Amy M. O'Brien
Senior Managing Director |
Head of Responsible Investing

730 3rd Avenue
New York, NY 10017
T: (212) 916-5178
E: amy.obrien@nuveen.com

Yves P. Denizé
Senior Managing Director |
Division General Counsel

730 3rd Avenue
New York, NY 10017
T: (212) 916-6261
E: yves.denize@nuveen.com

Filed electronically at Regulations.gov

July 30, 2020

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 Sir or Madam:

Teachers Insurance and Annuity Association of America ("TIAA") and its wholly-owned subsidiary Nuveen, LLC ("Nuveen"), referred to together as TIAA, appreciate the opportunity to respond to the Department of Labor's (the "Department") Proposed Rule, "Financial Factors in Selecting Plan Investments" (the "Proposed Rule" or "Proposal"). This letter primarily focuses on TIAA's concerns with the Proposal's unfavorable scrutiny and mischaracterization of environmental, social, and governance ("ESG") investments. We encourage the Department to engage broadly with the retirement investment industry for fact-finding in this area. TIAA also has concerns with the Proposal's new and expansive articulation of the duty of loyalty, in general. While we appreciate the Department's efforts to codify ERISA's long-standing interpretation of the duty of loyalty – that fiduciaries not act to subordinate the interests of plan participants to unrelated objectives – the Proposal is far-reaching and will have unintended consequences for ERISA plans and participants. TIAA respectfully requests the Department withdraw its Proposed Rule.

About TIAA and Nuveen

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over its century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants it serves and to provide financial products that meet their needs. To carry out this mission, TIAA has evolved to include a range of financial services, including asset management and retail services. Today, TIAA's investment model and long-term approach serves more than 5 million retirement plan participants at more than 15,000 institutions.[1] With its strong nonprofit heritage, TIAA remains committed to its mission of serving the financial needs of those who serve the greater good.

Nuveen, as the asset management arm of TIAA, offers a comprehensive range of outcome-focused investment solutions designed to secure the long-term financial goals of institutional and individual investors. Nuveen is comprised of investment advisers who collectively manage or record keep over $1 trillion in assets,[2] including a series of registered fund complexes, private funds, institutional separately managed accounts, and structured vehicles. Nuveen and its affiliates offer deep expertise across a comprehensive range of traditional and alternative investments through a wide array of vehicles and customized strategies. Most relevant to the Department's Proposed Rule, Nuveen executes its enterprise-wide ESG investment approach, as dictated by the company's responsible investing policy,[3] and is a top-10 manager among ESG mutual funds, exchange-traded funds, and variable insurance products.[4]

ESG Investing Has Become Increasingly Integral to Investment Management

Today, ESG factors such as human capital management, supply chain risk, energy efficiency, and/or natural resource usage, among many others, are used in sophisticated, data-driven investment strategies that seek competitive risk-adjusted returns. Throughout this comment letter, we will use the terms "ESG investments," "ESG investment options," or "ESG funds" to refer to strategies that include specific criteria related to ESG factors in their investment methodology (e.g. leading ESG practices or indicators relative to peers), and which are specifically branded to indicate the inclusion of ESG criteria. This is an important distinction from "ESG integration," which does not solely apply to branded funds and allows investment managers to incorporate ESG factors alongside more "traditional" analyses, to broaden the scope of financially material data used to evaluate companies. This approach is increasingly utilized across a wide range of conventional investment strategies and will also be referenced in our comments.[5]

ESG Investments are Aligned with the Pecuniary Interests of Plan Participants

In the preamble to the Proposed Rule, the Department states that the "proposed regulation is designed in part to make clear that ERISA plan fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for non-pecuniary objectives." Our primary and overarching concern with the Proposed Rule is that the Department implicitly and mistakenly characterizes ESG investments as subordinating risk and return to non-pecuniary objectives. Further, the way in which ESG investments are portrayed in the Proposed Rule

[1] As of March 31, 2020
[2] As of March 31, 2020
[3] See TIAA Policy Statement on Responsible Investing, 7th Edition, available at https://www.tiaa.org/public/pdf/ri_policy.pdf.
[4] Based on rankings sourced from Morningstar Direct as of December 31, 2019.
[5] ESG investments or ESG integration differ from "socially responsible" investment approaches, which affirmatively seek to advance specific social goals that may not be consistent with a solely pecuniary approach.

does not reflect the market's understanding of ESG investing or the wide array of investment options available to ERISA fiduciaries, including options with fee structures that are commensurate with non-ESG funds.

Accordingly, we respectfully disagree with the implication throughout the Proposed Rule that ESG investments and investment considerations are "non-pecuniary" in nature and therefore should not be given that same consideration afforded to non-ESG investments when plan fiduciaries are making investment decisions. The facts, data, and statistics demonstrate that ESG investing is "pecuniary" and can be in the best interests of participants. ESG factors directly align with pecuniary considerations and are aimed at increasing competitive risk-adjusted returns. Failure to consider the appropriate role of ESG investments or factors, in fact, could in certain circumstances be counter to the pecuniary interests of participants.

Growing Consensus that ESG Considerations are Financially Material to Investment Decisions

Asset managers are increasingly integrating ESG factors into their traditional financial analysis across conventional investment options. According to a Harvard survey from 2018, 80 percent of asset managers now consider ESG factors when making investment decisions, citing client demand, and the belief that ESG factors are material to investment performance.[6] Current market realities underpin the strong connection between value, risk, and ESG. A 2019 analysis found that intangible assets, such as brand equity, customer/supplier relationships, and public rights – areas of value deeply tied to ESG factors – comprises 84 percent of the total market value of the S&P 500.[7] While intangible assets are difficult to assess solely through traditional financial analysis, the evaluation of ESG factors can supplement traditional data and give investment managers valuable insights into a company's potential long-term value and risk profile.

A recent McKinsey study[8] further demonstrates how ESG factors connect to corporate health. McKinsey finds that "ESG links to cash flow in five important ways: (1) facilitating top-line growth; (2) reducing costs; (3) minimizing regulatory and legal interventions; (4) increasing employee productivity; and (5) optimizing investment and capital expenditures.[9]

Net of Fees, ESG Investments Provide Competitive Risk-Adjusted Returns

Substantial research demonstrates that ESG investments offer risk-adjusted returns competitive with traditional funds. One such study, published by the CFA Institute, showed that over a 10-year period an S&P 500 portfolio comprised of companies that performed well on ESG factors generated lower risk and greater annualized return than a portfolio comprised of companies that performed poorly on ESG factors.[10] A separate Morgan Stanley analysis of approximately 11,000 mutual funds across equity and

---

[6] Amel-Zadeh, A., & Serafeim, G. 2018. "Why and How Investors Use ESG Information: Evidence from a Global Survey." Financial Analysts Journal, Vol. 74, No. 3 (Third Quarter), P. 87–103

[7] 2019 Intangible Assets Financial Statement Impact Comparison Report, Ponemon Institute & Aon, April 2019

[8]https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.pdf

[9]https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Strategy%20and%20Corporate%20Finance/Our%20Insights/Five%20ways%20that%20ESG%20creates%20value/Five-ways-that-ESG-creates-value.pdf

[10] *ESG Investing: Can You Have Your Cake and Eat It Too?*, Dhingra, Gautam, Olson, Christopher, September 3, 2019 [https://blogs.cfainstitute.org/investor/2019/09/03/esg-investing-can-you-have-your-cake-and-eat-it-too/]

fixed income showed that from 2004-2018 the returns of ESG funds were competitive with traditional funds, and even demonstrated greater downside protection during periods of high market volatility.[11] ESG funds have further demonstrated their ability to protect against risk, especially when compared to traditional peers, during the recent market turmoil caused by the COVID-19 pandemic. Through June 30, 2020, 72 percent of ESG funds had year-to-date returns that ranked in the top half of their Morningstar categories, and 44 percent ranked in the top quartile. This means that ESG funds out-performed non-ESG funds during this time.[12] Additionally, ESG funds offer expense ratios on par with comparable conventional funds. Of the 30 ESG funds launched in 2019 alone, 23 percent of the share classes ranked in the cheapest 10 percent in their Morningstar Category. Overall, competitive performance, net of fees, has been a fundamental factor driving growth in assets aligned with ESG investments, both in funds specifically branded as ESG investments and those that factor in ESG considerations.

ESG Considerations are Becoming a Key Component in the Menu of Investment Options Available to Retirement Plan Participants

While the number of ESG funds is increasing, so too is the number of funds leveraging ESG integration. In 2019 alone, the universe of ESG funds grew to over 303 open-end and exchange-traded funds, with flows into these funds totaling $21.4 billion – four times the record amount set in 2018. In addition, the numbers of conventional funds that now say they integrate ESG factors increased from 81 in 2018 to 564 in 2019.[13]

This growth and diversification in fund options, growing industry consensus on the financial materiality of ESG factors, and competitive performance are driving trends across retirement investing. According to data from investment consulting firm Callan, although less than one percent of the 2,400-plus fund options in Callan's Defined Contribution Index[14] were ESG investment options, 20 percent of the non-ESG funds indicated they integrate ESG considerations into the investment process. Meanwhile, 18 percent of plans have added an ESG fund to their investment lineup, and the vast majority of plans (94 percent) had exposure to ESG-managed assets where at least one fund manager indicated they use ESG considerations in the investment process.[15] According to Callan's survey, 35 percent of respondents indicated plans to broaden the scope of ESG incorporation in the future.[16] For TIAA's recordkeeping clients that have engaged third-party investment consultants to support their oversight and guidance to the plan and menu options, more than two-thirds offer at least one ESG product and, overall, 80 percent of all active recordkeeping clients offer an ESG investment as an available option on the investment menu.

---

[11] Sustainable Reality – Analyzing Risk and Returns of Sustainable Funds, Morgan Stanley Institute for Sustainable Investing, 2019
[12] *Sustainable Funds Weather the First Quarter Better Than Conventional Funds,* Hale, John, April 3, 2020 [https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-than-conventional-funds]
[13] Sustainable Funds U.S. Landscape Report – Record flows and strong fund performance in 2019, Hale, John, Morningstar, February 14, 2020
[14] Callan's DC Index measures the performance, asset allocation, and cash flows of over 90 large defined contribution plans representing approximately $250 billion in assets
[15] Callan Institute 2019 ESG Survey, Blanton, Shane and West, Anna, 2019
[16] Callan Institute 2019 ESG Survey, Blanton, Shane and West, Anna 2019

ERISA's Existing Fiduciary Framework Sufficiently Covers ESG Investments without Needing to Single Out a Particular Class or Style of Investing for Disparate Treatment

The existing ERISA fiduciary framework does not differentiate between various types of investments for the purpose of the duties of loyalty and prudence. Instead, the duties of loyalty and prudence in Section 404(a), as developed by case law and the Department's regulations over the past 45 years, subject plan fiduciaries to the same duties irrespective of the type of investment selected.[17] The Proposed Rule would fundamentally change this well-established rule of law by singling out ESG investments for special scrutiny. It does so by compartmentalizing ESG investments into a special "duties of prudence and loyalty" category with additional (and ambiguous) investment duties and documentation requirements.

For example, the Proposed Rule states: "[e]nvironmental, social, corporate governance, or other similarly oriented considerations are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories…"[18] While we agree with the Department that ESG considerations should be used as pecuniary factors, we are concerned with the Department's prescriptive approach in this area. For example, the references to "qualified investment professionals," "material," and "generally accepted investment theories," invite subjective interpretations and create a heightened level of scrutiny for ESG investments that do not apply to any other type of investment. This prescriptive approach also sets out a dangerous precedent for singling-out a category of investments for special scrutiny without any clear reason or basis for doing so.

ERISA's fiduciary duty of prudence is recognized as the "highest known to the law."[19] In selecting any investment (including one with ESG factors), the Department has articulated many times its general position, which plan fiduciaries firmly understand, that the duties of loyalty and prudence require plan fiduciaries to not increase expenses, sacrifice investment returns, or reduce the security of plan benefits to promote collateral goals. Depending on the Administration in place at the time, the Department has conveyed its general position in different tones, but the general position has remained the same throughout.

Plan fiduciaries should be able to continue to use ESG factors to expand the scope of data and analysis to inform decision-making when constructing a portfolio or managing assets to maximize return and minimize loss to the plan. This approach fits squarely within the Department's existing guidance without any need for superfluous and limiting conditions. For example, an investment manager who determines a real estate property near the shoreline is imprudent, due to potential damage from rising sea levels, should continue to be subject to the general duties of prudence and loyalty, and should not be second-guessed by another investment professional who may disagree with the materiality of a pecuniary impact of that assessment, nor scrutinized because of collateral or incidental benefits.

Furthermore, the Department's prohibition against including ESG investments as, or as a component of, a qualified default investment alternative (QDIA) is neither rooted in law nor warranted from a public policy standpoint. The prohibition unnecessarily reduces fiduciary choice by removing investments that could otherwise serve as a QDIA from consideration. The well-rooted general duties of prudence and loyalty that apply to a plan fiduciary when selecting any type of investment alternative in a plan,

---

[17] For example, in the *Dudenhoeffer* case, the Supreme Court made it clear that ERISA fiduciary duty requires all investment be subject to the same duty of loyalty and prudence.
[18] 29 CFR Part 2550 RIN 1210–AB95 (Proposed Rule) at (c)(1).
[19] *Donovan v. Bierwith*, 680 F.2d 263, 272 n. 8 (2d Cir. 1985).

together with rigorous QDIA regulations, provide ample and robust safeguards around a QDIA designation. The Proposed Rule would upend this rule of law and, for the first time, subject a category of investment to special scrutiny under ERISA.[20] It would do so while also depriving plan participants of participation in ESG investments that otherwise meet the QDIA criteria and have a direct nexus to maximizing returns for investors – an outcome that would be contrary to ERISA's duties of loyalty and prudence of maximizing risk-adjusted returns for investors.

In sum, given that the existing statutory and regulatory framework of fiduciary duties of prudence and loyalty already provides ample safeguards for ESG investments, the Department does not have to single out a potential investment that incorporates ESG factors for special scrutiny. This is true regardless of whether the ESG investment is a QDIA or other investment in a defined contribution plan, an investment in a defined benefit plan, or in an ERISA vehicle. And, while this approach currently singles-out ESG investments, it could also set a dangerous precedent for arbitrarily singling-out investment strategies or investments that the Department does not favor.

Lastly, we also have concerns with the Proposal's new, expansive five-factor articulation of the duty of loyalty, even outside the ESG investments arena. While we appreciate the Department's effort to codify ERISA's long-standing interpretation of the duty of loyalty as not subordinating the interests of the plan participants to unrelated interests, the Proposal's five-factor articulation is superfluous and confusing. Instead, as suggested by many others in the industry, the succinct and clear approach would be to define the duty of loyalty with a simple standard stating that a "fiduciary may not subordinate the interests of participants and beneficiaries as retirement savers to any other interest of the participants, beneficiaries, the fiduciary itself or any other party." This approach would also align with the Department's articulation of the "Impartial Conducts Standards" in the recently proposed "Improving Investment Advice for Workers and Retirees" Class Exemption.

Conclusion

TIAA understands the need for the Department to ensure plan fiduciaries focus on the best interests of participants. However, we believe the Proposed Rule is based on misperceptions of ESG investments and could deprive plan participants of investments that may be in their best interest. Accordingly, we respectfully request that the Proposed Rule be withdrawn. We would welcome the opportunity to meet with the Department to further discuss our concerns. We also believe a public hearing would be beneficial to allow the Department to hear from industry experts about the increasingly important role ESG investments play in strengthening and diversifying retirement plan portfolios.

We appreciate the Department's consideration of our comments. We look forward to and welcome the opportunity to engage further on any aspect of this issue.

[20] ERISA does impose certain restrictions and considerations on employer securities or employer real property, but those restrictions and considerations stem from special Congressional policy focused on the duty to diversify, not the duties of loyalty and prudence.

Sincerely,

Amy O'Brien

Amy O’Brien
Senior Managing Director, Head of Responsible Investment
Nuveen, LLC

Yves P. Denize
Senior Managing Director, Division General Counsel
Nuveen, LLC