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: Financial Factors in Selecting Plan Investments Proposed Regulation (RIN 1210-AB95)

Dear Director Canary:

On behalf of Impact Shares and our advocacy partners including the NAACP, YWCA and the United Nations we thank you for the opportunity to submit comments on the notice of proposed rulemaking entitled "Financial Factors in Selecting Plan Investments" ("Proposal" or "NPR"). I have included an e-mail recently sent out by the NAACP commemorating the second anniversary of the fund we operate in collaboration with them. You will notice that the fund's performance ranks in the 4th percentile beating nearly fourteen hundred peers in the category of Large cap blend. Identifying companies that empower people of color and having the NAACP work with companies to improve corporate America's practices relative to communities of color can return competitive returns for investors and the country alike. Please do not cow to special interests at the detriment to our society evolving in positive and productive ways.

Integrating environmental, social, and governance (ESG) factors into investment activities is essential to fulfilling fiduciary obligations to engage in appropriate risk management. We believe that the Proposed Rule fundamentally misconstrues the importance and role of ESG integration in reducing risk and increasing returns. Further, the Proposed Rule is likely to lead to confusion and costs for retirement plan fiduciaries. We, therefore, urge you to retain existing guidance and not move forward with a final rule.

Despite the Proposed Rule's stated goal of providing clarity for ERISA fiduciaries, it instead creates confusion due in part to a failure to distinguish ESG integration and Economically Targeted Investing (ETI).

ESG integration is the consideration of risk factors as part of prudent fiduciary management and a strategy that takes these factors into account in investment actions. ETIs are investments that aim to provide financial returns as well as collateral, non-financial benefits. For example, ETIs often advertise job creation or climate impact as goals of the investment. [1]

ESG Integration

The Proposed Rule states that ERISA fiduciaries have fulfilled their obligations if they have "selected investments and/or investment courses of action based solely on pecuniary factors" and that "ESG factors and other similar factors may be economic considerations." In fact, there is now an extensive body of research that makes clear that ESG factors are material investment considerations. [2] As such there exists a sound basis for integrating ESG factors into investment actions.

A policy by the DOL that simply clarifies that fiduciaries must integrate material factors into their investment actions, and that ESG factors may be material, would be appropriate. We are concerned, however, that the remaining components of the proposal create confusion and are likely to cause fiduciaries to believe they are not permitted to consider material ESG factors in their investment analysis.

The "all else being equal test"

We are highly concerned that the Proposed Rule inappropriately creates new burdens for fiduciaries under the "all else being equal test" that will lead to unnecessary costs for plan participants. It also creates confusion about what activities the DOL is attempting to regulate.

Currently, under the "all else being equal test," which has been in place since 1994, fiduciaries may select an investment that provides collateral benefits only after they have determined that the risk and return profile of that investment option is substantially similar to that of competing options that would meet the financial needs of the fund.

The Proposed Rule proposes the retention of the "all things being equal" test but adds new and costly record keeping requirements for fiduciaries to document their conclusion that multiple options are equal and that it is, therefore, appropriate to make a decision based on collateral benefits. Below is a chart detailing three examples of traditional ETFs and their ESG counterparts. Highlights below indicate outperformance. As shown, funds that integrate ESG factors into their plans largely outperform their traditional counterparts, indicating that ESG factors can indeed be a material rather than non-pecuniary factor.

The Proposal's discussion of the "all things being equal test" is cause for confusion because, while the test was originally developed to guide the consideration of ETIs, and the discussion in the Proposal appears to envision the selection of an ETI investment, the language of the Proposal does not distinguish the application of this test from the broader discussion of ESG integration, inappropriately suggesting that the documentation requirement is necessary whenever ESG factors are considered.

Defined contribution plan investment options

The Proposed Rule states that ERISA fiduciaries may select "ESG-themed funds" as an investment option for a participant-directed plan but that an "ESG-themed fund" cannot be selected as the default investment option. This determination appears to be based on confusion between ESG integration and ETIs. In our view, all investment options should be required to integrate ESG factors as part of prudent investment decision-making. In addition, it may be appropriate for ERISA fiduciaries to offer ETIs as options that participants may select in participant-directed plans. ESG issues can have a material impact on the financial performance of securities as well as sustainability of the markets for future investors. In 2015 the Supreme Court confirmed that "a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments." [3] Fund investors can create market volatility and undermine sustainable wealth creation when they fail to account for material ESG factors, undermining the interests of future beneficiaries.

The Department's stated rationale for prohibiting an "ESG-themed fund" from being selected as the default investment option is that it is not appropriate to select "investment funds whose objectives include non-pecuniary goals." This statement shows a fundamental misunderstanding of the purpose of ESG integration, which is to integrate all material factors into investment decision-making. In addition, it is likely to cause confusion for fiduciaries as they attempt to rationalize the Department's statements in the Proposed Rule that ESG factors are likely to have a material economic impact with the discussion of ESG factors in this context, in which the Department has deemed them "non-pecuniary."

Conclusion

The Proposal mischaracterizes ESG integration and fails to distinguish between ESG integration and economically targeted investing. This is likely to lead to confusion for ERISA fiduciaries and costs to plan savers. If the Proposal is finalized in its current form, we are concerned that fiduciaries will struggle to fulfill their obligations to integrate all financially material risk factors while also trying to respond to the language in the Proposal that appears to be aimed at preventing fiduciaries from taking account of these same risks.

Institutional investors have a duty to act in the best, long-term interests of their beneficiaries. In this fiduciary role, we believe that ESG factors may be financially material, and integrating ESG factors is core to investment decision-making. If the Proposed Rule goes into effect, it will undermine fiduciaries' ability to act in the long-term best interest of their beneficiaries. As such, we urge you to you to allow the existing guidance to remain in effect and not move forward with a final rule.

[Insert signature here]

[1] For further discussion of ESG integration as an investment strategy, see Gary, S. *Best Interests in the Long-Term: Fiduciary Duties and ESG Integration*, 90 U. Colo. L. Rev. 733, 745 (2019), attached hereto as **Exhibit A** and incorporated into this comment letter in full.

[2] See, e.g., Amato, J.V., and Dyott, I.S., ESG Investing: An Active Approach to Long-Term Value Creation, Neuberger Berman (2019), www.nb.com/documents/public/global/t0349_0119_wp_esg_investing_an_active_approach.pdf, attached hereto as **Exhibit B** and incorporated into this comment letter in full; Ballentine, C., ESG Stock Resilience Is Paving the Way for a Surge in Popularity, Bloomberg (31 Mar. 2020), www.bloomberg.com/news/articles/2020-03-31/esg-stock-resilance-is-paving-the-way-for-a-surge-in-popularity, attached hereto as **Exhibit C** and incorporated into this comment letter in full; Hale, J. Sustainable Funds Weather the First Quarter Better Than Conventional Funds, Morningstar (3 Apr. 2020), www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-than-conventional-funds, attached hereto as **Exhibit D** and incorporated into this comment letter in full; Konqui, M.H, et al. Why Using ESG Helps You Build Better Portfolios, Lyxor Asset Management (July 2019), www.lyxor.com/why-using-esg-helps-you-build-better, attached hereto as **Exhibit E** and incorporated into this comment letter in full; Logan, L., Commentary: Active Beats Passive in Promoting Sustainable Development, Pension & Investments (23 Apr. 2020), www.pionline.com/industry-voices/commentary-active-beats-passive-promoting-sustainable-development, attached hereto as Exhibit E and incorporated into this comment letter in full; Wurtz, F., ETFs for ESG: Why Passive Makes Sense for ESG, IPE (2019), www.ipe.com/etfs-for-esg-why-passive-makes-sense-for-esg/10033627.article, attached hereto as **Exhibit F** and incorporated into this comment letter in full. See also Gary, S., supra, 90 U. Colo. L. Rev. 733 (2019).

[3] *Tibble v. Edison International*, 135 S. Ct. 1823, 1828-29 (2015).

Appendix A NAACP ESG Fund 2 year anniversary e-mail

For more than 111 years, the NAACP has been at the forefront in the fight to eliminate social and economic discrimination. The current national conversation about racial inequity has highlighted the mission of the NAACP, and validated the need to offer comprehensive solutions to what has been decades of economic discrimination. Over the years, the Association's advocacy work seeking transformative change has employed different strategies. NACP is the most recent strategy which builds upon more than 20 years of NAACP Industry Scorecards. The Scorecards employed research methods which gathered, measured, and reported data regarding corporate commitments for diversity in hiring, contracting, promotions, corporate boards and C-suite staff.

Harnessing the power of capital markets to create social change, NACP is currently the only ETF in the market with a racial equity focus. Through a collaboration between Morningstar, Sustainalytics and Impact Shares we have built the Morningstar Minority Empowerment Index and the NAACP Minority Empowerment Fund which tracks this index. Since its launch in 2018, NACP has proven that a socially focused financial instrument can perform well with an annualized two year return of 11.86% which places it in the 4th percentile for total return out of 1,394 funds in the Morningstar Large Cap Blend Category since inception. It has also provided the premier national civil rights organization with an effective new tool for its economic advocacy in the fight to eliminate racial discrimination. The goal of which is to create a level playing field for all.

This unique financial instrument has created access for the NAACP to engage corporations in customized, concrete, and actionable strategies to move the needle on matters including racial board diversity, corporate supplier diversity, community engagement programs, freedom of association policies, and other key factors. NACP has become the foundation of the NAACP's corporate engagement strategy as an important tool for informing the current conversations for racial equity.

Warm regards,

Ethan

Performance data quoted represents past performance and does not guarantee future results. The investment return and principal value of an investment will fluctuate so that an investor's shares, when redeemed, may be worth less than their original cost and current performance may be higher or lower that the performance quoted. For performance current to the most recent month end, please visit our website at ImpactETFs.org or call 844-448-3383. NACP's gross expense ratio is 1.66%, and net expense ratio is 0.75%. The Adviser has contractually agreed to reimburse fees until 10/28/2020.

June 15, 2020: CNBC

Watch now: ETF Edge on the NAACP's Minority Empowerment ETF, the 'S' in ESG

Bob Pisani explores aligning capital with the cause of racial equity in an interview with Marvin Owens, Head of Economic Programs at the NAACP Ben Johnson, Head of ETF Research at Morningstar and Ethan Powell, Impact Shares.. Watch here

June 19, 2020: Fortune

Looking to invest in companies that care about equality? This NAACP-backed ETF may be the answer

Two years ago, the NAACP partnered with Impact Shares—a nonprofit fund manager specializing in socially conscious, ESG-focused exchange-traded funds (ETFs)—to develop a novel investment product.

Read more here

June 19, 2020: Barron's

This Tiny ETF Is Fighting Racism and Beating the Market

The Impact Shares NAACP Minority Empowerment ETF (ticker: NACP) was launched in 2018, currently with $4.6 million of assets under management. The tiny ETF is the only one that explicitly addresses issues of racial inequality.

Read more here

About the NACP Fund

Broad equity market exposure; racial justice and equality. NACP is designed to provide broad equity market exposure to U.S. Large and Mid-Cap companies that fit the NAACP's vision of good corporate citizens. With NACP, investors may achieve market returns while investing in a way that is consistent with their values.

A Nonprofit ETF. Impact Shares is a 501(c)(3) nonprofit organization, which earns an equity market rate of return for investors and donates all net advisory profits from NACP's ETF management fee to the NAACP. This provides an additional funding source for the NAACP's mission, to ensure a society in which all individuals have equal rights without discrimination based on race.

Support the NAACP. Founded in 1909, the historic power of the NAACP in advancing human rights has been transformative, impacting an expansive range of issues within American society from the eradication of lynch mobs, to ensuring equal education (Brown v. Board of Education), and ushering in the Civil Rights movement. In the 21st century, the NAACP sees corporate American as the "third act" for the equity movement, with racial and ethnic equity, empowerment, and inclusion the next frontier for the private sector.

Learn more about the Impact Shares ETFs

NACP

WOMN

SDGA

IMPORTANT CONSIDERATIONS

Appendix A NAACP ESG Fund 2 year anniversary e-mail

Carefully consider the Funds investment objectives, risk factors, charges, and expenses before investing. This and additional information can be found in Impact Shares' statutory and summary prospectus, which may be obtained by calling 844-448-3383, or by visiting www.impactetfs.org. Read the prospectuses carefully before investing.