Baillie Gifford Overseas Limited
Registered Office:
Calton Square, 1 Greenside Row, Edinburgh EH1 3AN
Tel. +44 (0)131 275 2000 Fax +44 (0)131 275 3999
www.bailliegifford.com

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

30 July 2020

Re: Proposed Rule: Financial Factors in Selecting Plan Investments [RIN 1210-AB95]

Ladies and Gentlemen:

Baillie Gifford Overseas Limited ("BGO") appreciates the opportunity to provide comments on the proposed amendments to the "Investment Duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), published by the Department of Labor (the "DOL") in the Federal Register on June 30, 2020, addressing the circumstances under which ERISA fiduciaries may consider environmental, social or corporate governance ("ESG") factors in evaluating investments.

We support the proposal in recognizing the primacy of ensuring financial security in retirement, and the role and obligations of fiduciaries and the asset management industry in achieving this goal. We also agree with the DOL that it is imperative that asset management product descriptions are very clear and comprehensive, especially in relation to ESG issues.

We are, however, concerned that the proposed amendments do not acknowledge that there are many ways in which ESG factors can be relevant to investment products, and that these ought not all be treated alike. The proposed amendments also assume that there is a clear distinction between pecuniary and non-pecuniary factors. We believe that this is an overly simplistic presentation which may encourage behavior and decisions which are not in the long-term interests of plan beneficiaries.

Background on Baillie Gifford and Its Clients

BGO is a wholly owned subsidiary of Baillie Gifford & Co ("Baillie Gifford"). Founded in 1908, Baillie Gifford is a privately-owned UK investment management firm based in Edinburgh, Scotland. The Baillie Gifford Group focus on long term, active investment management. Our client base is predominantly institutional in nature and located globally. Assets under management as at June 30th, 2020 were $324 bn and clients based in the United States ("U.S.") represent approximately 40% of client AUM. All U.S. clients are advised by either of Baillie Gifford's two wholly owned subsidiaries, BGO, established in Scotland in

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1983, with approximately $126 bn under management, or Baillie Gifford International LLC ("BGI"), established in 2005 in Delaware with less than $1 bn in assets under management. BGO is authorized and regulated by the Financial Conduct Authority ("FCA") in the United Kingdom ("UK"), and both of BGO and BGI are registered as investment advisers with the SEC in the U.S. and qualify as qualified professional asset managers ("QPAMs") within the meaning of DOL regulations. Clients of BGO and BGI collectively include in excess of $30bn in ERISA plans, state plans and mutual funds.

Our experience of deploying clients' capital into tangible, returns-generating activities has taught us that investing responsibly for the long term is not counter to generating financial returns for clients, it is intrinsic to it. The overwhelming majority of accounts managed by Baillie Gifford follow a long-only, active approach to investment based on identifying and holding high quality growth businesses that enjoy sustainable competitive advantages in their marketplace. We look beyond current financial performance, undertaking proprietary research to build up our in-depth knowledge of an individual company and form a view on its long-term prospects. This focus on "bottom up" research also applies to our work on governance and sustainability. Financially material governance and sustainability issues are routinely considered throughout the investment process and are highly material considerations within our investment analysis.

For the majority of our funds, there are no limitations to the sectors in which we can invest, and the objectives of these funds are solely financial. A subset of our investment products (including Positive Change and Global Stewardship) take governance and sustainability integration further through negative screening, positive selection or having an impact focus based on the recognition that companies which act sustainably outperform over the long term. As shown in Appendix A, these two strategies have outperformed their benchmarks by 19.44% and 11.87% respectively. Although these strategies are in their infancy, their performance is encouraging in showing that funds with an ESG focus can provide positive returns for clients. Appendix A also shows that the integration of ESG considerations into our other strategies, as outlined above, is not detrimental to their overall performance.

Need for Clarity on ESG

The proposed amendments do not provide sufficient distinction between strategies that incorporate ESG factors and strategies that prioritize "ESG" over other critical considerations. We would ask the DOL to provide some clarity on this point.

The motivation for the proposed amendments appears to be a fear that non-material (non-financial) considerations are encroaching into the decision-making of fiduciaries, distracting them from the material (financial) factors. In our view, "ESG" is simply a new label for issues which have always been relevant for operating businesses and acting in the long-term interests of shareholders. While the significance of environmental and social issues has become more widely recognized in recent years, it has long been evident that governance considerations are material and integral to financial investment analysis. It would be remiss of investment managers not to continually look ahead to identify and assess factors which might become more relevant to the analysis. For example, the potential for future carbon emission targets and taxes cannot be separated from the financial prospects of a motor vehicle manufacturer. The line between pecuniary and non-pecuniary considerations cannot be clearly drawn, and in fact there are very few considerations that could be considered truly non-material to the investment case. This becomes increasingly the case as the investment time horizon becomes longer, and so arguably is particularly true for pension plans. This type of holistic analysis cannot be said to seek to promote considerations other than financial outcomes. Relevant ESG considerations are not incorporated because of an interest in these issues *per se* but because they are material to the investment case. The materiality of these considerations to the investment analysis is recognized by stewardship codes around the world that require asset managers to demonstrate how ESG issues are integrated into their investment analysis.[1]

The proposed amendments do not distinguish between investments where ESG considerations are integrated into the investment analysis, like the vast majority of Baillie Gifford funds, and investments with ESG objectives (which have a focus in addition to or prioritized above financial returns). For example, paragraph (c)(3) treats alike investment alternatives that merely include one or more ESG assessments or judgments in their investment mandates and investment alternatives that feature ESG parameters in the fund name. We are concerned that the proposed amendments treat all of these approaches in the same way and may lead to a "chilling effect" on any investment which refers to or takes into account ESG considerations, as fiduciaries may be concerned about accusations of promoting a goal other than financial returns. The lack of clarity of definition, combined with a pervasive implication in the proposed amendments that any strategy with ESG components is inherently suspect, may naturally lead ERISA plan fiduciaries to become overly and, in our assessment, needlessly restrictive in their willingness to consider ESG-aware strategies. This would have a negative impact on plan beneficiaries as it would restrict the investment universe, and perversely could do so by limiting access to investment options which take a responsible, holistic, long-term approach to investment analysis. Moreover, in light of an ERISA fiduciary's obligation to diversify investments, even investments with an ESG focus in addition to financial returns may have a role as part of a balanced, diversified portfolio and should not automatically be treated with suspicion.

We encourage the Department of Labor to acknowledge the inherent materiality of ESG issues to investment analysis, and thereby remove any ambiguity about whether additional analysis and documentation is required when considering investments that integrate ESG considerations. We further encourage the Department of Labor to be explicit about the type of ESG investing which the proposed amendments intend to limit.

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[1] See, for example, Investor Stewardship Group Principle B https://isgframework.org/stewardship-principles/; Financial Reporting Council UK Stewardship Code 2020 Principle 7 https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf

Costs of ESG Strategies

Similarly, we suggest that it is unhelpful for the preamble to suggest broadly that ESG investing is generally more expensive with lower returns than non-ESG investing, while at the same time acknowledging that there is no consensus about the definition of ESG investing. While we agree that full and transparent disclosure about product costs and expected returns is essential, this is true of all types of investment. However, we believe this is an issue to be addressed through disclosure requirements rather than casting doubt on the legitimacy of a particular investment approach and potentially limiting access to a wide range of investments.

Importance of Global Context

Baillie Gifford's global footprint allows us a broad insight into regulation across jurisdictions. The European Commission's plan for major regulatory change to enable a transition to a low carbon economy and to maintain a stable financial system aims to achieve sustainable and inclusive growth, manage financial risks stemming from climate change and social issues, and foster transparency and long-termism in financial activity. This regulatory reform is underpinned by the Taxonomy Regulation (first stage due to be implemented in 2020), which is intended to create a unified classification system for sustainable investment and will include disclosure obligations on how asset managers and institutional investors integrate ESG into their risk processes. The Taxonomy Regulation sets out the criteria for determining whether an economic activity constitutes an environmentally sustainable activity. This is intended to alleviate the burden on investors' own due diligence regarding a product's environmental sustainability and eliminate the practice of greenwashing (where financial products are inaccurately marketed as "green" or "sustainable"). The proposed Taxonomy Regulation establishes an EU-wide classification system or "framework" intended to provide businesses and investors with a common language to identify to what degree economic activities can be considered environmentally sustainable. It aims to "provide clarity and transparency on environmental sustainability to investors, financial institutions, companies and issuers thereby enabling informed decision-making in order to foster investments in environmentally sustainable activities. The Taxonomy Regulation together with the Disclosure Regulation will require firms to disclose the degree of environmental sustainability of funds and pension products that are promoted as environmentally friendly, and include disclaimers where they do not, which in theory means that the regulation will affect all financial market participants. We feel the DOL could consider adopting a similar framework which, instead of restricting ESG investments for investors, encourages additional disclosures and reporting so that investors can gain comfort in their asset manager. This forward-looking regulation recognizes that high quality companies with sustainable products and good business conduct are increasingly central to delivering long-term investment returns: ESG minded companies have better supply chain management, employee practices, internal logistics and corporate governance, all of which contributes to more sustainable returns.

The European Commission also recognizes that active asset managers that are factoring ESG analysis into their investment processes gather a more complete picture of a company (or investment) which is complementary, not contradictory, to understanding the likelihood of a company generating returns.

In light of these developments, the Department of Labor's proposal may be out of touch in terms of the wider direction of travel in relation to ESG integration. This could potentially be detrimental to US asset managers, if ESG integration and the selection of ESG-oriented strategies are subjected to material discouragement for ERISA portfolios. If an ERISA fiduciary determines prudently to manage assets from European financial market participants, then it should be permissible to consider sustainability risks (ESG risks) in investment decisions. A prohibition on considering such risks could result in investment managers splitting strategies in two: one that complies with the ERISA-driven prohibitions, and one that complies with European requirements. A manager could thereby be put in the position of having to develop additional allocation processes that depart from the more straightforward approach of assembling parallel accounts in a given strategy along a fully lockstep and pro-rata formula. This could well be detrimental to the ERISA investors' investment returns as well as limiting their choice.

A Question of Timing

Further, turning back to U.S. regulatory trends and developments, it appears that the DOL's proposal is also inconsistent with efforts of the SEC Investor Advisory Committee, which recently recommended that the SEC begin in earnest an effort to update the reporting requirements of Issuers to include material, decision-useful, ESG factors. There is acknowledgement from the SEC Investor Advisory Committee that investors require reliable and material ESG information upon which to base investment decisions and that ESG is no longer a fringe concept but an integral part of the larger investment ecosystem of a modern, global and interconnected world. The likely outcome is a more measured and disclosure-driven approach to the oversight and regulation of ESG-oriented investment strategies. Given the direction of travel of other U.S. regulators that significantly overlap in regulating aspects for the U.S. asset management industry, we see significant downsides to the seemingly radical departure of the DOL from the tendencies and pragmatism of other U.S. regulators. We would encourage the DOL to consider this view and to temper their expectations accordingly in formulating their final rule.

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We are available to discuss any questions you may have with respect to these comments.
Sincerely,

Suzanne Quinn
Head of North America Compliance
Suzanne.Quinn@Bailliegifford.com

Appendix A – Baillie Gifford Global and International Equity Strategy Performance

Baillie Gifford Global and International Equity Strategy Performance*			3 Years (%p.a.)			10 Years (%p.a.)		
Strategy	**Composite Name**	**Benchmark 1**	**Composite**	**Benchmark**	**Excess Return**	**Composite**	**Benchmark**	**Excess Return**
Global Alpha	Global Equity - Benchmarked (Alpha) - Unconstrained	MSCI AC World Index	12.07	6.70	5.37	12.93	9.74	3.19
Global Stewardship**	Global Stewardship	MSCI AC World Index	18.57	6.70	11.87	N/A	N/A	N/A
Long Term Global Growth	Global Equity - LTGG (Unrestricted) - Listed Equities	MSCI AC World Index	29.16	6.70	22.47	19.99	9.74	10.25
Positive Change**	Positive Change	MSCI AC World Index	26.14	6.70	19.44	N/A	N/A	N/A
ACWI ex US All Cap	ACWI ex US All Cap	MSCI AC World ex US	7.08	1.61	5.47	8.66	5.45	3.20
Developed EAFE All Cap	Developed EAFE All Cap	MSCI EAFE Index	6.19	1.30	4.89	8.97	6.22	2.75
EAFE Plus All Cap	EAFE Plus All Cap	MSCI EAFE Index	6.02	1.30	4.73	8.57	6.22	2.35
International Alpha	International Alpha	MSCI AC World ex US	7.40	1.61	5.79	9.10	5.45	3.64
International Growth	International Growth	MSCI AC World ex US (MSCI EAFE prior to 30/09/18)	16.15	1.69	14.46	11.83	6.34	5.49
International Concentrated Growth	International Concentrated Growth	MSCI AC World ex US	24.52	1.61	22.90	17.11	5.45	11.66

The strategies above represent the core Baillie Gifford global/international equity strategies available in the US. Performance data is based on the main marketed composite for each strategy. Benchmark 1 is the primary benchmark used for the selected composites.

** Global Stewardship and Positive Change Strategies include negative screening, positive selection or have an impact focus based on companies which act sustainably.