December 10, 2021

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

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (File Number RIN 1210-AC03)

Dear Acting Assistant Secretary Khawar,

The Interfaith Center on Corporate Responsibility (ICCR) is a broad coalition of institutional investors collectively representing over $4 trillion in invested capital. ICCR members, a cross section of faith-based investors, asset managers, pension funds, foundations, and other long-term institutional investors, have 50 years of experience engaging companies on environmental, social, and governance ("ESG") issues that are critical to long-term value creation. ICCR appreciates the opportunity to comment on the changes set forth in the Notice of Proposed Rulemaking ("NPRM") entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the changes are referred to herein as the "Proposed Rule").

ICCR strongly supports the Proposed Rule. Last year, ICCR submitted comments strongly opposing both of the 2020 rulemakings whose provisions the Proposed Rule would modify, "Financial Factors in Selecting Plan Investments" (the "ESG Rule")[1] and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (the "Proxy Voting Rule")[2] (together, the "2020 Rules"). Those comment letters are attached. In brief, ICCR argued that the changes proposed in the Financial Factors rulemaking "would deter consideration of ESG factors by ERISA fiduciaries, and perhaps others whose regulatory frameworks follow ERISA, despite ample evidence that integrating such factors can improve performance." We contended that the Proxy Voting Rule reflected "an unwarranted skepticism about shareholder voting, shareholder proposals and ESG considerations," and would discourage the exercise of shareholder rights despite abundant empirical evidence on the value of proxy voting and the ESG reforms it makes possible.

1 https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00663.pdf
2 https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00283.pdf

ICCR also objected to the process by which the 2020 Rules were adopted, arguing that the 30-day comment periods for both of the 2020 Rules were far too short to allow potentially affected parties to study the proposals and register their views.[3] The Department did not extend the comment period for either of the 2020 Rules and adopted final rules in December 2020, after it had become clear that the Trump Administration would leave office just a month later.

The 2020 Rules were adopted despite overwhelming opposition: An analysis undertaken by ICCR and several other organizations found that 95% of comments opposed adoption of the ESG Rule. Of the 86 asset managers that commented, only one small firm supported the ESG Rule; opposition was registered not only by socially responsible investment firms but also by large mainstream investors such as BlackRock, State Street and Vanguard.[4]

Many of ICCR's substantive comments on the 2020 Rules apply to the Proposed Rule and we do not repeat them here. Broadly, the 2020 Rules departed from settled standards with no evidence that fiduciaries were confused by or out of compliance with previous sub-regulatory guidance. The Department's rules should not reflect biases against particular investment approaches or considerations, and provisions of the 2020 Rules that communicate skepticism about ESG considerations in investment and stewardship should be removed.

Likewise, ICCR supports the Department's proposal to return to its approach to proxy voting that prevailed prior to the Proxy Voting Rule's adoption. We concur with the Department that "[t]he exercise of shareholder rights is important to ensuring management accountability to the shareholders that own the company."[5] The Proxy Voting Rule inappropriately discourages fiduciaries from exercising shareholder rights by emphasizing that ERISA's fiduciary duties do not require all shares to be voted, singling out proxy voting for special monitoring and documentation obligations, and providing two "safe harbors" allowing fiduciaries to refrain from voting under many circumstances. We support the elimination of those provisions in the Proposed Rule.

For the above reasons and the reasons extensively laid out in the attached comment letters from 2020, we strongly support the Department of Labor's Proposed Rule.

Thank you for this opportunity to provide our views on this important matter. Please feel free to contact Josh Zinner (jzinner@iccr.org) with any questions.

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[3] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00011.pdf; https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00008.pdf

[4] https://www.ussif.org/Files/Public_Policy/DOL_Comments_Reporting_FINAL.pdf, at 3-4.

[5] NPRM, at 31.

Sincerely,

Josh Zinner
CEO
Interfaith Center on Corporate Responsibility

ATTACHMENT 1

July 30, 2020

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

Re: Department of Labor RIN 1210-AB95, "Financial Factors in Selecting Plan Investments"

Dear Assistant Secretary Wilson,

The Interfaith Center on Corporate Responsibility (ICCR) is a broad coalition of institutional investors collectively representing over $500 billion in invested capital. ICCR members, a cross section of faith-based investors, asset managers, pension funds, foundations, and other long-term institutional investors, have nearly 50 years of experience engaging companies on environmental, social, and governance ("ESG") issues that are critical to long-term value creation. ICCR members fundamentally believe that companies that meaningfully address environmental and social risks, and that have strong and accountable governance practices, are companies that are best positioned for long-term success.

ICCR and the 138 member signatories to this comment letter write to express our strong opposition to the Department of Labor's (the "Department's") proposed rule, "Financial Factors in Selecting Plan Investments" (the "Proposed Rule"), set forth in the Notice of Proposed Rulemaking ("NPRM").[1] The Proposed Rule would impose significant analytical and documentation burdens on fiduciaries of benefit plans governed by the Employee Retirement Income Security Act ("ERISA") wishing to select (or allow individual account holders to select) investments that use ESG factors in investment analysis or that provide ESG benefits.

We are concerned that the Proposed Rule will deter consideration of ESG factors by ERISA fiduciaries, and perhaps others whose regulatory frameworks follow ERISA, despite ample evidence that integrating such factors can improve performance. While not all of ICCR's members are governed by ERISA, we are further concerned that the NPRM broadly calls into question, with no factual basis, not only "ESG-themed" investment products but also ESG ratings and the use of ESG factors in traditional investment analysis.

The NPRM does not establish either that the Proposed Rule is necessary or that it would provide appreciable benefits, and it fails to analyze costs to plans and their participants and

1 Financial Factors in Selecting Plan Investments (RIN 1210-AB95), 85 Fed. Reg. 39113 (June 30, 2020).

beneficiaries. These major shortcomings preclude an adequate cost-benefit analysis. Accordingly, we strongly urge the Department to withdraw the Proposed Rule.

Background--ESG and Investing

Consideration of ESG factors in investing has achieved widespread acceptance both in the U.S. and globally in recent years, since ICCR members began engaging with companies about environmental, social, and governance issues in the early 1970s. Although much of the NPRM focuses on investments promising moral or ethical ESG benefits, major growth has occurred in integration of ESG considerations in order to improve portfolio company performance.[2] According to a survey by RBC Global Asset Management, 70% of institutional investors in Canada, the U.S. and the U.K. "apply ESG principles to investment decisions," with 53% of respondents citing mitigation of risk and higher returns as reasons for doing so.[3]

The CFA Institute, a global association of investment professionals, has stated that it believes that the requirement that investment professionals weigh all material information "includes the consideration of material ESG information/considerations (ESG factoring) as an important component of a complete and thorough financial analysis for any actively managed fundamental investment portfolio."[4] "ESG Investing and Analysis" is one of three areas of "research and thought leadership" featured on the organization's home page.[5] The Principles for Responsible Investment boasts over 3,000 signatories with more than $100 trillion in assets under management; signatories commit to "incorporat[ing] ESG issues into investment analysis and decision making processes."[6]

In his 2020 letter to CEOs, Larry Fink, the Chairman and CEO of BlackRock, the world's largest asset manager, announced that BlackRock would "place sustainability at the center of [its] investment approach" and asserted that "[c]limate change has become a defining factor in companies' long-term prospects." Similarly, State Street Global Advisors President and CEO Cyrus Taraporevala recently noted: "Having already engaged with companies on a number of governance matters for many years, we see that shareholder value is increasingly being driven by issues such as climate change, labor practices, and consumer product safety. We believe that addressing material ESG issues is good business practice and essential to a company's long-term financial performance..."[7] The Business Roundtable, an association of large U.S. company CEOs, has recognized the importance of ESG considerations; last year, it issued a

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2 See https://corpgov.law.harvard.edu/2020/03/02/top-10-esg-trends-for-the-new-decade/; https://personal.vanguard.com/pdf/ISGESG.pdf; https://www.bsr.org/reports/BSR_Trends_in_ESG_Integration.pdf; https://www.ussif.org/files/Publications/SIF_Trends_14.F.ES.pdf

3 Hazel Bradford, ""70% of Institutional Investors Apply ESG to Investment Decisions—Survey," *Pensions & Investments*, Oct. 16, 2019 (https://www.pionline.com/esg/70-institutional-investors-apply-esg-investment-decisions-survey)

4 https://www.cfainstitute.org/-/media/documents/article/position-paper/cfa-institute-position-statement-esg.ashx

5 See https://www.cfainstitute.org/

6 https://www.unpri.org/pri/about-the-pri

7 https://www.ssga.com/us/en/individual/etfs/insights/informing-better-decisions-with-esg (emphasis in original)

"Statement on the Purpose of the Corporation" articulating a "fundamental commitment" to all stakeholders, including respecting "people in our communities" and protecting the environment.[8]

Empirical evidence indicates that better ESG performance is associated with lower idiosyncratic risk, lower probability of financial distress/bankruptcy, more positive analyst recommendations, lower cost of capital, and superior returns.[9] A study of shareholder engagements on environmental and social issues found that successful engagements led to higher sales growth and that successfully engaged firms with low ESG scores prior to engagement had statistically significant excess cumulative abnormal returns compared with similar non-engaged firms in the year following closure of the engagement.[10] A 2016 study found, among other things, that firms with high corporate social responsibility ("CSR") ratings are valued more highly than firms with low ratings, and firms with higher CEO pay-performance sensitivity and firms in jurisdictions with stronger legal protections for shareholders engage in more CSR activities, which supports a conclusion that CSR is value-enhancing.[11]

Insufficient Economic Justification and Flawed Cost/Benefit Analysis

The NPRM's justification for the Proposed Rule is speculative and poorly supported, suggesting that the Department is motivated more by political hostility to ESG issues than by a well-founded concern for plan participants and beneficiaries. The NPRM expresses worry that "the growing emphasis on ESG investing, and other non-pecuniary factors, may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defraying reasonable administrative expenses."[12] But the statistics cited in the NPRM do not track the proposed solutions to this supposed problem, as they conflate "ESG investing," "consider[ing] ESG factors in investment decisions," "ESG-themed" investment options, and "socially responsible" equity funds.[13]

No effort is made to assess the extent to which any of these products or approaches explicitly aim to provide non-pecuniary benefits—choices to which the Proposed Rule's "tie-breaker" provision applies--as opposed to considering ESG factors as part of traditional investment

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8 Business Roundtable, "Statement on the Purpose of a Corporation" (2019) (https://opportunity.businessroundtable.org/wp-content/uploads/2019/12/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures.pdf)

9 See Allen Ferrell et al., "Socially Responsible Firms," at 2-3 (2016) ("Ferrell Study")(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464561); https://hbr.org/2019/05/the-investor-revolution; https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf; https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf

10 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219; https://www.bsr.org/reports/BSR_Trends_in_ESG_Integration.pdf

11 Ferrell Study, supra note __, at 21-22, 25, 30.

12 NPRM, at 39120.

13 NPRM, at 39120-39121.

analysis.[14] The NPRM cites a law review article that defines the former as "collateral benefits" ESG investing and the latter as "risk-return" ESG investing, but often refers to the two concepts interchangeably.[15] Without some idea of the prevalence of each among ERISA-governed funds, it is not possible to analyze the benefits and costs of the Proposed Rule's differing approaches to collateral benefits and risk-return investing.

Nor does the NPRM evaluate the financial performance of various types of ESG investing compared to non-ESG counterparts. There is evidence that ESG funds, indices and portfolios outperform market and other benchmark indices over at least some periods.[16] Reporting on the first quarter of 2020, BlackRock noted that it "observed better risk-adjusted performance across sustainable products globally, with 94% of a globally-representative selection of widely-analyzed sustainable indices outperforming their parent benchmarks." That performance, according to BlackRock, "aligns with the resilience we have seen in sustainable strategies during prior downturns" and is attributable to a "range of material sustainability characteristics, including job satisfaction of employees, the strength of customer relations, or the effectiveness of the company's board."[17] The absence of such a discussion in the NPRM may reflect the fact that burdening fiduciaries' ability to select investments that outperform is more fairly characterized as a regulatory cost than a benefit.

The NPRM's analytical fuzziness and lack of performance data limit the Department's ability to quantify, even in a rough way, the benefits of the Proposed Rule. The NPRM's assertion that "[t]o the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participants' and beneficiaries' retirement investment returns,"[18] is purely speculative. As well, the NPRM makes contradictory claims about the extent to which plan fiduciaries are violating existing sub-regulatory guidance on the issues addressed by the Proposed Rule. On the one hand, the NPRM asserts that the Proposed Rule would provide the benefit of "eliminat[ing] confusion that plan fiduciaries may currently face."[19] In the next breath, however, the NPRM states that the Department believes that the number of plan fiduciaries that are not following or misinterpreting the guidance is "small."[20] If nearly all fiduciaries are following the guidance, why is the Proposed Rule necessary? Given the great

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14 The NPRM cites a law review article that defines the former as "collateral benefits" ESG investing and the latter as "risk-return" ESG investing. NPRM, at 39120 (citing Max Schanzenbach & Robert Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee," 72 Stan. L. Rev. 381, 392-97 (2020)).

15 NPRM, at 39120 (citing Max Schanzenbach & Robert Sitkoff, "Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee," 72 Stan. L. Rev. 381, 392-97 (2020)).

16 E.g., https://www.forbes.com/sites/brendancoffey/2019/11/12/esg-stocks-are-having-a-fantastic-year/#298759412fbb; https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103; https://www.morningstar.com/articles/976361/sustainable-funds-weather-the-first-quarter-better-thanconventional-Funds; https://www.top1000funds.com/wp-content/uploads/2013/01/Optimizing-ESG-Factors-in-Portfolio-Construction.pdf

17 https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf, at 3.

18 NPRM, at 39121.

19 NPRM, at 39119.

20 NPRM, at 39120.

uncertainty about the benefits of the Proposed Rule, continuing with the sub-regulatory guidance should have been one of the alternatives to the Proposed Rule considered in the NPRM.

In addition to this deficient showing on purported benefits, the NPRM does not adequately support its analysis of potential costs associated with the Proposed Rule. The NPRM concludes that the Proposed Rule would not impose "a significant increase in hourly burden or cost" because the true "ties" between "economically indistinguishable" investments that would permit a fiduciary to choose the one that provides a collateral ESG benefit "occur very rarely in practice, if at all."[21] The only basis provided for that conclusion is a single law review article referring to such equivalent investments, without support, as "unicorns."[22] Thus, the NPRM's conclusion regarding costs of complying with the tie-breaker provision of the Proposed Rule completely lacks support.

Potential foregone benefits that would flow from reducing ESG investing are not limited to those related to a specific investment decision. Investing in which ESG considerations play a role, especially the type of engagement with portfolio companies that ICCR members have led for decades, can bring about changes in corporate behavior that protect the value of other securities across the portfolio, as well as investments in other asset classes. Larry Fink points out in his recent CEO letter that climate impacts span asset classes[23]; thus, curbing greenhouse gas emissions by a company whose equity security a plan holds may protect value not only of the plan's investment in that company, by allowing it to avoid disruptions from impending regulations, but also for the plan's real estate investments, which face physical risk from climate change.

Taking steps to prevent catastrophic warming would also reduce risks to the global financial system and the broader economy.[24] These changes in behavior could well be reduced by the Proposed Rule, and the Department has an obligation to identify and analyze the potential negative impacts to companies, sectors, the financial system and the economy. Indeed, where ESG factors are material, we believe that the Department should clarify for ERISA fiduciaries that the duty of care under section 404(a)(1)(B) of ERISA requires their consideration, rather than imposing additional analytic and documentation burdens as the Proposed Rule now does.

<u>The Proposed Rule's Tie-Breaker Standard is at Odds with its Ostensible Purpose</u>

The long-standing purpose of the tie-breaker test, which has been in effect for years in the Department's sub-regulatory guidance, has been to ensure that a fiduciary does not accept lower expected returns or assume greater risks in order to obtain collateral benefits. Guidance issued in 2018 reaffirmed that standard.[25]

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21 NPRM, at 39123, 39125.
22 Rulemaking, article cite
23 https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter
24 <u>See</u> https://www.ceres.org/sites/default/files/reports/2020-06/Financial%20Regulators%20FULL%20FINAL.pdf;
25 <u>See</u> Field Assistance Bulletin (FAB) 2018-01.

The Proposed Rule goes far beyond the traditional tie-breaker test, which focused on risks and expected returns. The new test would require any investment option a fiduciary wants to choose based (in whole or in part) on non-pecuniary (or collateral benefit) reasons to be identical in every way, including fee structure, performance history, investment strategy, asset composition, and investment strategy, to an alternative investment except for the non-pecuniary benefit. Such an identical alternative investment might well be unavailable in the market, which would preclude a fiduciary from making the required comparison and thus from choosing the investment with the non-pecuniary benefit. The impossibility of satisfying this standard suggests that the test is designed to deter fiduciaries from considering investments with collateral benefits.

The proposed standard for defined contribution plan investment options is even more onerous. It requires that a fiduciary use "only objective risk-return criteria" to choose investment alternatives, which seems to place even the tie-breaker test off-limits. The rule for defined contribution plans also defines ESG investing more broadly: rather than an investment choice that provides collateral ESG benefits, the rule applies anytime a fiduciary wants to add "one or more prudently selected, well managed, and properly diversified investment alternatives that include one or more environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name."[26]

It is unclear what an ESG "assessment or judgment" is, or what it means for such a determination to be included in the investment mandate. Would an actively managed fund whose prospectus states that it does not aim to provide non-pecuniary ESG benefits and does not include ESG in its name but does incorporate ESG data into its traditional investment analysis fall within this provision? The NPRM does not discuss the reason the Proposed Rule treats decisions made by defined benefit and defined contributions fiduciaries differently, but absent a compelling justification, the same test—the existing tie-breaker test—should apply to both.

Finally, the standard for deeming an ESG factor to be pecuniary includes too many subjective terms and burdensome requirements, which we believe will have a chilling effect. ESG "or other similarly oriented considerations," whatever the latter are, "are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories."[27] Unpacking that provision reveals several thorny questions, involving subjective judgments, with which a fiduciary would need to grapple. Reasonable, informed people can disagree about these assessments, like whether a consideration is material to a particular industry or company or the view a qualified investment professional would take on that question. How do generally accepted investment theories, which tend to be basic finance theories like diversification and the capital asset pricing model, apply to something as granular as ESG

[26] NPRM, at 39127.
[27] NPRM, at 39127.

considerations? This standard contains numerous potential pitfalls designed to make it difficult and risky for a fiduciary to select an investment that has taken the uncontroversial step of incorporating ESG factors into traditional investment analysis. All of this is being proposed without any evidence whatsoever that fiduciaries' choices of such investments have resulted in lower returns or higher risk.

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For all of the above reasons, we strongly urge the Department of Labor to withdraw the Proposed Rule.

We appreciate this opportunity to provide our views on this important matter. Please feel free to contact Josh Zinner (jzinner@iccr.org) with any questions.

Sincerely,

Josh Zinner
CEO
Interfaith Center on Corporate Responsibility

ICCR Member Signatories:

444 S Foundation
Adrian Dominican Sisters, Portfolio Advisory Board
AJF Financial Services, Inc.
As You Sow
Avera Health
Benedictine Coalition for Responsible Investment
Bon Secours Mercy Health
Boston Common Asset Management
Boston Trust Walden
Brethren Foundation Funds, Inc.
BVM Shareholder Education/Advocacy Group (SEA)
Center for Social Concerns, University of Notre Dame
Christian Brothers Investment Services (CBIS)
Christian Church Foundation
Church Investment Group
Church of the Brethren Benefit Trust
Clean Yield Asset Management
ClearBridge Investments
Committee on Mission Responsibility Through Investment of the Presbyterian Church U.S.A.
CommonSpirit Health
Congregation of Sisters of St. Agnes
Congregation of St. Basil
Congregation of St. Joseph
Corporate Responsibility Office - The Province of Saint Joseph of the Capuchin Order

Dana Investment Advisors
Daughters of Charity, Province of St. Louise
Domini Impact Investments LLC
Dominican Sisters ~ Grand Rapids
Dominican Sisters of Mission San Jose
Dominican Sisters of Sparkill
Dominican Sisters of Springfield, IL
Dominican Sisters of San Rafael
Episcopal Diocese of Western Massachusetts
Ethos Foundation
Etica Sgr - Responsible Investments
Everence and the Praxis Mutual Funds
Felician Sisters of North America
Figure 8 Investment Strategies
FOR Investment Partners
Franciscan Sisters of Allegany NY
Friends Fiduciary Corporation
FSPA
Heartland Initiative
Investor Advocates for Social Justice
Investor Voice
Jessie Smith Noyes Foundation
Jesuit Committee on Investment Responsibility
Jesuits of the US Central and Southern Province
Maryknoll Fathers and Brothers
Maryknoll Sisters
Mercy Investment Services, Inc.
MicroVest Capital Management
Miller/Howard Investments, Inc.
Nathan Cummings Foundation
Newground Social Investment
Nia Impact Capital
NorthStar Asset Management, Inc.
Northwest Coalition for Responsible Investment
OIP Trust/Missionary Oblates
Priests of the Sacred Heart, US Province
Province of St. Mary of the Capuchin Order
Proxy Impact
Racine Dominicans - Socially Responsible Investment Committee
Reform Pension Board
Region VI Coalition for Responsible Investment
Religious of the Sacred Heart of Mary, WAP
Riverwater Partners
SC Group
SCC Corporate Responsibility Committee
School Sisters of Notre Dame
School Sisters of Notre Dame Cooperative Investment Fund
School Sisters of St. Francis
Seventh Generation Interfaith Inc.
SHARE
Sisters of Bon Secours USA
Sisters of Charity of Cincinnati Ohio
Sisters of Charity of New York
Sisters of Charity of Saint Elizabeth
Sisters of Charity, BVM
Sisters of Charity, Halifax
Sisters of Mary Reparatrix
Sisters of Saint Joseph of Chestnut Hill, Philadelphia, PA
Sisters of St. Dominic of Blauvelt, New York
Sisters of St. Dominic of Caldwell
Sisters of St. Francis of Philadelphia
Sisters of St. Francis-Dubuque
Sisters of St. Joseph of Baden, PA
Sisters of St. Joseph of Orange
Sisters of St. Joseph of Springfield
Sisters of St. Joseph, St. Louis, MO
Sisters of the Holy Names of Jesus and Mary

Sisters of the Humility of Mary
Sisters of the Presentation of the BVM of Aberdeeen SD
Skye Advisors LLC
SRIC
Stardust
T'ruah: The Rabbinic Call for Human Rights
The Episcopal Church (DFMS)
The Pension Boards-United Church of Christ, Inc.
Trillium Asset Management
Trinity Health
Union of Concerned Scientists
Unitarian Universalist Association
United Methodist Church Foundation
USA East Province of the Society of Jesus
USA Midwest Province Jesuits
Vert Asset Management

ATTACHMENT 2

October 5, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Proxy Voting and Shareholder Rights NPRM
Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

Dear Acting Assistant Secretary Wilson,

The Interfaith Center on Corporate Responsibility (ICCR) is a broad coalition of institutional investors collectively representing over $500 billion in invested capital. ICCR members believe, based on both empirical research and nearly 50 years of experience engaging companies, that meaningfully addressing environmental and social risks and adopting governance arrangements that promote accountability best position companies for long-term success.

ICCR writes to express our strong opposition to the Department of Labor's (the "Department's") proposed changes to fiduciary standards under the Employee Retirement Income Security Act of 1974 ("ERISA"), "Fiduciary Duties Regarding proxy Voting and Shareholder Rights" (the "Proposed Changes"), set forth in the Notice of Proposed Rulemaking ("NPRM").

The Proposed Changes, which would require ERISA fiduciaries to conduct vote-by-vote analysis of economic impact in order to cast proxy votes, are a transparent effort to discourage ERISA fiduciaries and their service providers from exercising their shareholder rights at portfolio companies. The Department should withdraw the NPRM because:

1. The NPRM offers no coherent justification for the Proposed Changes and reflects an unwarranted skepticism about shareholder voting, shareholder proposals and environmental, social and governance ("ESG") considerations.
2. The NPRM fails to discuss the abundant empirical research showing benefits from both shareholder voting and the kinds of ESG reforms it makes possible;

that omission precludes a proper analysis of whether the benefits the Department claims would flow from the Proposed Changes outweigh the substantial direct and indirect costs they would impose on ERISA fiduciaries, their service providers and our public markets.
3. The analysis the NPRM and Proposed Changes require is poorly explained and involves considerations unrelated to the merits of a proposal.
4. The suggested "permitted practices" are internally inconsistent and offer uncertain protection for fiduciaries.

The NPRM Fails to Make the Case That the Proposed Changes Are Necessary and Reflects an Unwarranted Skepticism About Shareholder Voting, Shareholder Proposals and ESG Considerations

The NPRM offers three reasons rule making is necessary. The first, which is easily dispatched, consists of data regarding shareholdings by ERISA plans; specifically, that fewer shares are held directly by ERISA plans and a lower proportion of ERISA fund assets are invested in public equities.[1] The Department does not explain how those developments, which are characterized as "changed circumstances," support the Proposed Changes, and we can identify no logical connection.

Second, according to the NPRM, ERISA fiduciaries "misunderstand"[2] their fiduciary obligations related to proxy voting and believe that they are required to vote all proxies regardless of economic impact on the plan. No evidence appears in the NPRM, nor could we locate any, supporting the notion that fiduciaries are confused about their obligations with respect to proxy voting. The Avon Letter, which the Department tries to blame for the alleged confusion, came out in 1988; since then, the Department has repeatedly (in 2008, 2016 and 2018) stated that fiduciaries do not have to vote all proxies in order to comply with their fiduciary obligations. For fiduciaries to be confused at this point, both they and their fiduciary counsels would have to have ignored or forgotten this guidance. Given how unlikely that is, it is incumbent on the Department to present some evidence that fiduciaries hold this mistaken belief or are acting in ways that reflect it. The NPRM contains no such evidence.

Relatedly, the Department urges that the problem of fiduciary confusion is "exacerbated" by the increase in the amount and types of shareholder proposals.[3] Although more shareholder proposals are submitted now than in 1988, the total

[1] NPRM, at 11.
[2] NPRM, at 8.
[3] NPRM, at 8.

number of proposals has leveled off in recent years.[4] This argument also illustrates the skepticism about shareholder proposals and ESG considerations that permeates the NPRM, which asserts that fiduciaries' confusion "may be" leading them to act "in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments."[5] The Department apparently assumes that proposals addressing environmental, social and public policy issues by definition do not have an economic impact on the value of plan assets, which is at odds with substantial research (discussed in detail below).

Third, the NPRM urges that "research regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment in the corporation has yielded mixed results."[6] The Department points to a few studies as showing this "mixed" result, but only two of those papers review actual empirical studies. Both Denes et al.[7] and Yermack[8] discuss studies showing both positive and negative impacts on firm performance from different kinds of shareholder votes. Denes et al. note that in more recent studies the relationship between shareholder proposals and firm value has tended to be positive, and Yermack synthesizes studies showing that the more recent tactic of withholding support from directors is associated with a range of positive outcomes, both of which contradict the Department's suggestion that the evidence regarding shareholder voting has shifted in a way that justifies the Proposed Changes.

The remaining studies are far afield from the NPRM's claims and provide no data relevant to the Proposed Changes. One, by Tracie Woidtke, analyzes the relationship between activist public fund ownership of shares in companies and those companies' performance. The paper by James Copland criticizes proxy advisors, and Dorothy Lund's article analyzes the incentives passive investors allegedly have not to vote responsibly but does not include any voting data.

The NPRM does not address research directly on the impact of shareholder voting showing that it can enhance firm value. For example, a 2020 study found that the passage of a corporate social responsibility ("CSR") proposal generates positive

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4 E.g., https://corpgov.law.harvard.edu/2018/11/26/shareholder-voting-in-the-united-states-trends-and-statistics-on-the-2015-2018-proxy-season/ (reporting proposal volume peak in 2008 and decline between 2013 and 2018);

5 NPRM, at 14.

6 NPRM, at 13.

7 Matthew R. Denes et al., "Thirty Years of Shareholder Activism: A Survey of Empirical Research," 44 J. Corp. Fin. 405 (2017).

8 David Yermack, "Shareholder Voting and Corporate Governance" (2010) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523562&download=yes).

abnormal returns.[9] Similarly, a 2012 Journal of Finance study estimated that the passage of a governance proposal causes a positive 2.8% cumulative abnormal return.[10] "Vote no" campaigns against directors, in which shareholders withhold support from directors in uncontested elections, lead to operating performance improvements and more disciplinary CEO turnover, according to a 2008 study.[11] The Department's failure to mention this literature renders its justification misleading and inadequate.

The NPRM Does Not Acknowledge or Weigh the Substantial Indirect Costs Imposed by the Proposed Changes

The NPRM acknowledges the substantial direct costs the Proposed Changes would impose, and provides an "illustration" in an effort to quantify them. However, it only glancingly mentions potential indirect costs that would flow from cutting back on voting by ERISA fiduciaries and their service providers, referring to but not discussing potential "externalities, public goods or other market failures" that could constitute "costs to society."[12] As a result, the NPRM's weighing of costs and benefits from the Proposed Changes is incomplete.

Our system of corporate governance rests on a balance of power among managers, the board and shareholders. Centralized management confers efficiency benefits, but also creates risks that management or directors will pursue actions at odds with shareholders' interests such as embarking on value-destroying strategies or engaging in self-dealing transactions. Shareholders' voting rights act as a check on such activities; shareholders can withhold support in director elections, veto transactions, express their views on executive pay, and endorse policy recommendations advanced in shareholder proposals. Research indicates that institutional investors like ERISA plans collect and analyze information more efficiently than other investors and are more effective monitors.[13]

Shareholders' leverage is not limited to the votes themselves. The possibility of shareholder disapproval shapes companies' actions, and companies put up for a shareholder vote proposals they have good reason to believe will pass. According to

[9] Fernando Martins, "Corporate Social Responsibility, Shareholder Value, and Competition," at 3 (Aug. 14, 2020) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3651240&download=yes).

[10] See Vicente Cuñat, Mireia Gine, & Maria Guadalupe, "The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value," 67 J. Fin. 1943 (2012) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555961)

[11] Diane Del Guercio et al., "Do Boards Pay Attention When Institutional Investor Activists 'Just Vote No'?", at 3-4 (2008) (https://www.readcube.com/articles/10.2139%2Fssrn.575242).

[12] NPRM, at 49.

[13] See https://clsbluesky.law.columbia.edu/2018/10/03/is-shareholder-voting-an-effective-corporate-governance-mechanism/.

a recent study, the competition for votes "provides management and counterparties with incentives to take preemptive actions that will bring about greater net benefits for the company and investors."[14] The NPR views a policy of voting with management as benign because "nearly all management proposals are approved with little opposition,"[15] but a lower likelihood of disapproval would be expected to lead to management proposals that are less value-maximizing. Those effects would likely be most pronounced where the interests of management and shareholders are least aligned, such as executive pay.

As we have argued in response to a recent rule making by the Department on ESG and investment choices, there is strong evidence of a link between superior ESG performance and firm financial performance. The NPRM ignores this literature, without explanation.

- A 2018 Bank of America study "found that firms with a better ESG record than their peers produced higher three-year returns, were more likely to become high-quality stocks, were less likely to have large price declines, and were less likely to go bankrupt.[16]
- Deutsche Asset & Wealth Management and researchers from the University of Hamburg surveyed the academic literature and found that 62.6% of meta-analyses showed a positive relationship between ESG and corporate financial performance.[17]
- A 2010 study found that shareholder proponents target "firms that both underperform and have generally poor governance structures" and concluded that the evidence did not support the claim that proponents "pursue self-serving agendas."[18]

Specific ESG considerations can also drive company performance. For example, empirical studies have found a consistent negative relationship between governance arrangements insulating boards from shareholder influence—which generally limit the effectiveness of shareholder voting--and company performance.

- An influential 2003 study found that companies whose governance provisions provided the strongest shareholder rights and lowest management power, as

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[14] Kobi Kastiel & Yaron Nili, "Competing for Votes," 10 Harv. Bus. L. Rev. 287, 291 (2020) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541&download=yes).

[15] NPRM, at 26.

[16] Robert G. Eccles & Svetlana Klimenko, "The Investor Revolution," *Harvard Business Review*, May-June 2019 (https://hbr.org/2019/05/the-investor-revolution)

[17] Gunnar Friede et al., "ESG and Corporate Financial Performance: Mapping the Landscape," p.7 (Dec. 2015) (https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf)

[18] Luc Renneboog & Peter G. Szilagyi, "The Role of Shareholder Proposals in Corporate Governance," at 16, 20-21 (July 2010) (https://edwards.usask.ca/centres/csfm/_files/papers2010/3b-The%20Role%20of%20Shareholder%20Proposals%20in%20Corporate%20Governance,%20L.%20Renneboog%20and%20P.%20Szilagyi.pdf)

measured using a governance index sometimes referred to as the "G Index," outperformed those with the weakest shareholder rights and highest management power by a statistically significant 8.5% per year.

- Weaker shareholder rights were also associated with lower profitability and sales growth.[19]
- Classified boards are associated with lower firm value and less performance-sensitive compensation.[20]

A Bank of America Merrill Lynch study "found that companies with high scores on gender/diversity measures, including board diversity, women in management and company policies on diversity/inclusion, generally saw lower subsequent price and EPS volatility and higher subsequent returns on equity than those with low scores."[21] Companies with one or more women on boards delivered higher average returns on equity, lower leverage, better average growth and higher price/book value multiples in a six-year Credit Suisse Research Institute study of 2,360 global companies.[22]

Shareholder voting is essential to obtaining value-enhancing ESG reforms. Voting serves a communication function, and helps mitigate the collective action problem resulting from widely dispersed shareholdings in public companies.[23] The dramatic reduction in the proportion of large-cap public companies with classified boards—their number dropped by more than 50% from 2000 to 2012[24]--was spurred by shareholder votes on the issue.[25] Similarly, shareholder campaigns pressing for greater board diversity led to a substantial increase in the proportion of S&P 500

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[19] Paul Gompers et al., "Corporate Governance and Equity Prices," Quant. J. Econ., 118(1), 107-155 (Feb. 2003) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=278920)

[20] Alma Cohen & Charles C.Y. Wang, "How Do Staggered Boards Affect Shareholder Value?" at 3 (July 2013) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2141410&download=yes); Olubunmi Faleye, "Classified Boards, Firm Value, and Managerial Entrenchment," 83 J. F. Econ. 501 (2007) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=877216)

[21] See https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf

[22] Credit Suisse, "Does Gender Diversity Improve Performance?" Jul. 31, 2012 (https://www.credit-suisse.com/us/en/about-us/research/research-institute/news-and-videos/articles/news-and-expertise/2012/07/en/does-gender-diversity-improve-performance.html)

[23] Alan R. Palmiter, "The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation," 45 Ala. L. Rev. 879, 901 (1994) (https://wakespace.lib.wfu.edu/handle/10339/26139)

[24] Cohen & Wang, at 1-2.

[25] See, e.g., https://www.chicagotribune.com/business/ct-xpm-2012-04-04-ct-biz-0401-bf-staggered-boards-20120401-story.html.

Board seats held by women,[26] and significant reductions in the rate of executive pay increases have followed high levels of voting support on executive pay proposals.[27]

The impact extends to companies that are not subject to proposals. As proponents began submitting proxy access shareholder proposals, some companies proactively adopted proxy access bylaws, and majority voting for director elections was implemented by some companies that were not targets of a shareholder proposal campaign on the issue.[28] A study by The Conference Board found that companies that were early proxy filers in 2011, when mandated management say on pay votes began, changed the terms of their pay programs to align pay more closely with performance and improved their disclosure even before any votes were cast.[29] In a recent study, peer companies improved their CSR performance after passage of a CSR shareholder proposal at a competitor.[30]

Finally, shareholder voting can help mitigate systematic risks that can affect the value of a plan's portfolio. Under modern portfolio theory, risks across the portfolio (systematic risks) cannot be diversified away, making it rational for institutional investors to focus on obtaining better ESG disclosure and to use those disclosures when investing and voting proxies.[31] The recent announcement by BlackRock, the U.S.'s largest asset manager and one of the "Big Three" passive investors, that it would accelerate its integration of sustainability considerations into its investment products and processes, illustrates this logic.[32] Addressing risks associated with climate change at one company, for example, can not only reduce risks for other issuers of public equities but can also have an impact on the performance of assets in other asset classes such as real estate, timber or private equity whose value depends on mitigating sea level rise, availability of fresh water, or the prices of agricultural commodities.

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[26] https://corpgov.law.harvard.edu/2020/01/28/board-composition-and-shareholder-proposals/ (noting that shareholders' "emphasis on board diversity has produced results": 46% of seats in 2020 are held by women, up from 17% in 2009).

[27] Randall S. Thomas et al., "Dodd-Frank's Say on Pay: Will It Lead to a Greater Role for Shareholders in Corporate Governance?" 97 Cornell L. Rev. 1213 (2012) (https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=2004&context=faculty-publications)

[28] See https://www.dorsey.com/newsresources/publications/client-alerts/2016/12/recent-developments-in-proxy-access; https://www.davispolk.com/files/2015-02-18_Proxy_Access_a_Decision_Framework.pdf; https://www.complianceweek.com/majority-vote-lite-companies-adopt-modified-policies/6961.article

[29] See Thomas et al., at 1257.

[30] Martins, at 42.

[31] John C. Coffee, "The Future of Ownership: ESG, Common Ownership, and Systematic Risk," at 10-12 (Sept. 2020) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197&download=yes).

[32] See https://www.blackrock.com/corporate/investor-relations/blackrock-client-letter.

The Analysis Required by the Proposed Changes is Not Feasible for Fiduciaries

To date, most fiduciaries have satisfied their duties under ERISA related to proxy voting by adopting proxy voting policies or guidelines that set forth the factors to be considered when voting on types of proposals. In formulating and updating these guidelines, fiduciaries review research on the value-relevance of different kinds of proposals, in addition to drawing on the experience of investment staff and service providers. Fiduciaries generally retain discretion to deviate from guidelines when doing so would be in the best interests of their plans. For example, many plans' guidelines consider outside auditor ratification to be a routine item and recommend a vote with management's recommendation, but also leave open the possibility of voting against ratifying the auditor where significant audit-related concerns exist.

The Proposed Changes would upend this cost-effective and sensible approach and require a vote-by-vote analysis of the economic impact of each proxy vote before a fiduciary can decide to cast it. As discussed above, we do not believe that the Department has provided sufficient justification for imposing the significant costs associated with such analysis. But putting aside cost concerns, the Proposed Changes and NPRM do not provide enough guidance for fiduciaries in carrying out this task, especially given the threat of fiduciary liability hanging over every analysis.

First, it is not possible for a fiduciary to have any sense of the economic impact of a proxy vote before results of that vote are tabulated and announced. ERISA plans are well-diversified, as the NPRM acknowledges, and thus no individual plan, by itself, can carry or defeat a proposal. Nor can a fiduciary know beforehand whether a plan's votes would make the difference between passage and defeat. Logic dictates that economic impact must depend, at least in part, on what company action the vote would prompt, which would turn on not just a particular plan's vote but the votes of all other shareholders.

For example, a fiduciary who believes that top executive incentive pay arrangements are encouraging underinvestment in the business might consider voting against management's say on pay proposal. Without knowing how other shareholders are going to vote, it would not be possible for the fiduciary to assess the likelihood that the plan's vote would help convince the company to alter its pay practices. A 20% no vote on a say on pay proposal almost certainly would have different consequences from a 40 or 60% no vote. Past Department interpretations allowed fiduciaries to consider whether the plan's exercise of shareholder rights, alone or with that of other shareholders, would be expected to impact the value of the plan's investment,[33] but the NPRM is silent on that question. A fiduciary would need a crystal ball, then, to carry out the analysis contemplated in the NPRM.

The NPRM is also muddled about the distinction between the pre-vote economic impact analysis required under the Proposed Changes and the substantive decision of how to vote. The NPRM states, "Information that will better enable fiduciaries to determine whether or how to vote proxies on particular matters includes the cost of voting, including opportunity costs, the type of proposal . . . voting recommendations of management, and an analysis of the particular shareholder proponent."[34] It is not clear which factors should be considered in the pre-vote analysis and which in the actual voting determination. We note that, to the extent the pre-vote analysis incorporates factors such as current practices of the company and peers, the specific action proposed in the management or shareholder proposal, and company performance, the pre-vote analysis would substantially duplicate the voting analysis, limiting the ostensible benefits of the Proposed Changes.

The NPRM indicates that fiduciaries should take into account when determining the economic impact of a proxy vote the costs an issuer might incur from a failure to achieve quorum for the shareholder meeting.[35] That information would not be available to fiduciaries, though, and it is unreasonable to require fiduciaries to try to acquire it from issuers.

According to the NPRM, the plan's opportunity costs should also be considered in the economic impact analysis. Presumably, though no explanation is provided, the Department believes that the time a fiduciary spends determining how to vote on a single proposal could be spent on another value-generating activity. This absurd suggestion would be impossible to implement. It is difficult to imagine the kinds of alternative activities in which a fiduciary might engage in the small amount of time typically spent analyzing a single proxy vote. Even if such hypothetical activities can be identified, how should fiduciaries value them?

The NPRM states that a fiduciary should consider "an analysis of the particular shareholder proponents" when deciding whether and how to vote on a proposal.[36] No explanation is provided about how a proponent's identity affects the economic impact of a proposal. We have seen no research indicating that the value of a governance change depends on the identity of the shareholder advocating for it. If

[33] Interpretive Bulletin 2016-01; Field Assistance Bulletin 2018-01.

[34] NPRM, at 21.

[35] NPRM, at 28 fn. 63. The fact that the Department went out of its way to clarify that a fiduciary may depart from a permitted practice in order to help a company make quorum at a meeting supports a conclusion that considerations other than maximizing the value of plan assets motivated the issuance of the NPRM.

[36] NPRM, at 21.

such research exists, the Department should describe it and explain how it relates to a fiduciary's analysis of a proposal.

Given the challenges outlined above, we believe that the Proposed Changes cannot be implemented by fiduciaries without significant risk of inadvertent noncompliance. The NPRM therefore should be withdrawn.

The Permitted Practices Are Internally Inconsistent and Offer Uncertain Protection to Fiduciaries

The NPRM concedes that the extensive and particularized cost-benefit analysis required by the Proposed Changes would be "resource-intensive" and "may often burden fiduciaries out of proportion to any potential benefit to the plan."[37] That acknowledgement bolsters our belief that the Department has imposed the vote-by-vote economic analysis requirement in order to steer fiduciaries toward the permitted practices, which allow fiduciaries to select types of proposals on which to abstain from voting or to vote in accordance with management's recommendations. Those practices, however, are internally inconsistent and are not designed to maximize the value of plan assets.

The permitted practices would provide illusory protection for fiduciaries. The permitted practice in which the fiduciary may decide to vote with management on specific kinds of proposals is "subject to any conditions determined by the fiduciary as requiring additional analysis because the matter being voted upon concerns a matter that may present heightened management conflicts of interest or is likely to have a significant economic impact on the value of the plan's investment."[38] To determine whether this exception applies, a fiduciary would need to engage in the exact vote-by-vote analysis that the permitted practice was supposed to allow the fiduciary to avoid. The NPRM does not explain how a fiduciary could monitor for such exceptions in a cost-effective way.

The Department defends this permitted practice of following management's recommendations by noting that officers and directors owe "their own" fiduciary duties to the corporation, implying that those duties are sufficiently similar to ERISA fiduciaries' duties that reliance upon their judgments is a sound practice.[39] However, fiduciary obligations under state corporate law are limited in order to avoid excessive risk aversion, most importantly by the powerful business judgment rule, which presumes that officers' and directors' decisions were informed, in good faith, and made in the honest belief that the action taken was in the best interests

[37] NPRM, at 24-25.
[38] NPRM, at 26.
[39] See NPRM, at 21 fn. 52, 26.

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of the company.[40] A shareholder cannot enforce director and officer fiduciary duties without showing that it made demand on the corporation or that such demand would be futile; ironically, in Aronson v. Lewis, the case cited by the Department, the complaint was dismissed for failure to plead demand futility. Both procedurally and substantively, then, corporate law's fiduciary duties are no substitute for those owed under ERISA.

Another permitted practice would allow a fiduciary to refrain from voting altogether when the plan's holding in an issuer relative to the plan's total assets is below a quantitative threshold such that the matter being voted upon is unlikely to have a "material impact on the investment performance of the plan's portfolio." The NPRM requests comment on a possible threshold of 5%.[41] A diversified ERISA plan would not invest 5% or more of total plan assets in stock of a single issuer, so this kind of rule of thumb would end up disenfranchising plans entirely. Moreover, this permitted practice introduces a "materiality" concept, which goes far beyond the cost-benefit analysis required of fiduciaries under the Department's sub regulatory guidance. The Department must acknowledge this break with prior guidance and explain why materiality would be appropriate in this context.

Given the thin and unbalanced economic analysis underpinning this proposal, and the obvious costs that it would impose on ERISA plans, one can only interpret the NPRM as an ideological attack on the concept of shareholder engagement on environmental, social, and governance issues. As a coalition of investors who have engaged effectively and productively with corporations on such issues for 50 years, we take exception to this bias and adamantly oppose this rule.

For all of the above reasons, we strongly urge the Department to withdraw the NPRM and not adopt the Proposed Changes. We appreciate this opportunity to provide our views on this important matter. Please feel free to contact Josh Zinner (jzinner@iccr.org) with any questions.

Sincerely,

Josh Zinner
CEO
Interfaith Center on Corporate Responsibility

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[40] Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. Ct. 1971).
[41] NPRM, at 27.