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July 29, 2020

VIA ELECTRONIC FILING

Mr. Eugene Scalia
U.S. Secretary of Labor
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: **Financial Factors in Selecting Plan Investments Proposed Regulation**

Re: **RIN 1210-AB95**

Dear Secretary Scalia,

The Vermont Pension Investment Committee (VPIC), which represents $5 billion in assets, considers environmental, social, governance, and financial factors in its investment decisions. The VPIC has a long-term investment strategy consistent with the duration of Retirement System liabilities and strives to be a thoughtful, analytical, and patient investor that believes portfolio risk management is a central fiduciary responsibility. While VPIC is not regulated under ERISA, it views the legislation as setting best practice standards for retirement plans. Therefore, VPIC is submitting comments on the Department of Labor Employee Benefits Security Administration's proposed rule, *Financial Factors in Selecting Plan Investments*, Regulatory Identifier Number (RIN) number 1210-AB95 to encourage the Department to reconsider the proposed rules on ESG.

VPIC is a member of the environmental advocacy group Ceres and supports its recommendations as outlined in its comment letter. Our principle concern with the proposed rule is that ESG factors are characterized as non-pecuniary unless proven otherwise. We are also concerned that the all-things-being-equal test will be replaced with too high a bar and lead to a reduction in assets in financial products that track ESG impacts.

We urge the Department to: (1) Retain the existing interpretation of the "tie-breaker" test, which allows for ESG factors to be considered for *non-pecuniary* reasons; and (2)rely upon its existing, protective framework in whether an ESG fund (pecuniary or non-pecuniary) may constitute a QDIA or component of a QDIA.

(1) The Department should retain the existing interpretation of the tie-breaker test, which allows for ESG factors to be considered for non-pecuniary reasons. The proposed rule in effect redefines the "tie-breaker" test (*i.e.*, the "all things being equal test) that a fiduciary would have to meet when it is making an investment decision on behalf of an ERISA plan for *non-pecuniary* reasons (*i.e.*, "collateral benefits"). The traditional and long-standing tie-breaker test is a much more workable standard. The traditional tie-breaker test and incidental benefits doctrine provide fiduciaries with clear direction while simultaneously protecting the interests of plan participants and beneficiaries in their retirement security. The Department should also reinstate the traditional tie-breaker test for fiduciaries who are selecting investment options for inclusion in defined contribution plan lineups. As it stands, fiduciaries must prioritize financial return over ESG factors but are able to consider non-pecuniary factors when deciding among product offerings with equal opportunity for financial return. The proposed rule would require the fiduciary to document the product offerings as precisely equal before considering ESG factors, which the Department acknowledges is a near impossible task.

2) The Department should rely upon its existing, protective framework in whether a ESG fund (pecuniary or non-pecuniary) may constitute a QDIA or component of a QDIA. QDIAs possess a special character and importance for many participants and beneficiaries in their retirement security. But there is already a well-understood protective framework in place with respect to both the selection and monitoring of QDIAs. The selection and monitoring of a QDIA, whether ESG-related or not, "is a fiduciary act and, therefore, ERISA obligates fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries."

If a fiduciary selects an ESG-related QDIA for *pecuniary* reasons, the analysis should begin and end with longstanding interpretations of ERISA's fiduciary duties, as well as the QDIA regulation, 29 C.F.R. § 2250.404c-5 specifically with respect to the fiduciary protection conferred under that safe harbor. A fiduciary who wishes to select an ESG-related QDIA for *non-pecuniary* reasons (*i.e.*, in whole or part for collateral benefits) already remains bound to the QDIA regulation (again, for purposes of availing itself of the protection under that safe harbor), ERISA's fiduciary duties, *as well as* the traditional tie-breaker test.

We urge the Department to withdraw, or in the alternative, substantially modify the proposed rule. Thank you for your time and consideration.

Sincerely,

Elizabeth A. Pearce
Vermont State Treasurer

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