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

Attention: Financial Factors in Selecting Plan Investments Proposed Regulation

Re: Comments on Department of Labor Proposal Regarding Environmental, Social and Governance Investing (RIN 1210-AB95)

Ladies and Gentlemen:

Voya Financial, Inc. ("Voya")[1] appreciates the opportunity to comment on the recent Department of Labor (the "Department") proposal (the "Proposal")[2] to amend the "investment duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In general, the Proposal would narrow, and by the Department's own admission effectively eliminate, the circumstances in which environmental, social and governance ("ESG") factors that do not meet the Department's definition of "pecuniary" may be used in the selection of ERISA investments. In the context of participant-directed individual

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[1] Voya Financial, Inc. (NYSE: VOYA) serves the financial needs of approximately 13.8 million individual and institutional customers in the United States. A *Fortune 500* company, Voya helps Americans plan, invest and protect their savings — to get ready to retire better. Working directly with clients and through a broad group of financial intermediaries, independent producers, affiliated advisers and dedicated sales specialists, Voya provides a comprehensive portfolio of asset accumulation, asset protection and asset distribution products and services. With a dedicated workforce of approximately 6,000 employees and an independent sales force of approximately 1,600 registered representatives, Voya is grounded in a mission to help Americans save, invest and protect for a secure retirement.

[2] 85 Fed. Reg. 39113 (June 30, 2020).

account plans, the Proposal would place new and burdensome requirements on fiduciaries seeking to make ESG-focused investments available to investors or even considering ESG factors in investment strategies that are not ESG-focused.

At Voya, our corporate values and business practices are aligned with ESG principles. We believe this creates value, improves performance and quite simply is the right thing to do. Accomplishments and highlights include:

- Voya holds an "A" ESG rating from MSCI, driven by ESG Investment Integration, and Voya is rated a leader by Sustainalytics as a result of our industry leading governance;
- Voya's board represents business-leading gender equality, with 50% of Voya's independent directors consisting of women;
- Voya was included in the 2020 Bloomberg Gender-Equality Index for the third consecutive year;
- Voya was named as one of the Best Places to Work for LGBT Equality for fifteen consecutive years in the 2020 Human Rights Campaign Foundation annual Corporate Equality Index;
- Voya was included in the 2020 Disability Equality Index® for the third consecutive year; and
- In February 2020, Voya was recognized on *Barron's* list of the 2020 100 Most Sustainable Companies, ranking third overall and, for the second year in a row, we were the highest-ranked financial services company.

Summary

We believe the Proposal is fundamentally flawed for two reasons.

First, among the many qualitative[3] factors an ERISA fiduciary may appropriately consider in making an investment decision, the Proposal singles out ESG factors and treats them with skepticism. ESG principles are widely embraced in businesses and investment markets around the world. For example, the United Nations supports "Principles for Responsible

[3] By "qualitative" we mean factors that principally involve subjective judgment rather than mathematical comparison. We note that certain factors that would ordinarily be considered qualitative using this definition are sometimes reduced to numerical rankings or comparisons, as may be the case with ESG factors.

Investment", an organization focused on encouraging investors to use responsible investment to enhance returns and better manage risks. We see no valid reason to isolate ESG factors and subject them to special tests above and beyond ERISA's existing, robust fiduciary principles. An informed and responsible fiduciary may have viewpoints on any number of qualitative matters. Why single out ESG factors, among all of them, for the special tests and restrictions in the Proposal? While giving appropriate consideration to all the facts and circumstances that affect an investment course of action, a fiduciary may have viewpoints on matters as diverse as country risk, technology habits of future generations, and workforce resiliency, to name just a few. The Department seems to assume that, among all possible qualitative factors, ESG factors are improperly motivated unless proven otherwise. The Proposal insists that ESG factors be "pecuniary", and present "economic risks or opportunities investment professionals would treat as material economic considerations under generally accepted investment theories". Does the standard apply to all possible qualitative factors a fiduciary may consider? If so, why does the Department not say so? Is every other possible qualitative factor likewise relegated to carefully documented "tie breaker" status if a fiduciary is not willing to risk having its judgment second-guessed under the "pecuniary" standard? If not, what is the Department's reasoning for omitting other qualitative factors and how does this decision relate to the goal of investor protection?

We believe that, over the long term, ESG factors can help identify companies that are well positioned to succeed commercially, and thus have the potential to outperform financially. We therefore believe the Proposal would harm ERISA investors, not protect them. Rather than putting the Department's thumb on the scale to *discourage* consideration of ESG factors, we believe the Department should affirmatively recognize and support the role that ESG factors can play in an ERISA fiduciary's investment process.

Second, in the context of participant-directed individual account plans, the Proposal fails to account for the positive effect on investor behavior that the *availability* of ESG-focused investment options can have, and fails to identify how and when changes to employee participation and / or saving rates can be validly considered by an ERISA fiduciary when selecting available plan investments.

As noted below, our experience and research show that the availability of ESG-focused investment alternatives positively influences participant behavior. Therefore, we believe that expected changes in participant behavior, and the impact those changes may have on participant financial health, are entirely appropriate fiduciary considerations.

We therefore urge the Department to withdraw the Proposal in its entirety and either leave prior guidance in place or develop a new proposal that recognizes and supports the important role that ESG factors can have in identifying appropriate investments and promoting participation in workplace retirement savings plans.

Prior Department Guidance

In Interpretive Bulletin ("IB") 2015-01, addressing years of conflicting prior guidance,[4] the Department made it clear that ERISA fiduciaries may property treat ESG factors as economic, meaning they may constitute core factors in deciding among competing investments. In the Department's own words:

> "Environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices. Similarly, if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from environmental, social and governance factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote. Fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors."

Thus the Department has already confirmed that ESG factors may well be economic (or "pecuniary") of their own right, and their existence does not cast suspicion on other factors that may be considered. ESG factors are not presumed to be non-economic, and no new process or standards are demanded in order to justify their use in investment selection. As it stands, the

[4] In IB 94-1, the Department stated that ESG-type factors (through "economically targeted investments") may be considered by ERISA fiduciaries in situations in which economic considerations are otherwise comparable. This set the stage for the so-called "tie breaker" test that we believe is frequently inappropriate in the context of ESG investing. Four years later, under a different administration, the Department sought to distance itself from IB 94-1 by stating, in IB 2008-01, that such situations should be "rare" and should be carefully documented to ensure compliance with ERISA's fiduciary obligations. This created doubt in the investment community as to the appropriateness of ESG factors, and how to apply "tie breaker" criteria.

above language appears to be an appropriate gloss on ERISA's general fiduciary principles in the context of ESG investing.

In the same bulletin, the Department declined to impose heightened procedural or recordkeeping requirements on ERISA fiduciaries who consider ESG-related factors in evaluating investments, stating that the "Department does not construe consideration of ETIs or ESG criteria as presumptively requiring additional documentation or evaluation beyond that required by fiduciary standards applicable to plan investments generally".

The Department also acknowledged situations in which ESG considerations are "merely collateral", or non-economic, and stated that in such circumstances ERISA fiduciaries may use such considerations as "tie breakers" between competing investments. The Department did not, however, express skepticism about treating ESG factors as economic or otherwise put its thumb on the scales to discourage use of ESG factors.

In Field Assistance Bulletin ("FAB") 2018-01, the Department distanced itself somewhat from this guidance by noting that it "merely recognized that there could be instances" in which ESG considerations are appropriately considered to be economic factors, and stated, without support, that ESG factors are "ordinarily collateral", i.e., ordinarily non-economic.

FAB 2018-01 did, however, contribute meaningfully to the Department's views on considering ESG factors in the context of a defined contribution plan investment lineup. The Department stated:

> "In the case of an investment platform that allows participants and beneficiaries an opportunity to choose from a broad range of investment alternatives, adding one or more funds to a platform in response to participant requests for an investment alternative that reflects their personal values does not necessarily result in the plan forgoing the placement of one or more other non-ESG themed investment alternatives on the platform. Rather, in such a case, a prudently selected, well managed, and properly diversified ESG-themed investment alternative could be added to the available investment options on a 401(k) plan platform without requiring the plan to remove or forgo adding other non-ESG-themed investment options to the platform."

Here, the Department acknowledged that ERISA plan investors may want the opportunity to invest in funds that reflect their personal values – values that may go beyond those of a merely pecuniary nature – and ERISA fiduciaries may appropriately respond to those demands as long as longstanding general fiduciary principles have been satisfied.

To recap, while the Department's views have changed over the course of several administrations, existing guidance includes three key elements:

(1) *ESG factors can predict economic and financial success, and there are no special processes or documentary burdens for justifying their consideration;*
(2) *ESG factors are not presumed to be non-economic unless proven otherwise or subjected to special tests; and*
(3) *ERISA fiduciaries may respond to investor demand for investment alternatives that reflect their personal values.*

The Proposal and its Expected Impact

By amending the "investment duties" regulation under Title I of ERISA, and singling out ESG factors among all other possible qualitative factors, the Department would expose ERISA fiduciaries who select ESG-focused investments to heightened litigation risks. In order to protect itself from litigation when using an ESG factor in anything other than a strict and documented "tie breaker", a fiduciary would have to satisfy itself that the ESG factor clears the following two hurdles:

- First, it must have "a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(a)(1) of ERISA".[5]
- Second, it must "present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories".[6]

Faced with the possibility of being second-guessed under these potentially vague standards, we believe fiduciaries will be hesitant to pursue ESG investing to the same extent if ERISA's existing and robust fiduciary standards simply continued to apply. By singling out ESG investments in this manner, the Department would expose fiduciaries who use ESG factors in

5 85 Fed. Reg. 39113 at 39128.
6 Id. at 39127.

investment decisions outside of strict and documented "tie breaker" situations to heightened litigation risk. The Proposal would not simply clarify duties under existing standards; rather, it would increase costs and risks in a new way that would dampen investment practices that benefit ERISA investors. Thus, if adopted as proposed, we believe the Proposal would have a chilling and negative impact on ESG investment activities that would otherwise benefit ERISA investors.

In the context of participant-directed individual account plans, as noted below, our research indicates that the *availability* of ESG-focused investment options improves outcomes for retirement savers. The Proposal's focus in this area is unduly narrow; it demands a comparison of available investment options based solely on non-ESG related criteria. What if a plan sponsor were to conclude, in its reasonable judgment, based on facts and research available to it, that the inclusion of ESG-focused investment options would enhance both plan participation and savings rates? We believe it is a mistake for the Department to demand that fiduciaries ignore factors that influence plan and participant financial health in favor of narrow and restrictive tests like that included in the Proposal.

Voya's Experience and Research Regarding ESG Investing

Our experience shows that ESG-focused investments can outperform broader markets, particularly in times of market stress.

- In March 2020, the MSCI World stock index fell by 14.5 percent, but 62 percent of global ESG-focused large-cap equity funds outperformed the global tracker, according to Morningstar.[7]
- In the first quarter of 2020, seven out of ten sustainable equity funds finished in the top halves of their Morningstar Categories, and 24 of 26 ESG-tilted index funds outperformed their closest conventional counterparts.[8]
- Globally, ESG principles are more widely embraced in corporate governance than generally what we see in the United States. Morningstar research recently found

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7 John Hale, *Sustainable Funds Weather the First Quarter Better Than Conventional Funds,* MORNINGSTAR (April 3, 2020), https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-than-conventional-funds.

8 Id.

> that European-based ESG funds have outperformed conventional funds in various timeframes – one, three, five, and 10 years.[9]

In our Investment Management business, our institutional clients, consultants, and retail intermediaries increasingly ask about our processes to integrate the consideration of ESG factors into our investments and our ESG capabilities.

In our Retirement business, almost 30% of our clients currently offer a form of ESG investment in their defined contribution plans. While this represents just 1% of assets in plans that we service, we believe there is potential to grow. Recent Voya research found that 76% of consumers felt it was important for their employer to apply ESG principles to workplace benefits, and 60% would likely contribute more to an ESG-aligned retirement plan if it were certified. We are working closely with DALBAR, which is creating an ESG certification for Retirement Plans that would measure how actively a plan sponsor is applying the principles of ESG to the plan. Voya is one of two recordkeepers currently planning to participate in the launch of this certification.

Available research and data also show a steady upward trend in use of the term ESG among institutional asset managers, an increase in the array of ESG-focused investment vehicles available, a proliferation of ESG metrics, services, and ratings offered by third-party service providers, and an increase in asset flows into ESG-focused funds. According to Morningstar, the amount of assets invested in sustainable funds in 2019 was nearly four times larger than in 2018.

We also believe that trends in non-ERISA retirement plans are relevant because they help inform consumer trends and expectations, as well as fiduciary practices in the broader investment industry. As a majority of cities, counties and states in the U.S. incorporate ESG into their contracting and procurement practices, ESG is becoming an even more important criterion for investing, especially when it comes to retirement savings. For example:

- Most cities, counties and states have Minority, Women and Disabled Business Enterprise (known as MBE/WBE/DBE) procurement requirements.
- New York State Comptroller Thomas DiNapoli recently released a "Climate Action Plan," which provides a roadmap for the Common Retirement Fund to address climate risks and opportunities across all asset classes.

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[9] Siobhan Riding, *Majority of ESG funds outperform wider market over 10 years*, FINANCIAL TIMES (June 13, 2020), https://www.ft.com/content/733ee6ff-446e-4f8b-86b2-19ef42da3824.

- The state of California (CalPERS) has a sustainable investments program that helps the Investment Office deliver returns through the identification, analysis, and management of high-value sustainable investment risks and opportunities that may affect investment returns.

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We appreciate this opportunity to comment on the Proposal and would be happy to answer any questions or provide additional assistance to the Department.

Sincerely,

Christine Hurtsellers, CEO, Investment Management

Charles Nelson, CEO, Retirement

Voya Financial, Inc.