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Submitter Information

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General Comment

I am an ERISA lawyer who practiced as in-house counsel with a major financial services firm. Although now retired from full-time employment, I do stay involved with the benefits world and have closely followed the debate over environmental, social and governance ("ESG") issues in the development of Department of Labor guidance.

In general I appreciate the Department's current effort to undue the impact of the 2020 Investment Duties regulation, which has had the effect of undermining the consideration of ESG issues in investment decision-making. Although not completely clear in the 2020 final rule, the 2020 rule preamble appeared to portray ESG issues as a "suspect class" in investment decision-making. The new proposed rule would directly reverse that bias in the regulation itself. I do note that only ESG issues are now provided as concrete examples in the rule proposal. The Department may want to consider other examples purely for purposes of a balanced perspective.

A second comment concerns the new disclosure proposed with respect to participant-directed defined contribution plans where a designated investment alternative has been chosen in a so-called "tie-breaker" situation because of collateral benefits created in addition to investment return to the plan. It does not appear that the collateral benefit is limited to ESG matters. I don't think that this disclosure will be particularly useful and, more importantly, it may be difficult to determine when it applies. The preamble discussion includes the following comment: "The proposal intentionally provides flexibility in how plan fiduciaries may fulfill this requirement given the unknown spectrum of collateral benefits that might influence a plan fiduciary's selection." [86 FR 57280] Even assuming that such a collateral benefit may be determined in a given case, the critical question is whether it should have any impact on the investment information already required for participants in making their fund choices.

In addition, the Department acknowledges in the proposal preamble that the proposed requirement may often be addressed by the disclosures already required under current regulations. [86 FR 57280] This suggests that the effort to decide whether additional wording is appropriate would not be commensurate with the value of any such disclosures to participants.

The proposed rule states that such additional disclosure must be 'prominently displayed" in the disclosure materials provided to participant and beneficiaries. The wording could be construed to require a greater focus on the collateral benefit, which seems to risk a distraction from basic and more important information required under the current regulations.

One last point, the addition of this disclosure to the investment duties regulation could be missed by those who view regulation 29 CFR 2550.404a-5 as the complete list of participant disclosure for such plans. In order to avoid such mishaps, it would be helpful (if the disclosure requirement is retained) to amend 29 CFR 2550.404a-5 to add a cross-reference or transfer the new disclosure requirement to 29 CFR 2550.404a-5 in its entirety. Of course, as mentioned above, I think the better course of action is to delete the disclosure requirement from the final rule altogether.

Thank you for your consideration.

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