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July 30, 2020

Submitted electronically to www.regulations.gov

Mr. Joe Canary, Director
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 Director Canary:

On behalf of the American Federation of Labor and Congress of Industrial Organizations (the "AFL-CIO"), we are writing to provide comments on the U.S. Department of Labor's proposed rulemaking entitled "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposed Rule"). If adopted, the Proposed Rule will create unnecessary and burdensome regulations that will discourage fiduciaries from making prudent investments that generate collateral benefits for communities and economic growth for working people.

The AFL-CIO is a voluntary federation of 55 national and international labor unions that represent 12.5 million working people. Members of AFL-CIO affiliated unions participate in private-sector pension and employee benefit plans that will be affected by the Proposed Rule. Many of these plans have a long history of making prudent, job-creating investments that generate competitive, risk-adjusted returns to pay promised benefits while at the same time providing collateral benefits for communities.

The AFL-CIO shares the Department's goal to secure the retirement and other employee benefits of America's workers and their families. Section 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") requires that fiduciaries act solely in the interest of a plan's participants and their beneficiaries for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan. As Chief Judge Benjamin Cardozo famously wrote in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928):

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

However, the AFL-CIO is concerned that the Proposed Rule will result in consequences that the Department does not intend and has not fully considered. We respectfully note that in explaining its position on the need for such a rule, the Department does not cite evidence that the current guidance has led fiduciaries to subordinate the interests of plan participants or their beneficiaries. Moreover, we agree with the Department that a key term, "ESG investing," is exceedingly vague and we are concerned about the consequences of adopting a rule that does not clearly define the very investments it prohibits. Finally, the AFL-CIO believes that the Proposed Rule overestimates the benefits and underestimates the costs the Proposed Rule would impose on affected benefit plans and their participants and beneficiaries.

The Proposed Rule was published in the Federal Register on June 30, 2020, permitting a brief 30-day comment period that was inadequate in length. Executive Orders 12866 and 13563 state: "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."[1] Given the significance of the Proposed Rule, the AFL-CIO reiterates our June 30, 2020 request that the comment period be extended to 120 days.

The AFL-CIO requests that the Department withdraw the Proposed Rule and allow the current, subregulatory guidance (Interpretive Bulletin 2015-01) to remain in place. In the alternative, the Department should withdraw the Proposed Rule until it has had an opportunity to correct the deficiencies described herein, after which it should re-propose a rule and provide sufficient time for comment thereon, including a public hearing and a post-hearing comment period.

The Proposed Rule Contains Vague Terms that Create Additional Liability for Fiduciaries

The Department points to the lack of "consensus about what constitutes a genuine ESG investment" but proposes a rule that relies heavily on equally ill-defined terms. The Proposed Rule uses the phrase "one or more environmental, social, corporate governance, or similarly oriented assessments or judgments" without defining any one of the terms: "environmental," "social," or "corporate governance . . . assessments or judgments." The catch-all "similarly oriented" renders the phrase even less clear. The Proposed Rule then expressly prohibits the use of an "environmental, social, corporate governance, or similarly oriented investment mandate alternative" as a component of a Qualified Default Investment Alternative for participant directed plans without further defining those key terms.

Given the vagueness of the phrase "environmental, social, corporate governance, or similarly oriented factors," if the rule is adopted, fiduciaries will face a situation where every investment

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[1] Executive Order 12866, 58 FR 51735, October 4, 1993, and Executive Order 13563, 76 FR 3821, January 21, 2011.

decision will be susceptible to challenge on the grounds that it involved consideration of one of those factors. The plain meaning of the terms "environmental"[2] and "social"[3] are so inherently broad as to be meaningless without a precise definition of "environmental" or "social" investment. Likewise, the term "corporate governance" refers to the system through which companies are directed and controlled, including proxy voting.[4] Use of that broad term raises the question of whether fiduciaries would have to avoid any equity investments that include proxy votes if the rule goes into effect.

The Department's own stated rationale for the Proposed Rule admits that the concept of "environmental, social, and corporate governance" is vague and, indeed, "evolving," stating that:

> "Various terms have been used to describe this and related investment behaviors, such as socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, impact investing, and economically targeted investing. The terms do not have a uniform meaning and the terminology is evolving." (footnote omitted). [. . .]
>
> "As ESG investing has increased, it has engendered important and substantial questions and inconsistencies, with numerous observers identifying a lack of precision and rigor in the ESG investment marketplace. There is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts." (footnotes omitted).

If the Department is unable to define the investment behaviors that it is attempting to regulate or prohibit, fiduciaries will be unable to determine how to comply with a final rule. We urge the Department to consider how such an uncertain and indefinite rule is not just poor policy, but also an unconstitutional violation of due process under the vagueness doctrine.[5]

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[2] *See* https://www.merriam-webster.com/dictionary/environmental, defining "environment" as: "1. the circumstances, objects, or conditions by which one is surrounded; 2a: the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival; b: the aggregate of social and cultural conditions that influence the life of an individual or community; 3: the position or characteristic position of a linguistic element in a sequence; 4: a computer interface from which various tasks can be performed," with "environmental" as an adjective thereof.

[3] *See* https://www.merriam-webster.com/dictionary/social, defining "social" as: "1: involving allies or confederates; 2a: marked by or passed in pleasant companionship with friends or associates; b: sociable; c: of, relating to, or designed for sociability; 3: of or relating to human society, the interaction of the individual and the group, or the welfare of human beings as members of society; 4a**:** tending to form cooperative and interdependent relationships with others; b**:** living and breeding in more or less organized communities especially for the purposes of cooperation and mutual benefit; c *of a plant* **:** tending to grow in groups or masses so as to form a pure stand; 5a: of, relating to, or based on rank or status in a particular society; b: of, relating to, or characteristic of the upper classes; c: FORMAL; 6: being such in social situations."

[4] *See 29* CFR 2509.2016-01 ("The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock.").

[5] *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of

We also respectfully point out that major portions of the Proposed Rule are internally inconsistent with each other. Paragraph (c)(1) makes a distinction between "pecuniary" and "non-pecuniary" environmental, social, corporate governance, or other similarly oriented considerations, and states that "[a] fiduciary's evaluation of an investment must be focused only on pecuniary factors." However, paragraph (c)(3)(iii) goes further by expressly prohibiting consideration of both pecuniary and non-pecuniary ESG factors in choosing the Qualified Default Investment Alternative ("QDIA") for individual account plans.

The Department's justification for paragraph (c)(3)(iii) asserts that "this requirement in the proposal is intended to help ensure that the financial interests of plan participants and beneficiaries in retirement benefits remain paramount by removing ESG considerations in cases in which participant's retirement savings in individual accounts designed for participant direction are being automatically invested by a plan fiduciary." In other words, the Department proposes to require that fiduciaries disregard pecuniary ESG considerations when selecting the QDIA even in situations where ESG funds may be superior investments on a risk-return basis.

As the Proposed Rule notes, some funds might simply use a name that implies a particular ESG-oriented approach to investing. However, the lack of precision in the definition of "environmental, social, corporate governance, or similarly oriented assessments or judgments" makes it unclear whether the choice to invest in such a fund is prohibited. And yet, paragraph (c)(3) implies that an investment in funds "that include these parameters in the fund name," regardless of their actual investing approach, would be impermissible as a QDIA. This could lead to a risky semantic exercise for trustees trying to figure out which words cause a fund's name to place the fund into this prohibited category.

In explaining the Department's concern regarding funds including "ESG" parameters in their names, the Department points to a request for comment from the U.S. Securities and Exchange Commission (the "SEC") "on the framework for addressing names of registered investment companies and business development companies."[6] But as SEC Commissioner Elad Roisman recently noted, "there is not consensus on what, exactly, 'ESG' means."[7] We therefore respectfully request that the Department wait until the SEC has determined whether its own action is necessary before the Department proceeds further with a rulemaking that might have now-unknown undesirable implications.

The Proposed Rule exposes fiduciaries to increased liability if they select investments where there might be an argument that the investments considered risks associated with environmental, social, or corporate governance because there is a lack of guidance or consensus as to what the

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them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.") (citations omitted).

[6] Request for Comments on Fund Names, U.S. Securities and Exchange Commission, Release Nos. IC–33809; File No. S7-04-20, https://www.sec.gov/rules/other/2020/ic-33809.pdf.

[7] Elad Roisman, "Keynote Speech at the Society for Corporate Governance National Conference," U.S. Securities and Exchange Commission, July 7, 2020, https://www.sec.gov/news/speech/roisman-keynote-society-corporate-governance-national-conference-2020.

terms "environmental," "social," or "corporate governance" factors mean. As the U.S. Chamber of Commerce's retirement policy director, Chantel Sheaks, stated when interviewed regarding the Proposed Rule, "[t]he DOL has created more of a problem than what existed" and "the added documentation requirements are a road map for the plaintiffs' bar."[8]

The Proposed Rule's lack of specific definitions for these terms will not only create confusion, but will create the possibility of liability based on an infinite set of arguments that may be made regarding QDIA investments having some relationship to "environmental," "social," "corporate governance," or "similarly oriented" factors. If the Proposed Rule is adopted, it will result in the unintended consequence of litigation-adverse fiduciaries choosing to avoid all actively managed investment funds given the widespread integration of ESG factors into investment decision-making by asset managers, as discussed below.

"ESG" is Widely Used by Investment Professionals to Measure Investment Risks

Setting aside the vagueness of the term "ESG," the reality is that institutional investors increasingly view ESG considerations as relevant for evaluating long-term investment risks.[9] The importance of ESG factors to investment decision-making has been recognized by the world's largest asset managers including BlackRock,[10] Vanguard,[11] and State Street.[12] As of 2018, asset managers using ESG criteria held $11.6 trillion in U.S. domiciled assets under management, up from $8.1 trillion in 2016.[13] According to a survey by the Callan Institute, 42 percent of U.S. institutional investors (including 19 percent of surveyed corporate plans) have incorporated ESG factors into the investment decision-making process.[14]

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[8] Warren Rojas, "Legal Battles Likely Over Trump's ESG Crackdown, Advisers Say," Bloomberg Law, June 24, 2020, https://news.bloomberglaw.com/corporate-governance/legal-battles-likely-over-trumps-esg-crackdown-advisers-say.

[9] GAO-20-530, Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them, at 9. (In an interview of 14 institutional investors, including 4 large private sector asset management firms, 3 mid-sized private sector asset management firms, 3 large public pension funds, and 4 mid-sized public pension funds, "[a]ll seven private asset managers and representatives at five of seven public pension funds said they seek ESG information to enhance their understanding of risks that could affect companies' value over time.")

[10] BlackRock, Inc., "Blackrock ESG Investment Statement," May 19, 2020, https://www.blackrock.com/ch/individual/en/literature/publication/blk-esg-investment-statement-web.pdf ("As long-term investors, accounting for environmental, social, and governance (ESG) risks and opportunities helps us provide sustainable value to our clients.").

[11] The Vanguard Group, "ESG Investing at Vanguard," 2019, https://institutional.vanguard.com/iam/pdf/INPESGOP.pdf ("Systematic inclusion of financially material ESG information (risks and opportunities) to complement standard investment analysis [are] employed by Vanguard.").

[12] O'Hanley, Ronald (Chairman and CEO, State Street Corporation), "ESG Investing 2.0: Moving Toward Common Disclosure Standards," 2020, https://www.statestreet.com/content/dam/statestreet/documents/Articles/1369%20ESG%20Metric%20and%20Reporting%20Standards.pdf ("For us, ESG is a value-driven imperative, not a values driven agenda.").

[13] US SIF Foundation, "Report on US Sustainable, Responsible and Impact Investing Trends," 2018, p.2., https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf.

[14] Callan Institute, "2019 ESG Survey," 2019, p. 3, https://www.callan.com/wp-content/uploads/2019/09/2019-ESG-Survey.pdf.

Consideration of ESG factors can provide superior risk-adjusted investment returns compared to traditional financial analysis alone. According to a recent McKinsey Global Survey, 57 percent of corporate executives and investment professionals believe that ESG programs create shareholder value, compared with just 3 percent who believe that ESG programs reduce shareholder value.[15] According to Morningstar, a majority of U.S. mutual funds which self-identify as being sustainable using ESG factors outperformed their conventional peers in 2019.[16] And according to Standard & Poor's, ESG fund outperformance has persisted during the COVID-19 related stock market volatility at the beginning of 2020.[17]

The overwhelming majority of academic studies also support the consideration of ESG factors for pecuniary risk-return reasons, or at least find that ESG funds are not associated with underperformance when compared to their conventional alternatives. According to a meta-study of more than 2,000 individual studies, 90 percent of academic studies find a nonnegative relationship between ESG criteria and corporate financial performance, and a majority of these studies find a positive relationship.[18] Another survey of academic literature that was commissioned by the Department in 2017 found that "when appropriately compared (e.g. ESG strategies, investment time horizon, performance measures), ESG investments provide performance at least comparable to that of non-ESG investments."[19]

The Department Should Retain Its Guidance on Economically Targeted Investments

For decades, the Department has recognized that ERISA allows plan fiduciaries to make economically targeted investments ("ETIs") so long as the investments do not sacrifice investment returns or incur greater risk.[20] In 1994, the Department formalized this guidance in ERISA Interpretive Bulletin 94-1 which stated that the "fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally."[21] With varying

[15] McKinsey & Company, "The ESG premium: New perspectives on value and performance," February 12, 2020, https://www.mckinsey.com/business-functions/sustainability/our-insights/the-esg-premium-new-perspectives-on-value-and-performance.

[16] Hale, Jon (Director, Sustainability Investing Research, Morningstar), *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Fund Performance in 2019* (February 2020), p.2. Available at: https://www.morningstar.com/lp/sustainable-funds-landscape-report.

[17] Esther Whieldon, Michael Copley, and Robert Clark, "Major ESG investment funds outperforming S&P 500 during COVID-19," S&P Global Market Intelligence, April 13, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103.

[18] Gunnar Friedea, Timo Busch and Alexander Bassen, "ESG and financial performance: aggregated evidence from more than 2000 empirical studies," Journal of Sustainable Finance & Investment, 2015, Vol. 5, No. 4, 210–233, http://dx.doi.org/10.1080/20430795.2015.1118917.

[19] Ogechukwu Ezeokoli, et. al., "Environmental, Social, and Governance (ESG) Investment Tools: A Review Of The Current Field," Summit Consulting, LLC, December 2017, https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf.

[20] Ian Lanoff, "The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully Under ERISA?" Labor Law Journal, Vol. 31, Iss. 7 (July 1, 1980), 387. *See* also 29 CFR 2509.94-1, FR Doc No: 94-15162, June 23, 1994, https://www.govinfo.gov/content/pkg/FR-1994-06-23/html/94-15162.htm (fn. 2-7).

[21] 29 CFR 2509.94-1, 59 FR 32607, June 23, 1994.

degrees of cautionary language, the Department has continued to recognize in its 2008[22] and 2015[23] revised interpretive bulletins that ETIs are permitted under appropriate circumstances.

Moreover, ETIs are a unique type of investment that should not be lumped into a catch-all definition "ESG investing." Fiduciaries have long relied on the Department's interpretive guidance on ETIs to make job-creating investments that provide other collateral benefits for communities, for example, by supporting infrastructure projects, economic development, small businesses, and affordable housing.[24] Many of these ETIs have long track records of providing competitive risk-adjusted returns while also creating collateral benefits.[25] These collateral benefits are particularly needed today to restore economic growth and create jobs following the COVID-19 pandemic.

ETIs can be prudent investments under ERISA. Investing in ETIs does not require sacrificing investment returns or increasing investment risk. Many plans achieve "market-rate" risk-adjusted returns by investing in ETIs that focus on underserved markets with capital gaps.[26] For example, according to a Wharton School study, "impact funds in the sample that seek market-rate-returns demonstrate that they can achieve results comparable to market indices, while still reporting mission preservation in the vast majority of their exited investments."[27]

Plan fiduciaries can consider non-pecuniary factors and still make investment decisions that meet all of ERISA's fiduciary requirements; therefore, there is no good reason to prohibit them from doing so.[28] For example, the Secretary of Labor recently ordered the Federal Retirement Thrift Investment Board to reverse its decision to invest the International Stock Index Investment Fund into a market index that includes Chinese equities.[29] Although the Thrift Savings Plan is not formally subject to ERISA, the Secretary presumably had no intention of subordinating the investment interests of federal workers to the non-pecuniary goal of national security.

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[22] 29 CFR 2509.08-1, 73 FR 61735, Oct. 17, 2008 ("the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan").
[23] 29 CFR 2509.2015-01, 80 FR 65137, Oct. 26, 2015.
[24] *See* Lauren Dixon and Tom Woelfel, The Pursuit of Financial Return and Societal Benefit: An Examination of Pension Fund Economically Targeted Investments, Accelerating Impact Investing Initiative, June 2017, https://www.pacificcommunityventures.org/wp-content/uploads/sites/6/2017/06/061417_Pension-Fund-ETI-Report.pdf
[25] *Id.*
[26] *Id*. at p. 12.
[27] Jacob Gray et. al., "Great Expectations: Mission Preservation and Financial Performance in Impact Investing," Wharton Social Impact Initiative, October 7, 2015, https://socialimpact.wharton.upenn.edu/wp-content/uploads/2016/09/Great-ExpectationsMission-Preservation-and-Financial-Performance-in-Impact-Investing.pdf.
[28] *See* Letter to the Calvert Group, US Department of Labor PWBA Advisory Opinion 1998-04A (May 28, 1998), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1998-04a.
[29] Letter from Eugene Scalia, Secretary, Department of Labor to Michael Kennedy, Chairman of the Federal Retirement Thrift Investment Board (May 11, 2020), *available at* https://www.scribd.com/document/461056623/2020-05-11-Scalia-Letter-to-FRTIB.

Repealing the Department's 2015-01 Interpretive Guidance will discourage plans from investing in ETIs that create jobs, grow the economy, and provide collateral benefits for communities – including many communities of color – that are in greatest need of economic development. In its place, the Proposed Rule seeks to limit investments that are "selected on the basis of a non-pecuniary factor" to "economically indistinguishable alternative investments." Moreover, the Proposed Rule will create specific documentation requirements for ETIs that do not apply to other ERISA plan investments.

While admitting that "the Department does not presently have sufficient evidence to say they do not," the Department asserts the unfounded belief that "true ties rarely, if ever, occur." This assumption ignores the reality that when comparing investment alternatives, fiduciaries must weigh a variety of objective risk-return criteria. Two investment alternatives can be equally competitive despite having differing characteristics. For example, assuming all else being equal, a higher-fee investment fund may be comparable to lower-fee alternatives because of the superior skills and qualifications of the managing investment professionals.

Fiduciaries consider the total mix of available information and cannot rely on past performance alone. As the SEC requires investment companies to disclose, "past performance does not guarantee future results."[30] Prudence requires considering a variety of factors when making investment decisions, and these factors may not be easily quantified to determine what constitutes a "true tie." Given that fiduciaries typically consider carefully researched "best in class" investment alternatives when selecting investments, actual ties are likely to be common.

The Proposed Rule Will Create Additional Costs for Defined Benefit Plans

The Proposed Rule will create additional costs for defined benefit plans even if they do not invest in ETIs. If adopted, the Proposed Rule will create additional, specific documentation requirements for plan fiduciaries when considering "economically indistinguishable alternative investments." Moreover, these enhanced documentation requirements will apply to all tie-breaker situations whenever investments are "selected on the basis of a non-pecuniary factor or factors such as environmental, social, or corporate governance considerations."

The Department asserts that truly "economically indistinguishable" alternative investments are rare, and therefore the enhanced documentation requirements will not result in a substantial cost burden. However, the Department admits that it does not have any data to support this assumption. And as the Department acknowledges, there is no universally accepted definition of what is a pecuniary vs. a non-pecuniary ESG consideration. Accordingly, fiduciaries will be well advised to meet the Proposed Rule's enhanced documentation requirements for nearly all investment decisions given the widespread integration of ESG considerations by investment professionals.

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[30] Amendments to Investment Company Advertising Rules, U.S. Securities and Exchange Commission, Release Nos. 33-8294 and 34-48558, File No. S7-17-02, https://www.sec.gov/rules/final/33-8294.htm.

Regarding the costs of the Proposed Rule, the Department asserts that it "does not intend to increase fiduciaries' burden of care attendant to" the consideration "of ESG factors in circumstances where such consideration is material to the risk-return analysis and advances participants' interests in their retirement benefits" without considering the potential difficulty in distinguishing between pecuniary and non-pecuniary factors. It further states that "no additional costs are estimated" for its new requirements and that "[w]hile fiduciaries may modify the research approach they use to select investments as a consequence of the proposed rule, the Department assumes this modification would not impose significant additional cost."

To the extent the Department's position is that it does not intend to increase fiduciaries' burdens in evaluating investments with ESG factors, the Department should confirm that fiduciaries' current due diligence process in evaluating ESG investments may remain in place. Thus, plan fiduciaries should be deemed to comply with the Proposed Rule if they are able to demonstrate that an investment with ESG factors provides appropriate risk-adjusted returns relative to an objective benchmark for the asset class under consideration.

There are many factors that plan fiduciaries consider when evaluating investment alternatives. Factors relevant to the due diligence process include levels of fees relative to other investments within the asset class, liquidity of the investment, track record of the investment manager, experience of investment management personnel, size of the proposed investment, and overall diversifying impact of the investment. No one factor is determinative in evaluating the overall reasonableness of an investment with potential ESG benefits.

As the Department is well aware, the due diligence process that is involved in evaluating an investment does not require plan fiduciaries to search for an investment within an asset class that produces the highest possible rate of return or one that produces the very lowest standard deviation. Rather, a plan fiduciary's responsibility is to create an investment portfolio that diversifies the assets of the plan so as to minimize the risk of large losses, provides liquidity relative to the anticipated cash flow requirements of the plan, and considers the projected return of the portfolio relative to the funding objectives of the plan.[31]

The Proposed Rule does not cite any evidence to suggest that plan fiduciaries are not adhering to the statutory requirements when considering investments that may have ESG components. Therefore, the Department should confirm that as long as there is a record created that plan fiduciaries engaged in the procedural due diligence outlined above, there are no additional requirements associated with an investment that may have ESG components. If the Department contemplates that additional due diligence efforts are needed when evaluating an investment that may have ESG factors, the potential costs to plans are likely to be far higher than assumed.

[31] 29 CFR 2550.404a-1, 44 FR 37225, June 26, 1979.

The Proposed Rule Also Underestimates its Costs to Individual Account Plans

The Department's estimate of the number of individual account plans covered by the Proposed Rule is unreasonably low. For example, it is inaccurate to rely on an estimated 6 percent of participant directed plans that offer ESG-themed investment alternatives. Notably, the Vanguard survey cited by the Department states that 9 percent of plans offer "socially responsible" funds. Many more participant directed plans are likely to include ESG related funds in some form compared with plans that only offer "socially responsible" funds.

In reality, all individual account plans will need to review their investments to determine whether the selected funds contain "environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name." In other words, even funds containing vague references to ESG topics in their fund name will be subject to scrutiny. These investments will be subject to the specified enhanced documentation requirements contained in paragraph (c)(3)(i) and (3)(ii) of the Proposed Rule.

The Proposed Rule also expressly prohibits funds that include ESG mandates from inclusion in the QDIA. But given the widespread adoption of ESG integration by investment managers and the inherent vagueness of the Proposed Rule, all QDIAs will be suspect. Moreover, the Department does not quantify the costs that participant directed plans will incur by changing their QDIAs. The burden of making such changes is not insignificant. For example, GAO 15-578, which investigated plans' use of default investment alternatives, reported the following:

> "Plan sponsors responding to our questionnaire and stakeholders we interviewed stated that after an extensive QDIA selection process, sponsors may be reluctant to make changes to the investment due to cost considerations, existing service provider arrangements, and fiduciary concerns.
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> • Cost: Stakeholders noted that changing a QDIA can be costly and may require considerable time and resources. For example, one stakeholder noted that QDIA changes require plan sponsors to notify participants, explaining the reasons for any changes and how it will affect their accounts. . . .
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> • Existing service provider arrangements: A plan sponsor's existing relationship with a service provider can limit plan sponsors' access to certain QDIA types and may make it challenging to change a QDIA. For example, a sponsor using a proprietary off-the-shelf TDF as a QDIA has limited options to change the QDIA if funds in the TDF series (or underlying funds) perform below expectations. Stakeholders stated that, in cases where a sponsor had negotiated reduced fees for using a certain QDIA, a change of QDIA could jeopardize the arrangement and increase the costs for managing or administering the investments. Similarly, a plan sponsor deciding to use a managed account as its QDIA may find that the record keeper had not partnered with a managed account provider, leaving the sponsor to

> either select a different QDIA or change record keepers—both options that plan sponsors cited as highly disruptive and costly.
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> • Fiduciary concerns: Plan sponsors and stakeholders stated that any change to a QDIA could expose sponsors to additional fiduciary liability. One plan sponsor stated that fear of potential litigation led the plan's investment committee to decide against changing a QDIA, even though the committee believed that initial selection decisions had been prudent and participants would be better served by the change."

The costs of changing QDIAs will be magnified by the ambiguity concerning which investments are prohibited under the Proposed Rule. This will make it extremely difficult for plan fiduciaries to determine whether they actually need to implement a change. The process of making that determination itself will require significant expenditures as fiduciaries will have to ask counsel and investment experts to interpret the meaning of "environmental, social, corporate governance, or similarly oriented investment mandate alternative." Given the vagueness of these terms, fiduciaries will have difficulty determining what is required of them so they may act accordingly.

In fact, the costs of the Proposed Rule are potentially very large for individual account plans. Participant directed plans will be required to forgo any QDIA investments that include ESG considerations in their investment mandates, and, given the implication of paragraph (c)(3) in the Proposed Rule, such plans will also be required to exclude from the QDIA any investments that appear to include ESG factors in their name. Accordingly, the universe of QDIA investment opportunities will be arbitrarily limited and plan participants and beneficiaries will bear the loss caused by not having access to potentially superior ESG investment alternatives.

The Economic Costs of the Proposed Rule Outweigh Its Purported Benefits

The Proposed Rule also overestimates the economic benefits that it will provide. The Proposed Rule's purported benefits are entirely speculative and based on the supposition that "[t]o the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participants and beneficiaries' retirement investment returns." However, the Department appears to rely on the argument that these benefits will accrue from "societal resources freed for other uses due to lessened active management." But the Proposed Rule does not prohibit active management, only a specific type of active management, ESG-related investments.

Nowhere in the Proposed Rule does the Department describe any enforcement cases against plans alleged to have sacrificed investment returns in pursuit of ESG investing. If the Department believes that there have been violations of ERISA related to ESG investing, enforcement is an appropriate response rather than new rules whose vagueness makes compliance difficult and expensive. We note that the Department's estimate of benefits generated by the Proposed Rule ends with the statement that "[t]he Department seeks information that could be used to quantify the increase in investment returns."

We believe that the Department's Paperwork Reduction Act estimate of the costs of documenting the Proposed Rule's requirements is unrealistic. The Department estimates that plan fiduciaries will expend, on average, 2 hours of labor and that the average hourly rate for plan fiduciaries is $134.20 per hour. The Department states that these estimates are based on information from its abstract of 2017 Form 5500 Annual Reports. However, the Proposed Rule does not disclose the Department's methodology on how it arrived at these estimates.

Rather than rely on vague assertions of estimated costs, the Department should estimate the actual costs of compliance, including the cost for plan counsel to interpret the new regulation and guide fiduciaries through evaluation of the rule as applied to investment selections. In performing this analysis, the Department should apply rates that are consistent with those typically charged to affected plans, which, in the Washington, DC region range between $300 - $500 per hour for union-side counsel and significantly higher for management side.

The Department acknowledges uncertainty regarding the benefits it expects from the Proposed Rule. This is evident in the economic analysis through statements such as "[t]he Department seeks data," "[i]t is unclear," and "[i]t is very difficult to estimate." Moreover, the costs of the Proposed Rule are significant and easily quantifiable, if the Department would conduct its analysis in a more rigorous fashion. As the Department's benefit-costs analysis is fatally flawed, it should withdraw the Proposed Rule to conduct a more robust economic analysis in order to comply with the Administrative Procedure Act's requirements.

Conclusion

Since the passage of ERISA, the Department has encouraged plan fiduciaries to adopt prudent procedures for investment decisions rather than mandate or prohibit specific investments.[32] In many ways, the Proposed Rule's express QDIA prohibition of ESG funds is a throwback to the statutory "legal lists" of authorized investments that historically regulated trust investments before ERISA formally enacted the modern prudent expert rule for selecting investments.[33] Rather than seek to discourage ESG investing, the Department should simply hold ESG investments to the same fiduciary standards that apply to all investments.

The Proposed Rule seeks to correct hypothetical problems, the existence of which the Department has provided no data to support, and the Proposed Rule itself creates new, very real problems. These real problems include increased and unnecessary liability for fiduciaries, significant confusion on how to comply with the Proposed Rule, and reduced investment options for plan participants and beneficiaries, including elimination of a large swath of high-performing ESG investments. Such an outcome will harm the retirement security of working people that it is the mission of the Department's Employee Benefits Security Administration to protect.

[32] 29 CFR 2550.404a-1, 44 FR 37225, June 26, 1979.
[33] *See* Bevis Longstreth (former SEC Commissioner), Modern Investment Management and the Prudent Man Rule, Oxford University Press, 1986 (Chapter 1 describes the history of how the prudent man rule superseded the "legal list" state statutes that governed trust investments).

The AFL-CIO therefore respectfully requests that the Department withdraw the Proposed Rule in its entirety. In the alternative, the Department should revise the Proposed Rule and invite additional comment. The AFL-CIO also requests that the Department schedule a public hearing on the Proposed Rule, to be conducted virtually in accordance with COVID-19 public health guidelines. As is customary for Department rulemakings, the hearing should be accompanied by the opportunity for the submission of post-hearing comments by participants and observers. Accordingly, the comment period on the Proposed Rule should be held open after the hearing.

Sincerely,

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