Breckinridge
CAPITAL ADVISORS

July 30, 2020

VIA ELECTRONIC FILING

Assistant Secretary Jeanne Wilson
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: RIN 1210-AB95, *Financial Factors in Selecting Plan Investments* proposed rule

Dear Assistant Secretary Wilson,

Please consider withdrawing or amending the Department of Labor Employee Benefits Security Administration's proposed rule, *Financial Factors in Selecting Plan Investments*, Regulatory Identifier Number (RIN) number 1210-AB95.

I am founder and President of Breckinridge Capital Advisors, a high-grade fixed income investment advisor. As the steward of over $40 billion in client assets, I have serious concerns that the Department's proposed regulatory action misconstrues Environmental, Social & Governance ("ESG") as a category of "investment vehicle". This is a mistaken narrative and will likely create confusion among those with fiduciary roles. Furthermore, investors' increased mindfulness of the materiality of "ESG" factors, and the impact they may have on the reliability of long-term investment returns, is entirely consistent with ERISA's definition of fiduciary responsibility.

At Breckinridge, we recognize ESG analysis as a means of discerning long-term value. While our analysis of an issuer's creditworthiness begins with fundamental bottom-up research, we believe evaluating ESG information and trends provides a broader, more forward-looking assessment of potential risks that may not be reflected in the market. Therefore, we believe bond issuers scoring well in our ESG research process are better prepared to meet future challenges and to take advantage of new opportunities.

Our belief is that a thoughtful and forward-looking assessment of risk would be incomplete without the inclusion of material ESG factors. Proprietary, quantitatively based, sector specific ESG frameworks are part of our investment approach. In addition, analysts consider internal and external qualitative research, enhanced by our engagement efforts. Analysts

Breckinridge Capital Advisors
125 High Street, Suite 431
Boston, Massachusetts 02110
Tel 617-443-0779 Fax 617-443-0778
www.breckinridge.com

assign sustainability ratings to bond issuers that are important factors in security selection and portfolio positioning.

I have reviewed Ceres' letter submitted on this subject on *June 30 and support their recommendations*. I am concerned that the proposed rule would dissuade fiduciaries from assessing ESG risks and opportunities in their investments. I urge the Department to withdraw, or in the alternative, substantially modify the proposed rule. Specifically, I call on the Department to:

(1) Acknowledge that ESG issues may, in fact, pose material short-, medium- and long-term financial impacts and risks on issuers;
(2) Clarify that when ESG issues present material risks or opportunities, the fiduciary duties under the U.S. Employee Retirement Income Security Act of 1974, as amended (ERISA), would compel qualified investment professionals to treat such ESG issues as economic considerations;
(3) Retain the existing interpretation of the "tie-breaker" test, which allows for ESG factors to be considered for *non-pecuniary* reasons; and
(4) Rely upon its existing, protective framework in whether an ESG fund (pecuniary or non-pecuniary) may constitute a qualified default investment alternative (QDIA) or component of a QDIA.

(1) The Department should acknowledge that ESG issues may pose material short, medium- and long-term financial impacts and risks. A substantial body of evidence has demonstrated that ESG issues can pose short-, medium- and long-term financial impacts and risks to companies and financial markets. Institutional investors and non-governmental organizations have identified material ESG issues for every industry sector.[1] Some ESG issues, such as those posed by a changing climate, pose systemic risks to financial markets.

(2) The Department needs to clarify that, when ESG issues present material risks or opportunities, ERISA's fiduciary duties would compel qualified investment professionals to consider them. An increasing number of U.S. investors, including Breckinridge, are already considering ESG in engagement and investment decisions. The financial effects of ESG issues could manifest in the short-, medium- and long-term. Because of the financial impacts and risks of ESG issues, and because ESG investments, on average, provide comparable or superior returns to non-ESG investments,[2] we believe that investment

[1] For more information, please see the letter signed by Mindy Lubber, CEO of Ceres, submitted to the Department of Labor on June 30, 2020.
[2] Ibid.

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managers would not be able to fully meet their fiduciary duty by not considering ESG in investment decisions.

(3) 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 necessary breathing room 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 line-ups.

4) The Department should rely upon its existing, protective framework in whether an 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, and the fiduciary protection conferred under the safe harbor of QDIA regulation 29 C.F.R. § 2250.404c-5. 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.

I urge the Department to withdraw, or in the alternative, substantially modify the proposed rule.

Sincerely,

Peter B. Coffin
President, Breckinridge Capital Advisors