December 8, 2021

VIA ELECTRONIC FILING

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

RE: *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*
Attention: RIN 1210-AC03

Dear Acting Assistant Secretary Khawar,

Sierra Nevada Brewing Co respectfully submits this letter in support of the Department's proposed rule, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* ("the Proposed Rule"), 86 Fed. Reg. 57272 (Oct 14, 2021).

Sierra Nevada is the third largest craft brewery in the country and is recognized as a pioneer of both American craft beer and sustainability in business operations. Our company was founded on and continues to operate under a philosophy of balancing environmental, social, and economic needs. Our employees are driven by these same values and they are why we support this proposed rule. Our employees want and deserve access to retirement plans and investment options that include considerations for environmental, social and governance (ESG) factors including climate change risk, social impact, and economic resiliency. The current rules have essentially barred our plan providers from offering ESG funds as viable, prudent options. The proposed rule would help align our employee retirement options with our company values, support the increasing expectations and desires of our employees and contribute to the long-term sustainability and resiliency of our economy.

We applaud the Department for its thorough and carefully considered proposal. We believe the Proposed Rule aligns with longstanding Department guidance and the protective nature of the Employee Retirement Income Security Act of 1974 (ERISA). The Proposed Rule would reverse the troublesome provisions in two rules adopted in late 2020, *Financial Factors in Selecting Plan Investments* and *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*. These rules received overwhelming opposition from stakeholders, ushered in a series of changes that overturned long-established Department policies and stifled an ERISA fiduciary's otherwise prudent consideration of ESG factors in their investment decision-making and proxy voting. As a result, American workers and retirees are being denied access to ESG investment opportunities that offer competitive returns and reduce risks to their investments. The Proposed Rule would fix this.

Climate change is a relevant factor that fiduciaries must be free to consider

Fiduciaries must be empowered to evaluate *all* factors that impact risk and return, including climate change, which affects nearly all sectors of the economy. Climate related disasters are increasingly frequent, with a record 22 events causing over $1 billion damage each in the US during 2020 alone, for a total cost of $100 billion. A 2019 analysis of 215 of the world's largest companies identified just under $1 trillion of potential risk to them from climate change – and noted that half of these losses are expected to materialize in the next five years. As an empirical matter, climate risks are not yet fully reflected in asset prices, which means that prudent fiduciaries are warranted in probing further. Climate-related financial risks are especially relevant to retirement investors, who invest over decades, and are generally universal owners with exposure to many at-risk sectors. As society increasingly recognizes the importance of responding to the climate crisis, new regulation and changes in consumer demand will create significant market and investment opportunities that fiduciaries may wish to consider.

Sophisticated institutional investors recognize these risks and opportunities, and are addressing climate risk as a bedrock principle of capital preservation and growth. Individual investors also want access to ESG funds. Climate concerns and other ESG risks will be a significant driver of investment risk and return for the foreseeable future. As with any factor, performance of ESG funds will vary, but an analysis of 11,000 mutual funds over 14 years showed that ESG funds had lower downside risk and equivalent returns to the broader market. In spite of this overwhelming evidence, organizations that offer retirement plans, or "plan sponsors," wary of the Department's stance, have largely remained on the sidelines, with fewer than 3% offering ESG funds in their investment menu. The Proposed Rule removes the impediments to ESG considerations, returning to fiduciaries their broad mandate to consider all relevant factors.

The Proposed Rule restores fiduciary authority to consider all relevant factors

Since 1978, Department regulations have required fiduciaries to consider all relevant factors when choosing among available investment options. The *Financial Factors* rule replaced this well-understood legal standard with a new and ill-defined "pecuniary" test, causing considerable confusion. The Proposed Rule appropriately eliminates this new term, restoring the traditional all-relevant-factors test.

We are particularly supportive of paragraph (b)(4) which, as the preamble states, "clarifies and confirms that a fiduciary may consider *any* factor material to the risk-return analysis, including climate change and other ESG factors." This reaffirms that "under ERISA, if a fiduciary prudently concludes that climate change or another ESG factor is material to an investment or investment course of action under consideration, the fiduciary can and should consider it and act accordingly, as would be the case with respect to any material risk-return factor." In our view, the Proposed Rule is consistent with, and encapsulates, the spirit and text of ERISA, as stated in the paragraph (c)(1), "A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan."

The Proposed Rule clarifies that investment options incorporating relevant climate and other ESG factors are eligible as defaults

We endorse the Department's rescission of the prohibition on certain investment alternatives being used as a default investment: the Qualified Default Investment Alternative (QDIA). A fiduciary's responsibilities of prudence and loyalty are no different for a QDIA than for other plan investments, and if a participant does not wish to invest in the QDIA, they can select another investment vehicle. Any other approach would, as the Department observes in the preamble, "only serve to harm participants by depriving them of otherwise financially prudent options as QDIAs."

The Proposed Rule clarifies that ERISA plans may continue to make prudent investments that provide collateral benefits for workers, communities, and the environment

The *Financial Factors* rule provided that non-financial factors that offer collateral benefits to beneficiaries could be used to decide between funds only where the funds are economically "indistinguishable" (a provision known as the "tie-breaker rule.") This untenable standard effectively prohibited the use of collateral benefits altogether, a stark departure from longstanding Department guidance. While the Proposed Rule's "equally serve the financial interests of the plan" language is an improvement on the term "indistinguishable," we suggest that the language is still too narrow. The issue is not how closely two or more investments resemble one another, but whether they are each the product of a prudent selection process. Fiduciaries should receive equal deference if their investment choice is the product of such a process. We believe it is more appropriate for the collateral benefit provision in the final rule to focus on whether investments are equally prudent (i.e., the output of a prudent fiduciary process,) rather than on an analysis of the equivalence of their financial characteristics.

The Proposed Rule restores fiduciary authority to make prudent decisions in proxy voting

We strongly support the ability of ERISA plan fiduciaries to exercise their judgment to vote proxies in the best interest of participants and beneficiaries. ERISA's fiduciary duties include active ownership, including informed proxy voting on shareholder proposals affecting companies owned by the plan. Fiduciaries must be given discretion to vote on these proposals, exercising critical oversight that has been shown to reduce downside risk. We support the Proposed Rule's revisions to the current rule, rightfully restoring a fiduciary's ability to vote on a wide array of important issues, including climate change.

Climate aligned investing will reduce unpriced risk, create jobs, and generate wealth

The physical risks of climate change present a minefield that fiduciaries must attempt to navigate. The transition to a net-zero economy will require nearly every industry to be redesigned and rebuilt, resulting in many stranded assets. But this transition also presents generational wealth and job creation opportunities. The Proposed Rule clears the way for fiduciaries to offer retirement investors access to these investment opportunities, that other institutional investors are now pursuing and to which retirement savers say they want access.

The Proposed Rule allows fiduciaries to consider all available information in seeking to best serve the interests of the plan's participants and beneficiaries. It eliminates confusing language and restores the authority to exercise shareholder rights in the beneficiaries' best interests. It represents a return to ERISA standards that have served American workers well in the nearly 50 years since ERISA became law. We at Sierra Nevada appreciate the Department's hard work in drafting this timely and thoughtful Proposed Rule.

Sincerely,

Mandi McKay
Director of Sustainability & Social Responsibility
Sierra Nevada Brewing Co

cc: Honorable Marty Walsh, Secretary of Labor