July 30, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite 400
Washington, DC 20210
Attention: Financial Factors in Selecting Plan Investments Proposed Regulation

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

Dear Acting Assistant Secretary Wilson,

I write to express my opposition to the Department of Labor's newly proposed rule, Financial Factors in Selecting Plan Investments. I share the view of other commenters that the proposed rule creates an arbitrary burden on plan fiduciaries, who already are governed by duties of loyalty and prudence. I also object to the unnecessarily short period for public comment, which has prevented me from offering a more detailed response to the Department's proposal. I ask that the Department consider extending the public comment period.

The Proposed Rule Discourages Beneficial ESG Investment and Imposes Costs on Americans' Retirement Savings

The investment strategies of the world's largest managers, comprehensive studies, and widely-accepted standards of practice among investment managers demonstrate that investment professionals believe ESG factors to be material and effective investment considerations.[1] The proposed rule discourages ESG investment by ERISA fiduciaries and creates a bias in favor of short-term results. It will harm plan participants and beneficiaries, not help them, and introduce new, unnecessary costs to beneficiaries' retirement plans.

[1] *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 436 (2020) (asserting that, while favorable empirical results are "not uniform," "studies of firm performance find that firms with high environmental and social scores enjoy higher earnings with lower risk than firms with low environmental and social scores. Moreover, there is evidence that firms can build goodwill through socially responsible activities, which can protect against reputational harm from adverse events."); Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Non-Financial Risk*, 41 J. CORP. L. 647, 665-68 (2016); Gunnar Friede, Timo Busch & Alexander Bassen, *ESG and Financial Performance: Aggregated Evidence from More Than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. (2015).

The Comment Period Is Too Short

The Department of Labor published the proposed rule on June 30, 2020 and has allowed only 30 days for public comment. For more complex rules that have unexplored consequences and implications, agencies may provide more than 180 days for comments. The shortened comment period here underestimates the intricacies of a proposal that holds the potential to impair Americans' retirement viability. By providing such a short comment period, the Department apparently hopes to expedite the rulemaking process in order to finalize the new rule before a potential change in the presidential administration. This is not an appropriate or ethical reason to rush a rulemaking.

The Department should abandon these proposed changes and maintain the current duty of loyalty and prudence already required of plan fiduciaries.

Respectfully,

Sarah C. Haan
Professor of Law
Washington and Lee University School of Law