

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

RE: Comment by Oxfam America Inc. on the Department of Labor's proposed rule "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95)

June 30, 2020

Dear Mr. Scalia:

Oxfam writes to provide a comment in response to the Department of Labor's (DOL) proposed rule, "Financial Factors in Selecting Plan Investments" (the "Proposal"). Thank you for reviewing our comments on this matter.

Summary

Oxfam is deeply concerned about the impact the proposal could have on retirement security. Amending regulations under section 404(a) of Employee Retirement Income Security Act of 1974 (ERISA) to set forth DOL's position on ESG investing, the proposal is woefully misguided.¹ The proposal does not provide adequate evidence of the inferiority of ESG funds versus conventional funds suggesting that the decision appears to be politically motivated. The proposal represents a threat to the retirement security of millions of Americans because:

- **The proposal demonstrates a fundamental misunderstanding of ESG:** The proposal fails to distinguish between Environmental, Social, and Governance (ESG) incorporation and Economically Targeted Investments (ETI). Though it highlights circumstances where ESG information is material, it fundamentally and mistakenly equates ESG criteria with non-pecuniary, or non-financially material, information.

¹ For information on the Employee Retirement Income Security Act of 1974, see <https://www.dol.gov/general/topic/retirement/erisa#:~:text=The%20Employee%20Retirement%20Income%20Security,for%20individuals%20in%20these%20plans.>

- **ESG funds’ have demonstrated superior performance in comparison to conventional funds:**² Several studies and investment managers have demonstrated that ESG incorporation has been directly linked to the discovery of investment risks. There is mounting evidence about the increasing sophistication and high performance of ESG funds with respect to the evaluation of risk and return in comparison to conventional funds, especially during periods of financial downturn.
- **The rule is out of step with the direction of the market:** ESG is now widely incorporated by mainstream investment managers and financial advisors. The reason for such a high adoption rate is largely because of the overwhelming evidence of its financial materiality and the high demand for such products from clients, particularly from millennials.
- **The evidence increasingly elucidates that poor ESG incorporation corresponds to poor risk management:** Lack of regard for ESG increases risks and as the evidence demonstrates, increases the reputational, legal, regulatory, and financial costs for investors. Ultimately a company’s strong ESG credentials increasingly demonstrates its ability to reduce business risk.
- **Disregard for ESG represents a breach of fiduciary duty:** The proposal places unnecessary burdens on fiduciaries for offering ESG investment options restricting investment managers from offering superior investment products and limiting the options available to planned participants and beneficiaries to maximize returns. In effect it prompts many fiduciaries to violate their obligation and duty to planned participants and beneficiaries.

I. Oxfam’s Organizational Interest

Oxfam is a global organization working to end the injustice of poverty by leading humanitarian responses to conflicts and disasters, building resilience, and supporting local organizations that develop the capacity of communities in living in poverty to grow nutritious food, access land and clean water, and obtain decent work and fair wages. Oxfam also tackles the systems, policies, and practices that keep people trapped in poverty by advocating for human rights, climate justice, gender justice, the dignity of survivors of conflicts and disasters, and against inequities in the food chain.³

As part of this mission, Oxfam regularly engages with corporations and other investors to understand how their financial decisions make an environmental and social impact on vulnerable communities. Our organization acts as a human rights risk advisor to firms with impact and ESG investing strategies, holds shares in numerous companies, and supports other stakeholders in the advancement of human rights and economic development objectives. We frequently support investors and companies in assessing companies’ human rights risk management and advocate for improvements in disclosure and oversight of various social and

² The terms conventional funds and traditional funds are used interchangeably throughout this comment and are used to represent funds/investment criteria that do not incorporate ESG.

³ Oxfam America website, <https://www.oxfamamerica.org/about/>

environmental issues that help companies improve their financial prospects through sustainability and long-term value.

Because Oxfam engages with communities globally, we bring to the table information from the ground up regarding adverse human rights risks and on the global and national-level context in which companies are operating. **This broad exposure gives us a unique window into the variety of ways in which different types of investors can understand what it means to invest with an environmental and social lens; that flexibility is inimical to allow ESG investments maximize their benefits to investors and communities alike.** Oxfam is also concerned that the proposal would severely limit the ability of Oxfam's fiduciary to offer ESG investment options which as the evidence suggests below can offer enhanced investment returns.

We are submitting this letter requesting that the DOL fulfil its obligations and analyze the costs and benefits, and impacts on efficiency, that would be posed by the introduction of this proposal. Our analysis indicates that ESG incorporation provides investors with a comprehensive picture of financial risks across their portfolio, enhancing their ability to develop strategies to reduce these risks, including ESG integration in analysis and investment decisions, corporate engagement, and advocating for policy and regulatory solutions. The proposed changes that the DOL intends to take presents challenges for fiduciaries to incorporate ESG standards as a product, imposing costly delays in the redress of risk management failures at particular companies, or deployment of more expensive vehicles for correcting such agency failures, such as litigation, books and records requests, and regulation. All of these ultimately increase investor costs.

II. The proposal demonstrates a fundamental misunderstanding of ESG

First and foremost, the proposal mistakenly conflates ETI and ESG; yet these are not the same investment practices. The entire focus of the DOL rule is predicated on a definition of ESG as primarily about offering "non-pecuniary" benefits to investors. This is contradictory to years of DOL guidance that allow such benefits so long as they do not sacrifice returns. Moreover, it characterizes ESG as a monolithic strategy which appears to be short-sighted and incorrect; ESG does not employ a one-size-fits-all investment approach.

There is a clear distinction between the ETIs and ESG incorporation. ETI is any investment or investment course of action that is selected, in part, for its expected non-pecuniary benefits, apart from the investment return to the employee benefit plan investor. It is an investment that generates collateral benefits for communities apart from the investment return to the plan. These investments have also been referred to as targeted investments, socially responsible investments, sustainable investments, and impact investments. On the other hand, investments that take ESG factors into consideration do not typically have explicit environmental or social goals. In fact, **ESG consideration is part of prudent risk management and a strategy to take investment actions aimed at responding to and mitigating potential financial risks.** ESG incorporation provides insight to investors about the sustainability of a long-

term business model, the company's treatment of important stakeholders, and can be an early warning signal to downside risks. Therefore, ESG provides an additional risk mitigation tool for investors above and beyond that which is available through diversification.⁴

III. ESG funds have demonstrated superior performance in comparison to conventional funds

There is plenty of empirical evidence supporting the claim that ESG incorporation has led to higher company performance offering investors better returns in comparison to traditional funds that do not account for ESG risks. In 2016, researchers used several studies to assess materiality based on the Sustainability Accounting Standards Board (SASB) guidance by constructing a portfolio of ESG performance and confirmed that firms with strong ratings on material sustainability issues outperformed those with poor ESG ratings including exhibiting comparatively higher growth in accounting profitability.⁵ Similarly, a Bank of America study also confirmed ESG integration's superiority: S&P 500 companies with high ESG rankings outperformed those with low ESG rankings by at least 3% every year during the period 2014-2019.⁶ The DOL itself asserted less than three years back that ESG incorporation has resulted in similar if not higher returns than non ESG investments.⁷ Separately and more broadly, a more recent study where researchers constructed a sector-neutral portfolio using MSCI's ESG scores from 2013-2018 concluded that **it is feasible for an asset owner to both uphold their fiduciary duty and have a positive impact on achieving the SDGs, and doing so does not result in a trade-off between financial returns and positive societal footprint.**⁸

Importantly, investment managers have also increasingly come out in support of ESG, which they believe offers comparable if not higher returns in comparison to conventional funds. Morgan Stanley compared sustainable to traditional funds from a period spanning 2004 to 2018 to assess performance and risk and the findings revealed that (a) there are no financial tradeoffs in selecting a sustainable fund over a traditional fund and (b) sustainable investing represents lower risks.⁹ The study further clarified that during periods of extreme volatility, there is "strong statistical evidence that sustainable funds are relatively more stable." No statistical differences in return were also revealed when TIAA conducted an analysis of

⁴ James P. Hawley and Jon Lukomnik, "The Third, System Stage of Corporate Governance: Why Institutional Investors Need to Move Beyond Modern Portfolio Theory", February 21, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3127767

⁵ Mozaffar Khan, George Serafeim, and Aaron Yoon, "Corporate Sustainability: First Evidence on Materiality." (March 11, 2015), Accounting Review, Vol. 91, No. 6, p. 1697-1724, 2015, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575912

⁶ ESG Matters – Global. ESG from A to Z: A global primer, November 25, 2019, Bank of America Merrill Lynch, https://www.bofaml.com/content/dam/boamlimages/documents/articles/ID19_12722/ESG_from_A_to_Z.pdf

⁷ Environmental, Social, and Governance Investment Tools: A Review of the Current Field, December 2017, Department of Labor, <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/ESG-Investment-Tools-Review-of-the-Current-Field.pdf>

⁸ Madelyn Antoncic, Geert Bekaert, Richard V. Rothenberg, and Miquel Noguer, "Sustainable Investment - Exploring the Linkage between Alpha, ESG, and SDG's", June 9, 2020, SSRN Working Paper, https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3623459&dgcid=ejournal_html_email_risk:management:ejournal_abstractlink

⁹ Sustainable Reality. Analyzing Risks and Returns of Sustainable Funds, 2019, Morgan Stanley Institute for Sustainable Investing, https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable_Reality_Analyzing_Risk_and_Returns_of_Sustainable_Funds.pdf

responsible investor (RI) equity indices in comparison to market indices and long-term performance was comparable to the broader market.¹⁰ Any magnitude in short-term variability was categorized as a consequence of the composition of the index. BlackRock, the world's largest asset manager, has jumped on the ESG bandwagon; it has publicly embraced the mounting evidence cited in favor of ESG, evidencing that an evaluation of traditional and sustainable indexes between 2012-2018 revealed that annualized total returns since 2012 matched or exceeded the standard index in both developed and emerging markets, with comparable volatility.¹¹

Investments adopting ESG criteria have also demonstrated more resilience during periods of financial downturn. Since ESG funds proliferated after the 2008-09 financial crisis, COVID-19 has been the first real stress test to evaluate performance and the results have been promising. Just Capital's Large Cap Diversified Index, which tracks companies' financial performance relative to their management of stakeholders, has outperformed the market during the current financial downturn.¹² Morningstar detailed a comparison of first-quarter returns in 2020 of 206 sustainable equity open-end and exchange-traded funds in the United States, noting that sustainable funds performed better on a relative basis in comparison to conventional funds despite (a) both suffering losses during the current financial downturn, and (b) ESG funds having higher expense ratios in comparison to conventional funds.¹³ Part of the reason for their superior performance is less exposure to energy stocks in comparison to market indices, though a large part is apportioned to the selection of companies that exhibit stronger ESG credentials.¹⁴

Some of the largest investment managers also support the argument that ESG funds can generate higher financial returns during a downturn. Sustainable strategies, according to BlackRock, offer better returns citing firm culture, customer relations, and board resilience as a contributing factor to strong performance and resilience during the current crisis.¹⁵ During the current financial downturn, JP Morgan has also jumped on the ESG bandwagon claiming that returns offered by ESG funds pre COVID-19 have not faltered as year-to-date, ESG global equity indices, outperformed traditional market indices dismissing claims that it is a "bull market luxury."¹⁶

¹⁰ Amy O'Brien, Lei Liao, and Jim Campagna, "Responsible Investing: Delivering Competitive Performance", July 2017, Nuveen, https://www.tiaa.org/public/pdf/ri_delivering_competitive_performance.pdf

¹¹ Sustainability, The Future of Investing, February 2019, BlackRock Investment Institute,

<https://www.blackrock.com/ch/individual/en/literature/whitepaper/bii-sustainability-future-investing-jan-2019.pdf>

¹² Just Capital Website, <https://justcapital.com/value-of-just-business/>

¹³ John Hale, "Sustainable Funds Weather the First Quarter Better Than Conventional Funds", April 3, 2020, Morningstar,

<https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-than-conventional-funds>

¹⁴ Id.

¹⁵ Sustainable Investing: Resilience amid uncertainty, May 2020, Blackrock,

<https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf>

¹⁶ Sustainable Investing in the spotlight, July 15, 2020, J.P. Morgan, <https://www.jpmorgan.com/securities/insights/sustainable-investing-in-the-spotlight>

IV. The rule is out of step with the direction of the market

The market has already decided the fate of ESG; it is steadily moving from the fringes to the mainstream. ESG funds have quadrupled from 2018 to 2019, with 30 new ESG product offerings launched in 2019 bringing the total ESG product offerings to 303.¹⁷ There is a high supply of ESG funds because of the high demand; Eighty two percent of money managers surveyed by USSIF in 2018 incorporate ESG because of high demand.¹⁸ ESG-focused equity funds took in nearly \$70bn of assets between 2019 and 2020, while traditional funds suffered almost \$200bn of outflows during that period according to EPFR.¹⁹ Many asset managers are rushing to either offer new products or enhance existing product offerings including offerings from Vanguard, Barclays, and State Street.²⁰

ESG is now widely incorporated into the investment analysis of financial advisors. Individual surveys conducted by State Street Global Advisors and the CFA Institute point to high support for ESG into investment analysis and risk mitigation.²¹ Financial industry participants prefer to pursue investments with a positive ESG record because of the higher financial value of these companies; this leads them to consider ESG issues when making strategic and operational decisions.²² Three-quarters of investment managers cited the desire to improve returns and to minimize risk over time as motivations for incorporating ESG into their investment process, and **more than a majority cited their fiduciary duty obligations as a motivation.**²³

The demand for ESG incorporation is especially high among millennials. Ninety-five percent of high net worth millennials surveyed by Morgan Stanley (total of 200 millennials ranging from ages 18-37 years were interviewed) were interested in sustainable investing and over 90% of

¹⁷ Morningstar, "The ESG universe is rapidly expanding", (March 19, 2020),

<https://www.morningstar.com/articles/972860/the-esg-fund-universe-is-rapidly-expanding>

¹⁸ Report on US Sustainable, Responsible and Impact Investing Trends 2018, The Forum for Sustainable and Responsible Investments, https://www.ussif.org/store_download.asp?key=N5TX4PjXtyvA4yzsALNo7jRgHs4TeI

¹⁹ Robin Wigglesworth, "The ESG Revolution is widening gaps between winners and losers", February 3, 2020, Financial Times, <https://www.ft.com/content/12bd616e-442b-11ea-a43a-c4b328d9061c>

²⁰ Jeff Kauflin, Vanguard's New ESG Fund: 40 Stocks And A Marketing Plan, March 7, 2019, Forbes,

<https://www.forbes.com/sites/jeffkauflin/2019/03/07/vanguards-new-esg-fund-40-stocks-and-a-marketing-plan/#9ae873665c42>;

"Expanding ESG Coverage in Barclays Research, March 24, 2020, Barclays,

https://www.investmentbank.barclays.com/content/dam/barclaysmicrosites/ibpublic/documents/our-insights/ESGResearch/ESG_WhitePaper_Public.pdf;

and Press Release, State Street Enhances ESG Products with New Data and Analytics Offerings, November 15, 2017, State Street,

<https://newsroom.statestreet.com/press-release/corporate/state-street-enhances-esg-products-new-data-and-analytics-offerings>

²¹ CFA Institute Survey: How do ESG Issues Factor into Investment Decisions?", (August 2015), CFA Institute,

<https://blogs.cfainstitute.org/marketintegrity/2015/08/17/cfa-institute-survey-how-do-esg-issues-factor-into-investment-decisions/> and State Street Global for the Future: ESG's place in investment portfolios. Today and Tomorrow." (April 2018),

available at <https://www.ssga.com/investment-topics/environmental-social-governance/2018/04/esg-institutional-investor-survey.pdf>

²² The ESG premium: New perspectives on value and performance, (February 2020), McKinsey & Company,

<https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/The%20ESG%20premium%20New%20perspectives%20on%20value%20and%20performance/The-ESG-premium-New-perspectives-on-value-and-performance.pdf>

²³ Id.

them expressed an interest in tailoring their investment according to their values.²⁴ A separate survey of over 5,000 investors conducted by UBS concluded that a majority of young investors (defined as those between the ages of 18-34 years) already have sustainable investments in their portfolio.²⁵ The transfer of wealth from baby boomers to millennials has been estimated at \$41 trillion and many of them are particularly outspoken of the business considerations on environmental and social issues.²⁶ In fact, ESG product offering is a sticking point for millennials; Eighty seven percent of high net worth millennials according to Bank of America prefer going through a company's ESG product offering before investing in it.²⁷

V. The evidence increasingly elucidates that poor ESG incorporation corresponds to poor risk management

Poor or lack of regard for ESG risk management can represent high risks for investors. For example, between 2005 and 2015, 90% of bankruptcies among S&P 500 companies were concluded by Bank of America to be the result of poor ESG standards.²⁸ This assumption is also supported by the International Monetary Fund, which cites weak governance structures as the primary reason for both the global crisis and the Asian financial crisis.²⁹ Disregard for ESG factors can increase market volatility; more than 80% of investors surveyed (total of more than 600 investors with over \$21 trillion AUM interviewed) by UBS believe that they are faced with "material risk" if they do not integrate ESG factors.³⁰ After conducting a series of stress test scenarios, researchers at the University of Cambridge concluded that investors could experience up to 45% of losses if policy makers fail to work with the private sector to mitigate climate change and risks of social unrest.³¹

Poor oversight and blatant violation of environmental and socially material factors have been extremely costly for companies. Fossil fuel companies, in addition to physical, regulatory, and transition risks of climate change, increasingly face legal risks as states, counties and cities have

²⁴ Sustainable Signals: Individual Investor Interest driven by Impact, Conviction, and Choice; 2019, Morgan Stanley Institute for Sustainable Investing, https://www.morganstanley.com/pub/content/dam/msdotcom/infographics/sustainable-investing/Sustainable_Signals_Individual_Investor_White_Paper_Final.pdf

²⁵ Global Insight: What's on investors' minds?, 2018, Vol. 2, UBS Investor Watch, <https://www.ubs.com/content/dam/ubs/microsites/ubs-investor-watch/IW-09-2018/return-on-value-global-report-final.pdf>

²⁶ World Economic Forum, "From the margins to the mainstream. Assessment of the Impact Investment Sector and opportunities to engage with mainstream investors.", (September 2013), http://www3.weforum.org/docs/WEF_II_FromMarginsMainstream_Report_2013.pdf

²⁷ 2018 U.S. Trust Insights on Wealth and Worth, June 2018, Bank of America, https://newsroom.bankofamerica.com/system/files/2018_US_Trust_Insights_on_Wealth_and_Worth_Overview.pdf

²⁸ 10 reasons you should care about ESG, September 23, 2019, Bank of America Merrill Lynch, ESG Matters, https://www.bofam.com/content/dam/boamlimages/documents/articles/ID19_1119/esg_matters.pdf

²⁹ Global Financial Stability Report: Lower for Longer, October 2019, International Monetary Fund, <https://www.imf.org/en/Publications/GFSR/Issues/2019/10/01/global-financial-stability-report-october-2019>

³⁰ Dennis Fritsch, "ESG: Do you or Don't you? Are the world's asset owners thinking about long-term sustainable finance?" Responsible Investor and UBS, 2019, https://www.ubs.com/campaign/res/ubs_extfront_prod/responsible-investor-ubs-esg-do-you-or-dont-you_.pdf

³¹ Millennial Uprising Social Unrest Scenario, October 2014, Cambridge Center for Risk Studies, University of Cambridge Judge Business School, https://www.jbs.cam.ac.uk/fileadmin/user_upload/research/centres/risk/downloads/crs-millennial-uprising-social-unrest-stress-test-scenario.pdf

filed legal claims against these companies for climate-related problems.³² Poor oversight and lack of regard for public interest is the reason pharmaceutical companies, wholesale distributors, and retailers are held liable for aggressively marketing opioids and face legal action from hundreds of states, counties, and cities in the US and billions of dollars in fines and settlements.³³ Similarly, Bayer, owner of Monsanto, which manufactured Roundup settled claims for \$12 billion over the chemical's role in causing non-Hodgkins Lymphoma, but is still exposed to over tens of thousands of unresolved claims that can cost additional billions of dollars in fines and settlements.³⁴ Legal challenges brought by stakeholders for poor environmental safeguards such as failure to conduct free, prior, and informed consent resulted in the closure of the Dakota Access Pipeline and the cancellation of the Atlantic Coast Pipeline by energy companies costing them \$7.5 billion and \$8 billion respectively.³⁵ Corporate hubris and a blatant disregard for public health and safety cost Volkswagen over \$30 billion in fines, suits, settlements, and recall expenses because of emissions cheating and immediately following led to a fall in its stock valuation by almost 25%.³⁶

The Department's stated rationale for prohibiting an "ESG-themed fund" from being selected as the default investment option is that it is not appropriate to select "investment funds whose objectives include non-pecuniary goals." This statement shows a fundamental misunderstanding of the purpose of ESG integration, which is to integrate all material factors into investment decision-making. Companies with strong sustainability practices are hailed as those with lower business risks and lower capital costs leading to higher valuations.³⁷ High ESG-rated companies, MSCI believes, are more likely to have lower volatility, higher profitability,

³² Leslie Hook, "Oil majors gear up for wave of climate change liability lawsuits", Financial Times, June 9, 2019, <https://www.ft.com/content/d5fbae4-869c-11e9-97ea-05ac2431f453> and Ara Jerving, Kate Jennings, Masako Melissa Hirsch, and Susanne Rust, "What Exxon knew about the Earth's melting Arctic", October 9, 2015, Los Angeles Times, <https://graphics.latimes.com/exxon-arctic/>

³³ Colin Dwyer, "Your Guide to The Massive (And Massively Complex) Opioid Litigation" National Public Radio, October 15, 2019, <https://www.npr.org/sections/health-shots/2019/10/15/761537367/your-guide-to-the-massive-and-massively-complex-opioid-litigation>

³⁴ Jeff Feeley, Tim Loh, and Bloomberg; "Bayer agrees to pay \$12 billion in legal settlements, in effort to put Roundup scandal behind it", June 25, 2020, Fortune, <https://fortune.com/2020/06/25/bayer-monsanto-billion-payment-settlement/> and Jeff Feeley, Tim Loh, and Tim Bross, "Even With \$11 Billion Settlement, Bayer Still Has 30,000 Claims to Roundup", June 26, 2020, Insurance Journal, <https://www.insurancejournal.com/news/national/2020/06/26/573605.htm>

³⁵ Carla F Fredericks, Mark Meaney, Nicolas Pelosi, and Kate R. Finn; "Social Cost and Material Loss: Dakota Access Pipeline", First People's Worldwide University of Colorado, November 2018, https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf and Sarah Rankin, "Developers cancel long-delayed, \$8 billion, Atlantic Coast Pipeline", July 5, 2020, Associated Press, <https://apnews.com/5e4dec29b0da663e6243a71aea016940>

³⁶ Charles Riley, "Volkswagen's diesel scandal costs hit \$30 billion", September 29, 2017, CNN, <https://money.cnn.com/2017/09/29/investing/volkswagen-diesel-cost-30-billion/index.html>; Naomi Kresge and Richard Weiss, "Volkswagen Drops 23% After Admitting Diesel Emissions Cheat", September 21, 2015, Bloomberg, <https://www.bloomberg.com/news/articles/2015-09-21/volkswagen-drops-15-after-admitting-u-s-diesel-emissions-cheat>

³⁷ William Burckart and Jessica Ziegler, "Fundamentals of Sustainable Investing. A guide for Financial Advisors", The Investment Integration Project and Money Management Institute, March 2019, <https://www.tiiproject.com/wp-content/uploads/2019/04/MMI-TIIP-Fundamentals-of-Sustainable-Investment-FINAL-DIGITAL.pdf>

higher dividend yield, and low business risks.³⁸ Many harmful business decisions could have been avoided if proper safeguards were in place to caution investors of the business risks.

VI. Disregard for ESG can represent a breach of fiduciary duty

The DOL emphasizes that financial considerations should be paramount in investment analysis when it states “ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits” and “[a] fiduciary’s evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan’s articulated funding and investment objectives.”³⁹ ESG issues pose systemic risks to financial markets which can destabilize the economy and negatively impact economic growth, all of which affects retirement security.

As fiduciaries, investment managers owe their clients a duty of loyalty and a duty of care. A fiduciary that only evaluates the criteria listed in item (c)(3) of the Proposed Rule— “benchmarks, expense ratios, fund size, long-term investment returns, volatility measures, investment manager investment philosophy and experience, and mix of asset types” — could, to the detriment of plan participants and beneficiaries, ignore other critical factors in analysis.⁴⁰ Fiduciary duty requires the consideration of all material factors, including those that fall under ESG categories. By severely restricting the ability of investment managers to incorporate ESG, the DOL is in effect demonstrating a blatant disregard for fiduciary duty, given that the evidence is overwhelmingly in support of the financial superiority of ESG products over traditional investment products. In effect, this proposal blocks fiduciaries from effectively carrying out their role in the following ways:

- It imposes undue burdens on fiduciaries who wish to offer ESG investment options by singling out these options imposing layers of additional analysis and documentation.
- It restricts the choices offered by retirement platforms by severely limiting plan beneficiaries from availing of the benefits of diversification, which include access to ESG options, many of which, as our research suggests, have outperformed the market indices, especially during the current market shock of COVID-19.
- It limits the ability of plan participants from accessing ESG retirement options by prohibiting funds using ESG criteria to be “added as, or a component of, a qualified default investment alternative.”

³⁸ Guido Giese, Linda-Eling Lee, Dimitris Melas, Zoltan Nagy, and Laura Nishikawa, Foundations of ESG Investing: How ESG affects equity valuation, risk, and performance, (July 2019), *The Journal of portfolio Management*, Vol 45, No. 5, p 1-15, (2019), <https://www.msci.com/documents/10199/03d6faef-2394-44e9-a119-4ca130909226>

³⁹ Proposed Rule, Financial Factors in Selecting Plan Investments, Federal Register No.: 2020-13705; Posted on June 30, 2020 by the Employee Benefits Security Administration, <https://beta.regulations.gov/document/EBSA-2020-0004-0002>

⁴⁰ Id.

Conclusion

Numerous studies show that the consideration of ESG criteria in investment analysis generally produces investment performances comparable to or better than non-ESG investments. There is no doubt that funds that use ESG criteria are consistent with long-term retirement objectives.

The Proposal is likely to have the perverse effect of dissuading fiduciaries, even against their better judgment, from offering options for their plans that consider ESG criteria in addition to more traditional financial criteria. As a result, it will unfairly, and harmfully, limit plan participants' options and diversification opportunities. Oxfam respectfully requests that the Proposal be withdrawn. Thank you once again for your consideration of these comments.

Respectfully,

Irit Tamir,
Director, Private Sector Department
Oxfam America