AMERICANS FOR PROSPERITY

July 30, 2020

Mr. Jason A. DeWitt
Office of Regulations and Interpretations
Employee Benefits Security Administration (EBSA), Room N-5655
U.S. Department of Labor (DOL)
200 Constitution Ave., N.W.
Washington, DC 20210

RE: RIN 1210-AB95, Financial Factors in Selecting Plan Investments Proposed Regulation.

Dear Mr. DeWitt:

Today, I write on behalf of more than three million Americans for Prosperity (AFP) activists across the U.S. to offer support for EBSA's proposal to amend regulations under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) to require plan fiduciaries to select investments solely based on financial considerations relevant to the risk-adjusted economic value of a particular investment or action. Financial outcomes, not policy preferences, should guide ERISA-governed private pension funds. This rule clearly ensures that more than $10.7 trillion in retirement investments for millions of hard-working Americans are not short-changed by non-pecuniary investing trends.[1]

We strongly support the goal of the proposed rule's paragraph (C)(1) to enshrine that "[i]t is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other nonpecuniary goal."[2] The rule codifies critical bedrock principles for fiduciaries; principles which are grounded in ERISA, legal history, and the nature of private pensions where individual investors do not have control of investment strategies.

Specifically, AFP strongly supports the following aspects of the proposed rule:

- DOL's description of the crystal-clear series of court decisions regarding ERISA fiduciary's undivided loyalty and singular focus on financial, rather than policy, interests.[3]
- The concern that, based on minor changes and different areas of emphasis in DOL bulletins and other sub-regulatory guidance, the "all things being equal" or "tie-breaker" test for evaluating competing investments can invite a thumb-on-the-scale approach towards subordination of financial considerations. The new guardrails provided in the proposed rule are critical.

[1] As Secretary Eugene Scalia recently noted, the number of funds considering "environmental, social, and governance" or ESG criteria rose from 81 to 564 between 2018 and 2019.
[2] 85 FR 39117.
[3] 85 FR 39114.

- We agree that clarity by DOL, especially in the form of notice-and-comment rulemaking finalized quickly, can address confusion that guidance and sub-regulatory declarations have engendered.[4] AFP also concurs with concerns about agency guidance as reflected in Executive Order 13891,[5] including that guidance documents can function as de facto regulations by quietly establishing precedents and standards without following basic transparency, notice-and-comment, regulatory analysis, and legislative accountability requirements.[6]
- Poor investments by pension plans are a highly important matter as the country faces calls for a multi-employer pension plan bailout of tens of billions of dollars with growing liabilities jeopardizing the retirement savings of millions.[7] In addition to improving these plans, the form of this rulemaking can provide additional impetus for state and local government reforms on pension capital allocation.
- While we support the additional clarity provided on when and how ESG factors may constitute financial considerations, we recommend that DOL further tighten these requirements, including specifying situations in which "qualified investment professionals would treat as economic considerations under generally accepted investment theories."[8] This clarity would avoid a different thumb-on-the-scale approach to infuse investments with policy, and it would avoid the need for future guidance from the Department.

In addition, AFP sides with the concerns raised in the proposal regarding the vague, inconsistent, and amorphous standards for evaluating equities under ESG standards. As Dr. Ellen R. Wald of the Atlantic Council recently explained, these shifting standards serve as a limiting factor that "deteriorates investing strategy by decreasing the ability to diversify and by excising good investments from the pool."[9] These concerns about diversification as well as the failure of ESG funds to maximize retirees' returns are further bolstered by a recent study from Wayne Winegarden of the Pacific Research Institute, which found that some ESG portfolios would be more than 40 percent smaller compared to a broader, S&P 500 index fund.[10]

In short, we commend DOL for this important proposal, which will help steady retirement investments for millions of Americans and enable our country to recover stronger. AFP appreciates the opportunity to comment, and our activists look forward to the swift finalization of this rule.

Sincerely,

Clint Woods
Policy Fellow, Regulations

[4] 85 FR 39116.
[5] 84 FR 55235.
[6] https://americansforprosperity.org/afp-comments-on-deadline-for-transparency-on-agency-guidances/.
[7] Gordon Gray, "Progress on Multiemployer Pensions?" American Action Forum, May 15, 2020.
[8] 85 FR 39115.
[9] Ellen R. Wald, "'ESG' may be popular but it could hurt your retirement portfolio," *The Hill*, July 28, 2020.
[10] Wayne Winegarden, "ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) INVESTING: An Evaluation of the Evidence," Pacific Research Institute, May 2019