Trinity Health

July 30, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave. N.W.
Washington, DC 20210

Re: RIN 1210-AB95, “Financial Factors in Selecting Plan Investments”

Dear Assistant Secretary Wilson,

Trinity Health appreciates the opportunity to respond to the Department of Labor’s (DOL’s) proposed rule, “Financial Factors in Selecting Plan Investments” (the “Proposed Rule”), set forth in the Notice of Proposed Rulemaking (“NPRM”). The Proposed Rule would impose significant analytical and documentation burdens on fiduciaries of benefit plans governed by the Employee Retirement Income Security Act (“ERISA”) wishing to select (or allow individual account holders to select) investments that use environmental, social, and governance (“ESG”) factors in investment analysis or that provide ESG benefits. **Our comments and recommendations reflect strong opposition to the DOL’s proposed rule.**

Trinity Health is one of the largest multi-institutional Catholic health care delivery systems in the nation, serving diverse communities that include more than 30 million people across 22 states. Trinity Health includes 94 hospitals as well as 109 continuing care locations that include PACE, senior living facilities, and home care and hospice services. We employ approximately 133,000 colleagues, including more than 7,800 employed physicians and clinicians. As of June 30, 2019, Trinity Health had total assets of $27.0 billion, including unrestricted cash and investments of $9.0 billion.

Trinity Health has more than 20 years of experience engaging companies on ESG issues that are critical to long-term value creation. Trinity Health advances investing strategies that hold companies accountable for addressing environmental and social risks, and having strong and transparent governance practices. We believe by doing this that our investments in such companies are more likely to have long-term success.

We are concerned that the Proposed Rule will deter consideration of ESG factors by ERISA fiduciaries, and perhaps others whose regulatory frameworks follow ERISA, despite ample evidence that integrating such factors can improve performance. Trinity Health has pension plans that are governed by ERISA and some that are not required to follow ERISA. Nonetheless, we remain concerned that the NPRM broadly calls into question, with no factual basis, not only “ESG-themed” investment products but also ESG ratings and the use of ESG factors in traditional investment analysis.

The NPRM does not establish either that the Proposed Rule is necessary or that it would provide appreciable benefits, and it fails to analyze costs to plans and their participants and beneficiaries. These major shortcomings preclude an adequate cost-benefit analysis. **Accordingly, we ardently urge the DOL to withdraw the Proposed Rule.**

Background--ESG and Investing

Consideration of ESG factors in investing has achieved widespread acceptance both in the U.S. and globally in recent years. Experienced and successful "investors have indicated that their ESG investments, social benefits notwithstanding, are fundamentally driven by expected financial returns, including considerations regarding long-term value, opportunity and risk, and have cited studies published over the past five years indicating that an ESG perspective can improve performance, including studies that show ESG-focused indexes have matched or exceeded returns of their standard counterparts, with comparable volatility, and investors who screened for ESG factors could have avoided 90% of S&P 500 bankruptcies from 2005 to 2015 and that S&P 500 companies in the top 25% by ESG ratings experienced lower future earnings-per-share volatility than those in the bottom 25%."[1]

Insufficient Economic Justification and Flawed Cost/Benefit Analysis

The NPRM's justification for the Proposed Rule is speculative and poorly supported. The NPRM expresses worry that "the growing emphasis on ESG investing, and other non-pecuniary factors, may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defraying reasonable administrative expenses."[2] But the statistics cited in the NPRM do not track the proposed solutions to this supposed problem, as they conflate "ESG investing," "consider[ing] ESG factors in investment decisions," "ESG-themed" investment options, and "socially responsible" equity funds.[3]

No effort is made to assess the extent to which any of these products or approaches explicitly aim to provide non-pecuniary benefits—choices to which the Proposed Rule's "tie-breaker" provision applies--as opposed to considering ESG factors as part of traditional investment analysis.[4] The NPRM cites a law review article that defines the former as "collateral benefits" ESG investing and the latter as "risk-return" ESG investing, but often refers to the two concepts interchangeably.[5] Without some idea of the prevalence of each among ERISA-governed funds, it is not possible to analyze the benefits and costs of the Proposed Rule's differing approaches to collateral benefits and risk-return investing.

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1 https://corpgov.law.harvard.edu/2020/07/07/dol-proposes-new-rules-regulating-esg-investments/

2 NPRM, at 39120.

3 NPRM, at 39120-39121.

4 The NPRM cites a law review article that defines the former as "collateral benefits" ESG investing and the latter as "risk-return" ESG investing. NPRM, at 39120 (citing Max Schanzenbach & Robert Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee," 72 Stan. L. Rev. 381, 392-97 (2020)).

5 NPRM, at 39120 (citing Max Schanzenbach & Robert Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee," 72 Stan. L. Rev. 381, 392-97 (2020)).

Nor does the NPRM evaluate the financial performance of various types of ESG investing compared to non-ESG counterparts. There is evidence that ESG funds, indices and portfolios outperform market and other benchmark indices over at least some periods.[6] Reporting on the first quarter of 2020, BlackRock noted that it "observed better risk-adjusted performance across sustainable products globally, with 94% of a globally-representative selection of widely-analyzed sustainable indices outperforming their parent benchmarks." That performance, according to BlackRock, "aligns with the resilience we have seen in sustainable strategies during prior downturns" and is attributable to a "range of material sustainability characteristics, including job satisfaction of employees, the strength of customer relations, or the effectiveness of the company's board."[7] The absence of such a discussion in the NPRM may reflect the fact that burdening fiduciaries' ability to select investments that outperform is more fairly characterized as a regulatory cost than a benefit.

The NPRM's analytical fuzziness and lack of performance data limit the Department's ability to quantify, even in a rough way, the benefits of the Proposed Rule. The NPRM's assertion that "[t]o the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participants' and beneficiaries' retirement investment returns,"[8] is purely speculative. As well, the NPRM makes contradictory claims about the extent to which plan fiduciaries are violating existing sub-regulatory guidance on the issues addressed by the Proposed Rule. On the one hand, the NPRM asserts that the Proposed Rule would provide the benefit of "eliminat[ing] confusion that plan fiduciaries may currently face."[9] In the next breath, however, the NPRM states that the Department believes that the number of plan fiduciaries that are not following or misinterpreting the guidance is "small."[10] If nearly all fiduciaries are following the guidance, why is the Proposed Rule necessary? Given the great uncertainty about the benefits of the Proposed Rule, continuing with the sub-regulatory guidance should have been one of the alternatives to the Proposed Rule considered in the NPRM.

In addition to this deficient showing on purported benefits, the NPRM does not adequately support its analysis of potential costs associated with the Proposed Rule. The NPRM concludes that the Proposed Rule would not impose "a significant increase in hourly burden or cost" because the true "ties" between "economically indistinguishable" investments that would permit a fiduciary to choose the one that provides a collateral ESG benefit "occur very rarely in practice, if at all."[11] The only basis provided for that conclusion is a single law review article referring to such equivalent investments, without support, as "unicorns."[12] Thus, the NPRM's conclusion regarding costs of

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[6] E.g., https://www.forbes.com/sites/brendancoffey/2019/11/12/esg-stocks-are-having-a-fantastic-year/#298759412fbb; https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103; https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-thanconventional-Funds; https://www.top1000funds.com/wp-content/uploads/2013/01/Optimizing-ESG-Factors-in-Portfolio-Construction.pdf

[7] https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf, at 3.

[8] NPRM, at 39121.

[9] NPRM, at 39119.

[10] NPRM, at 39120.

[11] NPRM, at 39123, 39125.

[12] Rulemaking, article cite

complying with the tie-breaker provision of the Proposed Rule completely lacks support.

Potential foregone benefits that would flow from reducing ESG investing are not limited to those related to a specific investment decision. Investing in which ESG considerations play a role, especially the type of engagement with portfolio companies that ICCR members have led for decades, can bring about changes in corporate behavior that protect the value of other securities across the portfolio, as well as investments in other asset classes. Larry Fink points out in his recent CEO letter that climate impacts span asset classes[13]; thus, curbing greenhouse gas emissions by a company whose equity security a plan holds may protect value not only of the plan's investment in that company, by allowing it to avoid disruptions from impending regulations, but also for the plan's real estate investments, which face physical risk from climate change.

Taking steps to prevent catastrophic warming would also reduce risks to the global financial system and the broader economy.[14] These changes in behavior could well be reduced by the Proposed Rule, and the Department has an obligation to identify and analyze the potential negative impacts to companies, sectors, the financial system and the economy. Indeed, where ESG factors are material, we believe that the Department should clarify for ERISA fiduciaries that the duty of care under section 404(a)(1)(B) of ERISA requires their consideration, rather than imposing additional analytic and documentation burdens as the Proposed Rule now does.

<u>For all of the above reasons, we ardently urge the DOL to withdraw the Proposed Rule.</u>

We appreciate this opportunity to provide our views on this important matter. Please feel free to contact Tonya Wells at wellstk@trinity-health.org or 734-343-0824 with any questions.

Sincerely,

Tonya K. Wells

Tonya K. Wells
VP, Social Impact Investing & Community Development
Trinity Health

[13] https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter
[14] See https://www.ceres.org/sites/default/files/reports/2020-06/Financial%20Regulators%20FULL%20FINAL.pdf;