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Submitter Information

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General Comment

I am writing to express a concern about the chilling effect this proposed rule may have upon religious freedom. I speak from past experience as a civil rights lawyer handling First Amendment religious freedom issues. Coincidentally, before that, my private-sector practice focused on ERISA litigation (including among other things, having served as a contributing author to the BNA Employee Benefits Law treatise). So I understand how fiduciary duty and religious freedom are both paramount.

I also speak personally from religious conviction, as a member of the Religious Society of Friends (Quakers) and the treasurer of a Quaker-affiliated 501(c)(3) organization. From the earliest days of our country, Quakers have understood how our religious convictions are inextricably entwined with our financial transactions. For example, for decades before the Civil War, Quakers advocated for the abolition of slavery due to our belief that there is that of God in every person. In commerce, this led many to abstain from using products or wearing fabric made from the labor of enslaved people. Nowadays, our commitment to integrity, equality, peace, and stewardship of the earth compels us to act likewise in how we invest our resources.

The organization that I serve as treasurer, as do many other faith-affiliated entities, has a detailed investment policy that informs how we invest our endowment and reserve funds (https://www.fcnl.org/updates/socially-responsible-investment-guidelines-22). This policy arises directly from our religious testimonies of peace, equality, integrity, simplicity, community, and stewardship. They are not a matter of personal taste; they are a matter of religious conscience.

In this vein, the section of the proposed rule that raises the most concern is (c)(3)(iii), prohibiting plan fiduciaries from selecting a conscientiously-selected investment product as the default investment option for an individual account plan -- even if that investment is a prudent choice -- if the reason for selecting it is motivated by conscience as well as the fiduciary hallmarks of loyalty and prudence. The Department's preliminary comments make it clear that it is the "non-pecuniary" motivation that taints the choice, even if the selection makes sense from an objective risk-return view. This looks perilously like punishing even prudent fiduciaries for having a conscience.

Further, the proposed rule could even harm plan participants. Even if an ESG investment is one that conscience-neutral fiduciaries would like to select as the default because it's the best choice from an objective viewpoint, they may reasonably believe that the Department is telling them they cannot. That looks like punishing companies or investment funds for their motivations, even if those criteria lead to superior performance for investors and plan participants. Followed to its logical end, the proposed rule could lead to participants receiving an inferior return on their default investments.