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July 29, 2020

Via Federal eRulemaking Portal: www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655 Dept of Labor proposed new fiduciary investment rules

U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210
Attn: Financial Factors in Selecting Plan Investments Proposed Regulation

Re: RIN 1210-AB95

To the Staff of the Office of Regulations and Interpretations:

TechNet is pleased to comment on the Department of Labor's recently published proposal ("**Proposal**") to regulate factors that ERISA retirement plan fiduciaries ("**Fiduciaries**") may consider when selecting plan investments with respect to an ERISA-covered retirement plan ("**Plan**"), including a 401(k) plan.

TechNet is the national, bipartisan network of innovation economy CEOs and senior executives. Our diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

TechNet advances public policies and private sector initiatives at the federal, state, and local levels that make the United States the world leader in innovation. We champion policies that foster a climate of innovation and competition, allowing America's tech industry to flourish. As such, we are acutely interested in the Proposal.

Most fundamentally, we are in agreement; when making decisions on investments and investment courses of action, Fiduciaries must be focused on a Plan's financial returns, and the interests of Plan participants and beneficiaries in their retirement benefits must be paramount. However, we believe the Proposal inappropriately and incorrectly suggests that the consideration of environmental, social, corporate governance and other similarly oriented factors ("'**ESG**' **factors**") by Fiduciaries engaged in the process of making Plan investment decisions involves -- by necessity -- a departure from the existing standards of prudent and loyal conduct already required under ERISA. We are concerned that the Proposal, if adopted, will interfere with a Fiduciary's ability to engage in a prudent process and act solely in the interest of a Plan's participants and beneficiaries, even with respect to ESG factors; will unnecessarily increase the litigation and liability risk to Fiduciaries to unacceptable levels, including the risk to many Fiduciaries who are individual Plan sponsor employees; and will create additional burdens on Fiduciaries, which the Department has not accurately or comprehensively considered.

1. Interference with Existing Duties of Loyalty and Prudence

When a Fiduciary engages in decisions related to the selection and monitoring of a Plan's investment options, the benefit interests of participants and beneficiaries must be paramount at all times. Consistent with the fiduciary responsibility provisions under ERISA section 404, Fiduciaries must do their work *solely in the interest of Plan participants and beneficiaries, for the exclusive purpose of providing benefits under the Plan and defraying reasonable Plan costs* (the "duty of undivided loyalty"), and *with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims* (the "duty of prudence").

A. The Proposal Confuses Pecuniary and Non-Pecuniary Factors with Respect to Fiduciaries' Objective Investment Analysis

The Proposal mistakenly confuses so-called "socially-driven investment strategies" with the consideration of ESG factors for purposes of objectively analyzing investment risks and potential returns. On the basis of that fundamental misunderstanding, the Proposal would impose an illusory and therefore arbitrary distinction between so-called "pecuniary" factors, which would generally be deemed appropriate for consideration by Fiduciaries, and ESG factors. The Proposal relegates ESG factors to the category of "non-pecuniary," and the Department generally characterizes them as inappropriate for Fiduciaries to take into account when making Plan-related investment decisions.

The Proposal's general re-framing of ESG factors as non-pecuniary is not only fundamentally flawed, but also directly conflicts with the prudent expert standard of conduct required by ERISA's statutory text.

There is an emerging consensus with the community of investment professionals that ESG factors are relevant to investment outcomes, measured both in terms of exposure to risk and opportunities for out-performance. It has recently been noted, for example, that a majority of ESG-themed funds consistently outperform the broader market across all asset classes. ESG factors have come to be so heavily intertwined with investment risk and potential return assessments that it is neither realistic nor appropriate to suggest, through regulation, that such factors are somehow inherently non-pecuniary in nature.

In fact, the integration of ESG factors into the process for assessing and evaluating investments has taken place for the precise reason that such factors, when appropriately considered, tend to drive improved investment returns and to reduce levels of investment risk. Within that investment decision-making context, there simply is no daylight between ESG and pecuniary factors. Investment experts can and do take ESG factors into account when considering the litigation, regulatory, operating, and market risks associated with potential investment opportunities. In this sense, ESG-related considerations can be a positive driver of more successful investment outcomes, measured in terms of long-term risk adjusted performance.

Those who are critical of the integration of ESG factors within the decision-making matrices used by asset managers tend to be dismissive of such considerations by assigning them to non-investment related social or political activism. And we would not disagree that investment decisions entered into purely for purposes of advancing a social or political agenda without consideration for investment outcomes, would contravene the ERISA duties of undivided loyalty and prudence. But, such knee-jerk dismissals overlook the vital role that properly weighed ESG factors can, should and do properly play in the analysis of investment opportunities.

B. The Widespread Adoption of ESG Factors by Investment Professionals Substantiates the Inclusion of ESG Considerations as Part of a Prudent Decision-Making Process

As noted at the outset of this letter, the duty of prudence owed by Fiduciaries under ERISA section 404 is defined by reference to the care, skill, prudence and diligence under the prevailing standards that a prudent person acting in a like capacity would use in the conduct of an enterprise of a like character and with like aims. In other words, the measure of prudent conduct may evolve over time and, at any given point in time, is evaluated against the standards then prevailing among industry experts.

ERISA is flexibly tailored to permit Fiduciaries to satisfy their statutory obligations of prudence and undivided loyalty under ERISA sections 403 and 404 without special rules specifying how Fiduciaries can carry out their responsibilities for any particular type of investment. That flexibility has served both Plan sponsors and Plan participants well for more than forty-five years. Yet the Proposal would unnecessarily limit the flexible application of ERISA's fiduciary standards by prescribing specific rules for ESG-themed investments. The Proposal would create a presumption that Fiduciaries who invest in ESG-oriented investments to have violated their ERISA duties absent documentation that ESG factors were not taken into account.

By doing so, the Proposal places Fiduciaries in an untenable position. This new framework essentially shifts the burden of proving compliance and creates a presumption that Fiduciaries have acted imprudently per se when selecting ESG-oriented investments. The Proposal would require Fiduciaries to comb through every single factor considered in connection with a Plan investment to identify and satisfy documentation requirements for any and all potentially ESG-oriented factors, to avoid a presumption of imprudent and disloyal decision-making. We strongly urge the Department to remain consistent with ERISA, long-established case law, the Department's own prior guidance, and Fiduciaries' practical time and monetary constraints by clarifying that Fiduciaries have always been, and remain, subject to ERISA's twin duties irrespective of the type of investment selected, without micro-managing those duties in the inconsistent and problematic ways described in the Proposal.

Within the investment industry, modern analytics in widespread use today take ESG factors into account for purposes of calibrating the risk and reward metrics associated with particular investment opportunities.[1]

Investment experts in the modern era focus on ESG factors because they can and do objectively impact a firm's valuation. ESG-related investment considerations have, without question, become one of the standards that investment experts use when engaged in the management of client assets. Under the ERISA's statutory definition of prudence, one could therefore readily conclude that Fiduciaries are already duty-bound to incorporate ESG factors into their investment decision-making processes.

Left in its current form, the Proposal would set up an untenable tension between the standard of prudence under the statute and the standard of prudence as described by underlying regulation. Under that sort of tension, Fiduciaries would be placed in the unenviable situation of having to choose between adhering to investment industry expert standards of conduct (which do take ESG factors into account) and a regulatory dictate to generally disregard such factors by treating them as "non-pecuniary." This could only create stress, confusion and risk for Fiduciaries by unnecessarily muddying the waters of applicable standards of Fiduciary conduct.

2. The Proposal Unfairly Singles Out Qualified Default Investment Alternatives.

The Proposal categorically rules out the inclusion of ESG-themed investments as "qualified default investment alternatives" or "QDIAs" under 401(k) plans. That result appears to be driven by the Department's view that – irrespective of the merits of an ESG-themed fund as an investment product – the presence of ESG themes somehow renders the fund inappropriate for use as or as part of a QDIA. In our view, this categorical exclusion is inappropriate. It completely overlooks, for example, the potential that an ESG-themed investment could be in the interest of

1 *See* Eccles and Klimenko, *The Investor Revolution,* Harvard Business Review, May-June, 2019 available at: https://hbr.org/2019/05/the-investor-revolution (Last Visited: 7/23/20) (The article's authors reported that ESG was universally top of mind for senior executives at 43 global institutional investing firms, including the world's three biggest asset managers (BlackRock, Vanguard, and State Street) and giant asset owners such as the California Public Employees' Retirement System (CalPERS), the California State Teachers' Retirement System (CalSTRS), and the government pension funds of Japan, Sweden, and the Netherlands.)

Plan participants and beneficiaries and could be selected through a prudent investment process conducted in accordance with the standard of ERISA section 404. Ironically, the effect of the exclusion in such a case would be to pre-emptively override the prudent and loyal judgment of Fiduciary.

3. The Proposal Does Not Provide a Clear Definition of ESG Factors and Creates Unnecessary Liability Risk and Other Burdens on Fiduciaries

If the Proposal is adopted, the Department should make changes to avoid uncertainty and increased litigation risks. First, the key concepts in the proposal are not clearly defined. Despite the Proposal's focus on ESG investments, it fails to define "environmental, social, corporate governance, or similarly oriented assessments or judgments." In fact, the Proposal acknowledges that these terms do not have a uniform meaning and that terminology is evolving. In addition, it leaves wholly unaddressed what an acceptable Fiduciary decision-making framework would be in order to properly take into account "environmental, social, corporate governance, or similarly oriented assessments or judgments" in making investment decisions in a Plan, not to mention how a Fiduciary would be expected to monitor such ESG factors on an ongoing basis under that framework. These risk-creating uncertainties should be addressed.

Finally, requiring Fiduciaries to perform supplemental analysis and produce additional documentation, in addition to the risk-adjusted economic value analysis that they must already perform, with respect to any investment where ESG factors are present adds a layer of inefficient and questionable value effort from an objective investment perspective into what is already a decision to which ERISA's existing fiduciary standards apply. The Department's economic impact report does not in our view fully address the impact of the additional analysis, record keeping and litigation expenses to Plan sponsors or the indirect cost to participants and or beneficiaries. This also creates unnecessary risk for Fiduciaries and may negatively impact the long-term growth for Plan investments overall.

We urge the Department to re-fashion the Proposal in a manner that would de-stigmatize the consideration of ESG factors, allowing prudent and loyal Fiduciaries to consider ESG factors within the current and sufficient framework of ERISA fiduciary standards. Thank you for this opportunity to comment on the Proposal.

Sincerely,

Linda Moore

Linda Moore
TechNet President and CEO