's dismal record of promulgating regulations that do not survive judicial review.[2]

My wife and I are both beneficiaries of ERISA defined benefit plans sponsored by Johnson and Johnson and AllianceBernstein LP, respectively. I have also retired from a nineteen-year career in the asset management industry, where I was an analyst, portfolio manager, Director of Research, Chief Investment Officer, and member of the Executive Committee, all at AllianceBernstein, LP. I operated within the fiduciary duties of loyalty and care every day. In addition I have conducted and published scholarly research into the relationship between

[1] Todd Garvey, "A Brief Overview of Rulemaking and Judicial Review," Congressional Research Service, March 27, 2017, at 13. Available at https://fas.org/sgp/crs/misc/R41546.pdf.

[2] The Institute for Policy Integrity, "Roundup: Trump-Era Agency Policy in the Courts," available at https://policyintegrity.org/?ACT=69&path=trump-court-roundup%2Fpdf&size=letter&orientation=portrait&key=deregulation-roundup&attachment=1&compress=1&filename=.

fiduciary duty and sustainability reporting.[3] I share the Department's opinion that ERISA is violated when plan trustees adopt investments for non-pecuniary reasons. The Supreme Court's decision in Fifth Third Bancorp et al. v. Dudenhoeffer et al. makes this clear. ESG is a broadly defined topic, the precise meaning of which should be clarified. If used explicitly as a financial factor which incorporates material long-term reputational, legal, regulatory, and physical risk to financial assets, then ESG investing is no different than value investing, growth investing, or investing with concern to any other financial factor such as size, quality, momentum, or low volatility. My wife and I recognize that the prospect of material long-term reputational, legal, regulatory, and physical risk to assets in our retirement portfolio could negatively affect our retirement income. This proposed rule, by freezing the desire of plan sponsors to further integrate ESG risks into retirement portfolios, will hurt my retirement income as well as the retirement income of millions of others.

ESG factors have been shown to be financially material. Khan et al.[4] find that the stock performance of firms with good ratings on material sustainability issues is significantly better than firms with poor ratings on these issues. Since that study was published it has been replicated by Russell Investments[5] and TruValue Labs.[6] There is little doubt that fiduciaries consider ESG information to be financially material; among the world's largest asset managers, both BlackRock[7] and State Street Global Advisors[8] have incorporated financially material sustainability disclosure into their proxy voting guidelines.

The Proposed Rule amends Subchapter F, Part 2550—Rules and Regulations for Fiduciary Responsibility, in part by requiring a comparison of investments to other available alternatives: "Paragraph (b)(2) of the proposal adds to the original regulation a requirement that appropriate consideration of an investment or investment course of action includes a requirement to compare investments or investment courses of action to other available investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C)." This requirement simply describes the prudent course of action that all fiduciaries should

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[3] Rissman, Paul and Kearney, Diana, Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility (February 1, 2019). 49 ELR 10155 (2019) , Available at SSRN: https://ssrn.com/abstract=3332813.
[4] Khan, Mozaffar and Serafeim, George and Yoon, Aaron, Corporate Sustainability: First Evidence on Materiality (November 9, 2016). The Accounting Review, Vol. 91, No. 6, pp. 1697-1724., Available at SSRN: https://ssrn.com/abstract=2575912.
[5] Russell Investments, "Materiality matters: Targeting the ESG issues that can impact performance – the material ESG score," available at https://russellinvestments.com/-/media/files/us/insights/institutions/governance/materiality-matters.pdf?la=en.
[6] TruValue Labs, "New Alpha from ESG2.0 Factors – U.S. Large Cap," available at https://www.truvaluelabs.com/wp-content/uploads/2017/11/Sum_PerfTest_SP500.pdf.
[7] BlackRock, "A Fundamental Reshaping of Finance," available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.
[8] State Street Global Advisors, "CEO's Letter on our 2020 Proxy Voting Agenda," available at https://www.ssga.com/us/en/institutional/ic/insights/informing-better-decisions-with-esg.

take when choosing investments.[9] Why, then, is this language necessary? Set in the context of a Proposed Rule concerning ESG investing, it implies that an investment strategy utilizing ESG factors somehow requires a greater degree of rigor in comparison to investment alternatives than strategies grounded in other factors such as size, value or momentum. Is there evidence for this implication? Or does the DOL mean to imply that all investment decisions must now undergo an additional layer of comparison that has not heretofore been required? The Proposed Rule is silent on both counts. Pension trustees must already document their choices of funds in order to show that they have obeyed their duties of loyalty and care; as the language in the Proposed Rule states, "fiduciaries already commonly document and maintain records about their investment choices, since that is a prudent practice and a potential shield from litigation risk." What, then, is the reason for this new language, if not to sow doubt among fiduciaries who wish to incorporate consideration of long-term, material risks stemming from climate change and social license to operate into their investment process? Many in the ERISA practice area have interpreted it as such, with opinions such as, "the Proposed Rule's changes to the regulations describing fiduciaries' duties of prudence and loyalty could create significant challenges for ERISA plan fiduciaries considering ESG investing."[10]

The rule regarding QDIAs is similarly unsupported by evidence, and thereby violates the Administrative Procedure Act. The Proposed Rule states that "in the QDIA context a fiduciary's decision to favor a particular environmental, social, corporate governance, or similarly oriented investment preference…would raise questions about the fiduciary's compliance with ERISA's duty of loyalty." Why is this the case, when favoring ESG investment preferences has been shown to improve the risk-reward profile of a portfolio? Where is the analysis to show the connection between an ESG investment preference and a potential violation of the duty of loyalty? It is simply asserted, without factual support. The proposed rule goes on to note that "[e]ach of the QDIA categories requires that the investment fund, product, model portfolio, or investment management service apply generally accepted investment theories, be diversified so as to minimize the risk of large losses, and be designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures." Funds which attempt to minimize material long-term financial risks stemming from environmental or social factors satisfy each of these requirements. Where is the analysis indicating that they don't? There is none.

The Department's logic in this Proposed Rule appears to be: 1. Investing with non-pecuniary motives is impermissible; 2. ESG investing by definition encompasses non-pecuniary motives; 3. Therefore ESG investing is impermissible. But the assertion that ESG investing necessarily encompasses non-pecuniary motives is absolutely untrue, and the Department has provided zero evidence to the contrary.

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[9] "…investment decisions essentially involve a choice between competing investment alternatives." 40 Fed. Reg. 51,662 (Nov. 6, 1975)

[10] Groom Benefits Brief, "DOL Proposes Rule to Crack Down on ESG," June 25th, 2020. Available at https://www.groom.com/resources/dol-proposes-rule-to-crack-down-on-esg/.

The risks to financial assets stemming from climate change, and the revocation of social license to operate, are real.[11] I don't want those who manage my family's retirement investments to ignore these risks as a result of political meddling, and neither do millions of other Americans. This rule should not be implemented.

Respectfully submitted by Paul Rissman

[11] Shalini Nagarajan, "Boohoo stock tumbles 30%, wiping $1.25 billion off its market value, after an explosive report into working conditions at one of its factories," Business Insider, July 7, 2020. *Available at* https://markets.businessinsider.com/news/stocks/boohoo-stock-price-reaction-criticism-over-low-factory-worker-wages-2020-7-1029371727#.