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July 21, 2020

200600-1

<u>*Via First Class Mail*</u>
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Rule on Financial Matters in Selecting Plan <u>Investments RIN 1210-AB95</u>

Dear Sir or Madam:

I write in strong opposition to the Department of Labor's proposed rule, "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposal").

Willig, Williams & Davidson represents hundreds of labor organizations and employee benefit plans throughout the United States. Critical to the success of our clients is the ability to invest working people's assets with companies and projects which not only provide for participants' retirement security, but also promote the fundamental sustainability and fairness critical to any kind of long-term financial prosperity.

The Proposal seeks to up-end decades of precedent allowing ERISA-regulated retirement plans to invest responsibly under appropriately strict conditions. This precedent has its origins in Department guidelines around economically targeted investments ("ETIs") and more recently has focused on investments guided by economic, social, and governance ("ESG") considerations.

The Proposal is fundamentally inconsistent with the purposes of ERISA which was adopted to protect retirement savers by setting high standards for retirement plan fiduciaries, requiring them to act with due care, skill, prudence, and diligence and to avoid conflicts of interest. The ultimate goal of ERISA is to maximize retirement savings for plan participants.

The overwhelming majority of rigorous, peer-reviewed academic studies have concluded that ESG-guided investments have in general performed as well as or better than comparable conventional investments. This is backed up in reports by leading industry analysts such as Morningstar. Given this overwhelming evidence, issuing onerous regulations that narrowly and specifically target and burden this type of investment, as the Department now proposes, undermines the purpose and intent of ERISA. By discouraging and deterring fiduciaries from investing in ESG-guided funds, the Department is effectively narrowing the field of available investment options for ERISA plans, which could force participants into potentially lower-performing investments resulting in lost long-term retirement savings.

For decades, the Department has allowed fiduciaries to consider ESG factors, whether or not they can be proven to be economically material, as tiebreakers in choosing among investments that are comparable from a risk/return perspective. The use of non-financial considerations as tiebreakers has been an essential part of ERISA practice, allowing fiduciaries to take into consideration factors, including some ESG factors, that cannot be conclusively shown on an individual basis to have a positive economic effect, but whose application does not diminish financial returns.

The Proposal would require fiduciaries to document that investments are "economically indistinguishable" in order be considered comparable for these purposes. There is no basis in real-world investment practice that supports the proposition that investments must be economically indistinguishable in order to be considered comparable on a risk/return basis. Since all investments have distinguishable economic characteristics, this change eliminates the possible use of an ESG factor as a tiebreaker. While the Department's commentary states that the use of ESG factors as tiebreakers could be continued, the threshold for risk/return comparability would be raised to an unachievable level, preventing fiduciaries from considering important factors that cannot be translated neatly into return metrics.

I have been practicing in the labor and employee benefits field for over 25 years. This is the first and only instance I have seen where the Department dictates particular investment *outcomes,* rather than require a prudent investment *process.*

ESG investing has been an effective, free-market tool for producing needed change, and its popularity with investors is growing rapidly. Targeting ESG investing for onerous and burdensome regulatory treatment, inconsistent with ERISA's purposes, appears political and responsive to corporate interests that have longed opposed responsible investment. Interference in the investment preferences of retirement investors by the Department on political grounds rather than to fulfill ERISA's purposes would be arbitrary and capricious, a violation of the economic rights of those investors, and a potential violation of their First Amendment rights.

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For all of these reasons on behalf of our clients and the working men and women who depend upon them, I respectfully request that the Proposal be immediately withdrawn from further consideration.

Very truly yours,

JAMES S. BEALL

JSB/ps