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VIA FEDERAL RULEMAKING PORTAL

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington DC 21210

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

Ladies and Gentlemen:

This letter is submitted in response to the request for comments by the Employee Benefits Security Administration ("EBSA") in Release No. RIN 1210-AB95, entitled "Financial Factors in Selecting Plan Investments," published at 85 Fed. Reg. 39113-02 (June 30, 2020) (the "Proposed Rule").

The purpose of this comment letter is to address certain litigation-related implications should the Proposed Rule be promulgated as written.[1] Specifically, we call to EBSA's attention two significant impacts of the Proposed Rule in the context of private litigation well beyond the context of ESG Funds investing that do not appear to be intended by EBSA but that we believe will result if the Proposed Rule is promulgated as presently structured: (1) by suggesting that fiduciaries would be required to make comparisons each time they make decisions regarding plan investments, the Proposed Rule is inconsistent with prior Department of Labor ("Department") guidance and court interpretations, and would expose fiduciaries to increased uncertainty, litigation risk, and costs; and (2) by conflating the duty of loyalty with the duty of prudence, and providing that objective criteria are determinative as to whether the duty of loyalty has been satisfied, the Proposed Rule is contrary to how courts have historically construed the duty of loyalty and would have further unintended consequences for plan sponsors and fiduciaries. Moreover, because these aspects of the Proposed Rule would apply to all fiduciary decision-making regarding investments across all types of ERISA-governed employee benefit plans, not just fiduciaries who utilize or consider utilizing ESG Funds, these consequences will be felt far beyond the circumstances that are the apparent focus of the Proposed Rule. We believe that promulgating a regulation that fundamentally alters the meaning of key fiduciary obligations across all investment-related decision-making for all ERISA governed plans—when the Department's stated intent

[1] This comment concerns the broad litigation-related implications of the Proposed Rule across a wide range of ERISA fiduciary duty suits; it does not address the use of investment strategies or funds that seek to, in part, advance environmental, social, and/or corporate governance considerations ("ESG Funds") in retirement plans, nor does it address whether the Proposed Rule is a permissible exercise of the Department's rulemaking authority.

was to address considerations with respect to only one type of investments, ESG Funds—is a classic example of the tail wagging the dog.

These implications are particularly important to consider given the explosive growth of private litigation involving ERISA-governed retirement plans in recent years. For example, at least 50 putative class action cases have been filed already in 2020 concerning the fees or performance of investment options in ERISA-governed defined contribution plans, as compared to 32 such cases filed in all of 2019. A leading industry publication reported recently that there is "no end in sight" to this "[f]lurry of case filings." Robert Steyer, *No End In Sight For Business of ERISA Litigation*, Pensions & Investments, July 13, 2020. We believe that the Proposed Rule, if promulgated as presently structured, would increase even further the volume and scope (and concomitant expense in defending) many types of ERISA class action suits by unnecessarily, and perhaps unintentionally, expanding the scope of liability for plan sponsors and fiduciaries. The Proposed Rule would therefore result in unnecessary costs and burdens to sponsors of retirement plans who are either defendants in such suits or may have to alter their practices to reduce the risk of suit; costs and burdens that have not been quantified by EBSA in connection with the issuance of its Proposed Rule.

The Proposed Rule Could Require Fiduciaries to Make Comparisons to Available Alternatives Which Is Inconsistent with Prior Department Guidance and Would Have Unintended Consequences

As to the duty of prudence, the Proposed Rule adds a new requirement that fiduciaries must consider in connection with a "particular investment or investment course of action" that is not required under current law: "[h]ow the investment or investment course of action compares to available alternative investments or investment courses of action with regard to the [enumerated] factors." 85 Fed Reg. 39113-02 at 39127 (quoting the proposed 29 C.F.R. § 2550.404a-1(b)(2)(ii)(D)). The breadth of this proposed new requirement could be viewed as requiring fiduciaries to make frequent, specific comparisons between any particular fund being considered or utilized in connection with a plan as against any or all available investment alternatives. Such a requirement would impose significant (if not cost prohibitive) additional burdens on fiduciaries, be inconsistent with past Department guidance and applicable judicial authority, and introduce unintended consequences in litigation for at least two reasons.

First, the Proposed Rule could require fiduciaries to do investment-to-investment comparisons that would be inconsistent with current Department guidance and courts' interpretation of the duty of prudence. In contrast to the Proposed Rule, the current 29 C.F.R. § 2550.404a-1 provides that fiduciaries do not need to abide by any particular set of procedures to satisfy the duty of prudence. In particular, there is no current legal requirement for a fiduciary to make this type of investment-to-investment comparison. Instead, current law establishes a flexible standard—that a fiduciary must give "adequate consideration" to the relevant "facts and circumstances." 29 C.F.R. § 2550.404a-1(b)(1)(A)

(2015). Courts have ruled that a wide range of actions can satisfy this standard—there is no set of proscribed actions that need to be taken given that the law must by necessity apply to practices employed by a wide range of fiduciaries overseeing a wide range of plans. Indeed, the Eighth Circuit has long recognized that, with regards to the prudence standard, "[t]here is no formula . . . for determining whether an ERISA fiduciary's conduct was reasonable, so the court should take into account all relevant circumstances." *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 921 (8th Cir. 1994). Other appellate courts have similarly held that a court should take into account "the totality of the circumstances" in analyzing a prudence claim, rather than compare the fiduciaries' conduct to any one specific required procedure. *See, e.g.*, *Bunch v. W.R. Grace & Co.*, 555 F.3d 1, 7 (1st Cir. 2009); *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 (4th Cir. 2007). Indeed, in a rare trial decision regarding ERISA's duty of prudence as applied to the actual fiduciary decision-making of defendants overseeing a plan designed to offer investment vehicles for an employee population comprised, in part, of the very managers of those same funds, the Chief Judge of the United States District Court for the Western District of Missouri held that the fiduciaries had satisfied their duties of prudence by comparing the plan's investments to benchmark indices and peer groups of alternative investments rather than to any specific individual alternative investments. *See Wildman v. American Century Services, LLC*, 362 F. Supp. 3d 685, 694, 703-08 (W.D. Mo. 2019).

By codifying for the first time specific steps that all fiduciaries must take regardless of the relevant "facts and circumstances," the Proposed Rule would lead to unnecessarily increased costs for plan sponsors, internal plan fiduciaries, and external service providers that serve as plan fiduciaries pursuant to either ERISA §§ 3(21) or 3(38), all of whom would be governed by the Proposed Rule in all of their investment-related fiduciary decisions. Rather than compare investments to benchmark indices and/or peer groups of alternative investments depending on the appropriate factual circumstances, as many do now, internal and external fiduciaries may decide that they would be required by the Proposed Regulation, if it becomes effective in its current form, to undertake an extensive comparison of each plan investment to some or perhaps all of the potential alternative investments each time they make a decision regarding the plan's investments. Such a comparison will likely be impractical, or impossible, in many, if not most cases—and will certainly require the expenditure of substantial additional time and resources.

Compounding this problem, the Proposed Rule provides no guidance as to how the relevant alternatives would be determined and how many of those alternatives the fiduciary is to utilize in performing the newly required comparison. For example, if a fiduciary is making a decision as to a diversified stock fund that falls within Morningstar's large cap growth category, would it be necessary for the fiduciary to compare that investment to all of the approximately 1,350 mutual funds within that category, not to mention the non-mutual fund investment vehicles such as collective investment trusts that could also qualify for that category?[2] It would not be feasible to require a fiduciary to compare the plan investment to even a fraction of those investments. Moreover, should external fiduciaries such as investment managers or advisors be required to conduct such an analysis, if doing so was even possible, the costs of such an expensive and burdensome analysis would be ultimately passed onto the plan, its participants, and their beneficiaries. In any event, exactly how does one conduct such an analysis to make the best prospective decision? And what is the expected outcome? Is the fiduciary expected to "chase performance" by replacing plan investments with the best performing alternative over some recent period? Performance chasing has been found to lead to worse results for investors with a long-term horizon than has a strategy of holding an investment with strong fundamentals. *See* Brian R. Wimmer, Daniel W. Wallick, and David C. Pakula, *Quantifying the impact of chasing fund performance* (July 2014) at 1-2, Vanguard Research.

Even more troubling is the fact that this requirement is an open invitation to 20/20 hindsight attacks by plaintiffs' lawyers. If they can identify one alternative that the fiduciary did not consider that had better after-the-fact performance than the plan investment, they may be able to successfully allege under the pleading standards announced in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that the fiduciary breached her duty of prudence (and even her duty of loyalty as the Proposed Rule is currently structured, as described below). *See generally Iqbal*, 556 U.S. at 678-82; *Twombly*, 550 U.S. at 555.

Moreover, this requirement would apply not only to decisions to initially select an investment, but also would presumably require a comparison of each plan investment to all other available investments every time a plan's investments are reviewed—a potentially Herculean task given that the duty of prudence is a continuous ongoing obligation. And it is a task that the government has previously disclaimed. As the government explained during oral argument before the Supreme Court, "the duty for ongoing monitoring is not the same as what you would do when initially putting the funds in place"; that "after the funds are put in place" a fiduciary may properly look to benchmarks or investment criteria—there is no precise "checklist that can be checked in every case." Tr. 18:23-19:12, *Tibble v. Edison Int'l*, No. 13-550 (U.S. Feb. 24, 2015) (argument by Nicole Saharsky, Assistant to the Solicitor General). The government's position in 2015—which is not reflected in the proposed Regulation—is consistent with courts' interpretations of the duty of prudence; as the Fourth Circuit has held, "a prudent fiduciary need not follow a uniform checklist." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 358 (4th Cir. 2014).

In sum, including a new requirement that a fiduciary always compare every investment in a plan to every other available investment is inconsistent with how courts have interpreted the duty of prudence, which necessarily allows for flexible application based on context and the wide array of plans and

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[2] *See, e.g.*, American Funds Growth Portfolio, https://www.morningstar.com/funds/xnas/rgwfx/performance (last visited July 23, 2020).

fiduciaries overseeing them. Imposing such a new requirement is not only inconsistent with how many plans are prudently managed today, but would have substantial adverse consequences. It would substantially increase the burden of serving as a fiduciary and therefore potentially discourage individuals from serving as fiduciaries. It would also increase the cost to plans of obtaining fiduciary services by increasing the burden on plan service providers, requiring them to incur additional costs in analyzing alternative investment options that would undoubtedly be passed on to plans and plan participants. We urge EBSA to reconsider whether to include this new standard, which would impact decisions well beyond those involving ESG Funds.

Second, when read together with the Department's statements in the preamble to the Proposed Rule regarding the purported benefits of low-cost and/or passively-managed investments compared to actively-managed investments (85 Fed. Reg. at 39115 n.15, 39121), the Proposed Rule could be read to suggest that fiduciaries would not only be required to compare actively managed investments to low-cost and/or passively-managed investments, but that they must *favor* passive management over active management regardless of whether passively-managed investments are appropriate for their plan and its participants. Such a requirement is also inconsistent with past Department guidance and courts' interpretation of the duty of prudence, and inappropriately puts the imprimatur of the Department on one form of investment style (passive management) over another widely utilized investment management style (active management).

In the past, the Department has stated that fees are just one consideration when evaluating investments, and has not favored the use of passively-managed investments over actively-managed investments:

- The Department has previously stated that ERISA does not mandate the cheapest possible fund, index or otherwise; "fees and expenses are only one of several factors" in making investment decisions. 29 C.F.R. § 2550.404a-5(d)(1)(iv)(A)(4).
- An EBSA handbook for plan fiduciaries recognizes that fiduciaries are not required to offer the cheapest possible investment: "Fees are just one of several factors fiduciaries need to consider in deciding on service providers and plan investments." Meeting Your Fiduciary Responsibilities, September 2017, *available at* http://www.dol.gov/ebsa/pdf/meetingyourfiduciaryresponsibilities.pdf.
- In 2007 Congress declined to amend ERISA to require plans to offer at least one index fund. *See* H.R. 3185, 110th Cong. (2007). In his written testimony, Brad Campbell, the agency head of EBSA at the time, expressed his "concern" that such proposed legislation would, among other things, "mandate specific investment options" thereby "limiting the ability of employers and workers together to design plans that best serve their mutual needs . . . ." The Appropriateness of Retirement Plan Fees, Hr'g. Before the H. Comm. on Ways and Means, 110th Cong. 19 (2007) (statement of Bradford P. Campbell, Assistant Sec'y of Labor).

- Just last month, the Chief of EBSA's Division of Fiduciary Interpretations issued an information letter stating that "a plan fiduciary would not, in the view of the Department, violate the fiduciary's duties under section 403 and 404 of ERISA solely because the fiduciary offers a professionally managed asset allocation fund with a private equity component" as a plan investment option, even though such investments typically carry higher fees than even actively-managed equity or fixed income mutual funds, let alone the low cost or passively-managed funds identified as preferred comparators by the Proposed Regulation. Information Letter 06-03-2020.

Courts have similarly interpreted ERISA's duty of prudence to not require any specific type of investment, and to not mandate the use of low-cost and/or passively-managed investments, but to instead give fiduciaries the freedom to choose among different investment styles that may be appropriate for their plans and participants. As the Seventh Circuit explained, "nothing in [ERISA] requires plan fiduciaries to include any particular mix of investment vehicles in their plan." *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009), *cert denied*, 558 U.S. 1148 (2010). This principle has been applied specifically to reject allegations that fiduciaries should have offered or considered offering passively-managed investments. *Divane v. Nw. Univ.*, No. 16-cv-8157, 2018 WL 2388118, at *6 (N.D. Ill. May 25, 2018), *aff'd*, 956 F.3d 980 (7th Cir. Mar. 25, 2020). It has similarly been applied to reject allegations that fiduciaries should have offered investments with cheaper fees, which may have been inappropriate for the plan and/or its participants for other reasons, because "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems)." *Hecker*, 556 F.3d at 586. Indeed, some courts have rejected comparisons between actively-managed investments and passively-managed investments because of the differences between these two types of strategies. *See, e.g.*, *Wildman*, 362 F. Supp. 3d. at 697, 710.

Because of those differences, it is good policy to not favor one of these types of investments over another, and instead to allow plan fiduciaries to have the flexibility to utilize actively-managed investments for their plans when such investments are appropriate for the plan, as the Department's previous guidance and courts' rulings had permitted. Actively-managed investments provide an opportunity to outperform a market index, while passively-managed investments seek only to replicate the return of a specific index, and therefore necessarily underperform that index due to trading costs and fees.[3] Academic research has demonstrated that active management can therefore add value to investors' portfolios.[4] Additionally, because they do not seek to match an index, managers of actively-managed investments have more discretion to increase or reduce exposure to sectors or securities than do managers of passively-managed investments, and therefore actively-managed investments can help

[3] *See* Wermers, R. R., *Active Investing and the Efficiency of Security Markets* (December 15, 2019) at 5, The Journal of Investment Management (2020), Forthcoming, *available at* https://ssrn.com/abstract=3353956.

[4] *Id.* at 5-6.

protect investors from certain risks, particularly downside risks.[5] By contrast, if the market index replicated by the passively-managed fund drops in value, that fund will necessarily drop in value as well. The Investment Company Institute demonstrated, for example, that for three, five and ten year periods ending on December 2018, the top actively managed funds not only outperformed index funds, but that they also provided substantially less variability of returns than index funds. *See* Br. of Investment Company Institute as Amicus Curiae in Support of Petitioners at 14, *Putnam Invs., LLC v. Brotherston*, No. 18-926 (U.S. Feb. 15, 2019).

Because the language in the preamble of the Proposed Rule regarding the purported benefits of low-cost and/or passively-managed investments compared to actively-managed investments is inconsistent with past Department guidance and courts' interpretations, it should be disclaimed in any final guidance on the topic of ESG Funds (or other rulemaking). Leaving that language in place would unnecessarily, and inappropriately, favor passive management as an investment strategy over active management. Not only would that potentially deprive participants of a widely utilized and often beneficial form of investment management, but it would produce uncertainty for plan sponsors, plan fiduciaries, and service providers, and lead to unnecessarily increased costs, including litigation costs, for the reasons discussed previously in this letter.

The Proposed Rule Conflates the Duty of Loyalty with the Duty of Prudence, Which, If Adopted, Would Impose a Novel Objective Test for the Duty of Loyalty

Additionally, the Proposed Rule expands the scope of 29 C.F.R. § 2550.404a–1 to cover ERISA's duty of loyalty, and then collapses the duties of loyalty and prudence together in its proposed § 2550.404a–1(b). Although the Department states in the preamble to the Proposed Rule that the Proposed Rule's treatment of the duty of loyalty merely "reiterate[s] long-established fiduciary standards of prudence and loyalty" (85 Fed Reg. 39113-02 at 39119), just as with its proposal to require a new set of specific procedures to satisfy the prudence test, it again effects a change in law as to the duty of loyalty that represents a significant departure from current and historic treatment of that duty, which currently focuses on the fiduciary's subjective intent, not a checklist of objective factors. This change could also have significant unintended adverse consequences.

Courts have generally construed ERISA's duties of loyalty and prudence consistently with the current 29 C.F.R. § 2550.404a–1, which describes considerations that a fiduciary should take into account to satisfy the duty of prudence, and does not state that those same considerations would apply to the duty of loyalty analysis. *See* 29 C.F.R. § 2550.404a–1(b)(i)-(iii). Indeed, the existing regulation does not discuss the duty of loyalty at all.

[5] *Id.*

With respect to the duty of loyalty, most courts that have considered the issue have held that ERISA's duty of loyalty is subjective and turns on the fiduciary's state of mind, not on compliance with objective, procedural criteria. *See, e.g.*, *In re Wells Fargo ERISA 401(k) Litig.*, 331 F. Supp. 3d 868, 875 (D. Minn. 2018), *aff'd*, No. 18-2781 (8th Cir. July 27, 2020). Therefore, the test of whether a fiduciary acted loyally focuses on "the reason" a fiduciary took the challenged action, and whether it was motivated by "subjective good faith." *Id.*; *see also Wildman*, 362 F. Supp. 3d at 700-701 (quoting and relying on *In re Wells Fargo ERISA 401(k) Litig.*). As the First Circuit reasoned in holding that a breach of the duty of loyalty can only be found where the fiduciary possessed "improper motivations" when taking fiduciary actions, whether a fiduciary fulfilled her duty of loyalty *must be* a subjective analysis because loyalty is a subjective concept by definition. *Brotherston v. Putnam Invs., LLC*, 907 F.3d 17, 40 (1st Cir. 2018) (quoting dictionary definition of "loyal"); *see also Perez v. First Bankers Tr. Servs. Inc.*, 210 F. Supp. 3d 518, 534 (S.D.N.Y. 2016) (holding that "[t]he duty of loyalty is grounded in the motivation driving a fiduciary's conduct").

By contrast, courts have understood that ERISA's "prudent person standard is an objective standard . . . that focuses on the fiduciary's conduct preceding the challenged decision." *See, e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). "In evaluating whether a fiduciary has acted prudently, [courts] therefore focus on the process by which it makes its decisions." *Id.*

Conflating the duties of loyalty and prudence and converting the duty of loyalty analysis into an objective, process-driven one, as the Proposed Rule does in § 2550.404a-1(b), is inappropriate. By conflating the duty of loyalty with the duty of prudence, the Proposed Rule is contrary to ERISA's statutory structure, which defines the two duties in different statutory provisions. ERISA § 404(a)(1)(A)-(B). And by requiring that a fiduciary satisfy the same objective, process-related criteria relating to the duty of prudence in order to demonstrate that she was also loyal, the Proposed Rule essentially states that a fiduciary must be prudent to be loyal. This violates cardinal rules of statutory interpretation; because ERISA's fiduciary duties of loyalty and prudence are contained in separate provisions of ERISA § 404(a)(1), they should be interpreted as having separate meanings to avoid rendering either superfluous. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Indeed, by converting the duty of loyalty analysis into an objective standard that turns on whether a fiduciary has met the criteria in § 2550.404a-1(b) of the Proposed Rule, the Proposed Rule is contrary to most courts' and many litigants' understandings of the duty of loyalty. The Proposed Rule would therefore implicitly cast doubt on the ways in which courts have traditionally interpreted these duties, requiring litigants to expend more time and resources on ancillary litigation, including but not limited to litigating whether the Proposed Rule has abrogated the prior court decisions on which the parties would otherwise rely.

Moreover, the Proposed Rule and Department's preamble do not reflect the current state of the law, which sensibly interprets ERISA § 404(a)(1)(A) to permit some "incidental benefit to other interests . . .

as long as the *primary purpose* and effect of the action is to benefit the plan." *Dupree v. Prudential Ins. Co. of Am.*, No. 99-8337-CIV.-JORDAN, 2007 WL 2263892, at *45 (S.D. Fla. Aug. 7, 2007) (emphasis added), *as amended* (Aug. 10, 2007). As the First Circuit explained in holding that "ERISA section 404(a) does not require a fiduciary to don the commercial equivalent of sackcloth and ashes:"

> Suppose the Plan specifies that [a benefit] may be paid other than in American dollars. If, in a particular case, it makes no practical difference to the beneficiary whether she receives her promised benefit in dollars or euros, but it is to the fiduciary's advantage to pay in euros, it could not rationally be argued that payment in euros was a breach of the fiduciary's duty under section 404(a). When the fiduciary's payment of a benefit does not unfairly diminish, impair, restrict, or burden the beneficiary's rights, section 404(a) is not transgressed.

Vander Luitgaren v. Sun Life Assurance Co. of Can., 765 F.3d 59, 65 (1st Cir. 2014). As that same circuit later observed, affirming judgment for the defendants on a loyalty claim, "to establish a claim for breach of the duty of loyalty plaintiffs were required to prove that defendant's motivation in taking these actions was to put its own interests ahead of those of Plan participants," not whether the fiduciary obtained some incidental benefit or whether a subsidiary purpose was advanced through actions principally designed to benefit plan participants. *Brotherston*, 907 F.3d at 40.

Ultimately, interpreting the duties of loyalty and prudence to mean the same thing, or require the same proof, presents regulatory guidance at odds with the statutory text. This will only exacerbate the costs, complexity and uncertainty of litigation, as litigants and courts address conflicting standards. This is of particular concern to fiduciaries and plan sponsors because ERISA already forces "asymmetric costs" of discovery on the defendant, costs that often are imposed for no other reason than "to force a settlement." *Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt.*, 712 F.3d 705, 719 (2d Cir. 2013).

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We believe that these litigation implications of the Proposed Rule will result in unnecessary costs and burdens for plan sponsors and fiduciaries, who will face an increased risk of suit for practices previously considered by the Department and the courts to be permissible. Fiduciaries should continue to have the flexibility to design procedures that suit the specific needs of their plans, and courts have sensibly identified that the test for loyalty is subjective, not objective. Against the backdrop of already skyrocketing litigation involving ERISA-governed retirement plans, adding additional litigation risks could cause some companies to choose to not offer ERISA-governed retirement plans altogether, deciding that the litigation risks are not worth the benefits of such a plan. Talented individuals may decline to serve as fiduciaries, depriving plan participants and beneficiaries of their service. Not only do these outcomes appear to be bad public policy, but they also appear contrary to the careful balancing of interests that led to the near unanimous, bi-partisan passage of ERISA in 1974, and the congressional goal, recognized by the Supreme Court, that in enacting ERISA, "Congress sought to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotations and citation omitted).

Very truly yours,

/s/ James O. Fleckner

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