December 10, 2021

Acting Assistant Secretary Ali Khawar
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN 1210-AC03, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Dear Secretary Khawar:

The Securities Industry Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Department of Labor's ("Department") proposed amendments to the "Investment Duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). We support the efforts of the Department and we appreciate the Department's extensive outreach to stakeholders in putting together this new proposal.

We appreciate the Department's recognition that a fiduciary should be able to consider all factors, including environmental, social and governance ("ESG") factors, that it determines are relevant to its investment and risk management decisions. We believe that the proposed rule[2] comports better with the requirements of ERISA and allows a fiduciary's prudent investment

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] 86 Federal Register 196, p. 57272 (October 14, 2021), "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" can be found at: https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf

process to guide its decisions with respect to the factors to be considered when making an investment decision. We believe putting in place a standard that does not tip the scales in any direction and, further, does not allow the subordination of the interests of participants and beneficiaries in their retirement income or financial benefits under a plan to other interests, will provide future certainty for fiduciaries, as well as provide the best result for plan participants and their beneficiaries.

I. A Prudent Process Should be the Focus

We strongly believe that the Department has correctly focused on the prudence of a fiduciary's analysis, rather than singling out particular factors to be considered by the plan fiduciary. Plan fiduciaries need flexibility to determine what is in the best interest of the plan and what factors to consider. While such factors could, in the fiduciary's judgment, include ESG factors, we would advise against requiring the consideration of ESG factors (or any other particular factors). Along these lines, we note that the statement in section (b)(2)(ii)(C) that a fiduciary's duty of prudence "may often require" it to consider ESG factors is inconsistent with the remainder of the proposal and should be revised. We make a specific language suggestion in the next section.

In enacting ERISA, Congress wisely chose not to include a list of permissible or impermissible investments or a list of required or prohibited considerations in making investment decisions. Instead, Congress left those decisions to fiduciaries subject to meeting their duties of care and loyalty and their obligations to act solely in the interests of plan participants and beneficiaries. As plan fiduciaries and participants seek to maximize risk-adjusted returns, their research may prudently lead them to the conclusion that ESG concerns can drive economic outcomes and/or reduce portfolio risk as part of their overall investment analysis. But it could also lead them to a different result which would entail a focus on different factors. In enacting ERISA, Congress intentionally decided to give plan fiduciaries wide discretion and latitude to take investment risks ***the fiduciaries*** determine are appropriate and suitable for their plans based on circumstances prevailing at the time of their decisions, and Congress specifically decided not to substitute their or any regulator's judgment for the fiduciary's judgments.

In this spirit, while we agree that it is appropriate following years of regulatory ping-pong on this issue for the Department to clarify that fiduciaries can, without violating ERISA, consider ESG factors such as climate change, we do not believe the Department meant to (or should) suggest that any particular factor is necessarily relevant to a fiduciary's investment decisions and must be considered. Rather, we believe the Department meant to suggest that ESG factors should be considered where a fiduciary determines it is appropriate, but it should not be given any additional weight beyond that which a fiduciary determines is appropriate.

II. <u>Suggestions for Improvement</u>

While we do believe the Department has put in place a proposal that properly allows a prudent fiduciary to do its job, we do have some suggestions to further build upon the Department's work. We are concerned that some of the phrasing used could inadvertently tip the scale towards inclusion of ESG factors, whether necessary or not. We believe the better course is to provide a balance: a neutral stance on the factors to be weighed by a fiduciary.

1. Change "may often require" to "would not preclude"

As noted above, we suggest the Department change the language in section (b)(2)(ii)(C) that currently reads "The projected return of the portfolio relative to the funding objectives of the plan, which *may often require*…" Our concern is that the phrasing might be read to suggest the Department thinks consideration of climate change or other ESG factors on each investment and investment course of action not only is permitted, but in fact is ***required***. We respectfully suggest that the Department substitute "would not preclude" or "which a fiduciary may determine would require" in place of the phrase "may often require." Our intent is to make clear a fiduciary can consider these factors when it determines it is appropriate to do so (subject, of course, to its duties of care and loyalty). This formulation would clarify that the decision making about the correct factors to consider remains properly in the hands of the fiduciary and that the Department did not intend to suggest otherwise.

2. Change "materiality" to "relevance"

The Department appears to use the terms "materiality" and "relevance" interchangeably throughout the regulation. Our members strongly believe that these two terms are not interchangeable. We believe a fiduciary should be able to consider a factor when relevant, rather than limiting that consideration to matters that meet some kind of materiality threshold. The term "relevance" is a standard that has consistently been used in ERISA and would be appropriate to use in this regulation as well. This would provide fiduciaries with the flexibility to consider those factors that they determine could have an impact on the ultimate return of the investment they are considering.

We would suggest the term "relevance" be used in place of "material" in the following two places:

a. Section (b)(4) currently says: “A prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis…”

   We propose that the paragraph instead read: “A prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action, that depending on the facts and circumstances, is relevant to the risk-return analysis…”

b. Section (c)(2) currently says: “A fiduciary’s evaluation of any investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are material to investment value…”

   We propose that the paragraph instead read: “A fiduciary’s evaluation of any investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are relevant to investment value…”

3. Delete examples to avoid flashpoints

We respectfully request that the final rule delete the examples that are used in section (b)(4) of the proposed regulation. These examples, which highlight factors that might be considered, could be seen as biased in favor of particular factors. It is our hope that this regulation will provide certainty to the industry by avoiding bias towards or against particular factors. Moreover, we are concerned that this list could become stale over time. We would suggest that section (b)(4) end with the phrasing, “which might include, for example, environmental, social and governance factors.” Parts (i)(ii) and (iii) of section (b)(4) would then be removed. Lastly, we would also replace the word “material” with “relevant” as indicated above. The end result would be a paragraph that reads for (b)(4):

> A prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is relevant to the risk-return analysis, which might include, for example, environmental, social and governance factors.

4. Tiebreaker test disclosure unclear

We suggest the Department eliminate the new disclosure requirement. There are already various other disclosure requirements under existing laws that must be provided with regard to investment options. The creation of a new requirement with different details to be highlighted is onerous for no corresponding benefit. Plus, this singles out particular factors as being ones that need to meet additional requirements. As we have noted above, ERISA is, and should be, factor neutral. It is the process that must be prudent.

Should the Department choose not to eliminate the disclosure requirement, it would be helpful for the Department to clarify the timing for when fiduciaries need to provide the disclosure, and what needs to be included within that disclosure. We recommend the disclosure be made available before the initial investment, and that it should focus on the characteristics of the fund itself based on information from sources already available such as fund fact sheets, etc…, as opposed to focusing on any particular benefit.

We would also point out that participant demand should not be considered a collateral consideration that raises a tie-breaker issue. Instead, fiduciaries should be able to consider participant demand when constructing a plan menu. As long as any fund placed on the platform was prudently selected, it would be appropriate for a plan fiduciary to respond to participant demand by potentially adding an ESG-themed fund.

5. Proxy Voting

We respectfully suggest that the Department change the proxy voting language in section (d)(4)(ii). The proposal clearly contemplates that a plan investor in a collective trust specifically permits the proxy voting guidelines of the collective trust to override the plan's own proxy voting guidelines. We urge the Department to allow the same process when a plan hires an investment manager to manage the assets of a plan in a separate account. As the Department has pointed out in the Avon letter[3], proxy voting is part and parcel of investment management decisions. "In general, the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock." The Avon letter goes on to say that if the plan trustee or named fiduciary has delegated investment authority but retains the right to vote proxies, an ERISA violation could occur. While the Avon letter permits a plan fiduciary to specifically retain this right, we believe the regulation should reflect Avon's general rule and explicitly allow an appointing plan fiduciary to adopt the investment manager's proxy voting guidelines.

We would also suggest further amending the language in (d)(4)(ii) to include the phrasing "To the extent that" at the beginning of that sentence and incorporate it into the next sentence. While the proposal contemplates that the investment manager of a pooled investment vehicle may be subject to the investment policy statement of multiple employee benefit plan investors, the investment manager of a pooled investment vehicle usually utilizes its own proxy voting policy and procedures. The investment manager's proxy voting policy and procedures will govern the pooled vehicle instead of the possibly competing policy statement of multiple employee benefit

[3] 1988 WL 897696, Pension and Welfare Benefits Administration (February 23, 1988)

plan investors. The new phrasing would read: "To the extent that an investment manager of a pooled investment vehicle holds assets of more than one employee benefit plan may be subject to an investment policy statement that conflicts with the policy of another plan, then compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies."

We would also recommend the Department strike (d)(2)(iii) from the proposed rule. Since fiduciaries of ERISA covered benefit plans already have a legal obligation under ERISA to select and monitor service providers, including proxy advisors, it would be redundant to include language requiring a fiduciary to follow the fiduciary's obligations. The proposed special monitoring obligation in (d)(2)(iii) singles out service providers who provide voting recommendations. This is unnecessary given the current ERISA framework in place to which fiduciaries already are subject.

6. Conclusion

We appreciate the Department's work on this proposal, and believe that it goes a long way toward neutrality. We hope our suggestions are helpful and if we can provide any further assistance, please do not hesitate to contact us.

Sincerely,

Lisa J Bleier

Lisa J. Bleier