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)**

To whom it may concern:

On behalf of The Sustainable Retirements Initiative, a project of the Intentional Endowments Network (IEN), I write to provide comments in response to the Department of Labor's proposed rule, "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposal").

IEN launched the Sustainable Retirements Initiative in October 2019. The Initiative was created due to strong interest on the part of the 150+ Higher Education institutions, foundations, investment firms, and not for profits that are members of IEN in exploring the integration of ESG options into their retirement plans. The initiative is intended to support fiduciaries in their consideration of all financially material factors, including ESG factors, into their investment processes.

Unfortunately, the Department of Labor fundamentally misjudges and misinterprets the valuable role that properly utilized ESG factors play in reducing risk and increasing returns for ERISA plan participants under generally accepted investment theories, especially in investment options as Qualified Default Investment Alternatives ("QDIAs"). Consideration of ESG is a well-developed risk management strategy aimed at integrating factors such as climate change and human capital management that evidence shows have a material economic impact on asset prices, especially when taking into account the risks that long-term, universal investors like pension plans face. An inherent advantage of adding an ESG lens to traditional investing is that ESG provides an additional risk control for investors above and beyond traditional risk diversification by seeking to avoid non-diversifiable systemic factors common to environmental and social issues. It is this risk mitigation concept that makes an ESG lens so valuable and conversely the failure to consider ESG so dangerous to ERISA plan investments.

The Department of Labor fails to articulate a rational connection between the relevant facts and the proposed rule. The Proposal reveals a fundamental misunderstanding of how professional investment managers use environmental, social and governance criteria as an additional level of due diligence and analysis in the portfolio construction process. Investment managers

increasingly analyze ESG factors precisely because they view these factors as material to financial performance.

In our comments to the Proposal, we are particularly focused on how the analysis underestimates the rule's cost and its incomplete analysis. An erroneous determination of the costs associated with implementation of a rule also provides a strong basis for challenging its validity. In particular, the Proposal's analysis:

- Overlooks the potential impact on savers' investment returns and risk exposures over the long term. The losses likely to be incurred by pension fund participants resulting from the rule would support corresponding gains taken by non-ERISA investors moving out of the riskier and lower returning assets, who appear to be favored by the proposal. This transfer of value and resulting reduced pension savings returns could be considered a "hidden pension tax."
- Ignores losses incurred by investment managers and advisors on the cost to develop ESG expertise
- Fails to consider additional administrative and personnel costs associated with one-off documentation required for ESG investments and strategies
- Further, if the impact of the proposed rule extends beyond ESG investing, as some anticipate it will, the economic analysis does not consider that cost impact.

The Proposal applies an incomplete fiduciary duty analysis that ignores the duty of impartiality and violates the duty of loyalty by using inaccurate data in a biased analysis.

The Proposal uses antiquated data covering different strategies to reach incorrect conclusions about the financial effects it would have on integration of material ESG factors into performance of pension fund assets. By discouraging fiduciaries from considering material ESG factors which are associated with better performance and lower risk exposures, the rule runs contrary to the duty of loyalty under ERISA. As a result, it will move pension investors into positions which are likely to be riskier over the long term.

The appropriate time perspective for evaluation of pension fund investments is over the long haul, as pension fund participants are investing for the long term. However, the proposal either applies no time frame at all or implies that fiduciaries should use a short time horizon when evaluating investments and risk exposures. Recent research findings on outperformance of companies and investors that take a long-term approach has been simply ignored.

The Proposal also undertakes no analysis of the fiduciary duty of impartiality and how it affects consideration of material ESG factors. This is in error, as it ignores how material ESG factors relate to the interests of future and younger beneficiaries. The US Supreme Court recognized that the duty of impartiality applies to ERISA in Varity v. Howe, 516 U.S. 489 (1996). "The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries. See Restatement (Second) of Trusts § 183 (discussing duty of impartiality); id., §

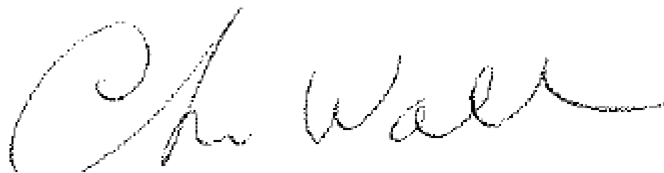
232 (same).” The rule seems likely to pull allocation of pension assets away from future wealth creation forward and defer risks into the future – essentially sacrificing the interests of younger fund participants to favor goosing of current performance and adding pro-cyclical dynamics to the US economy This approach seems especially problematic to exclude investments which consider what might be categorized as sustainable investment factors as part of an established strategy focused on generation of longer term, risk adjusted returns for younger fund participants.

Overall, the Proposal is likely to have the perverse effect of deterring fiduciaries, even against their experience and better judgment, from offering options for their plans that consider ESG criteria in addition to more traditional financial criteria, As a result, it will unfairly, and harmfully, limit plan diversification and perhaps compel plan participants to choose options that are either more risky or less profitable.

We respectfully request that the Proposal be withdrawn. Instead we suggest that fiduciaries should be required to consider all factors which affect risk and return or justify why they do not. The Proposal should be replaced by a rule to treat pecuniary ESG factors as any other pecuniary factor, removing any additional requirements, and making investments utilizing such ESG factors eligible for use in QDIAs.

Thank you for your consideration of these comments.

Yours sincerely,



Chris Walker

Senior Advisor, Sustainable Retirements Initiative

The Intentional Endowments Network