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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5665, U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

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

Ladies and Gentlemen:

On behalf of Voya Financial, Inc. and its affiliates ("Voya"), we appreciate the opportunity to submit comments on the notice of proposed rulemaking entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the "Proposed Rules").[1] Voya is supportive of the tone, clarity and content provided in the Proposed Rules. In particular, the Proposed Rules are crafted in a way that recognizes the important role that climate change and other environmental, social and governance ("ESG") factors can play in the evaluation and management of plan investments while continuing to uphold fundamental fiduciary obligations. The Proposed Rules reaffirm core principles that the duties of prudence and loyalty require ERISA fiduciaries to primarily focus on material risk-return factors and not subordinate the interests of plan participants to objectives unrelated to providing benefits under the plan and clarify that ESG factors may be appropriately considered by fiduciaries as financial factors that can be material to a risk-return analysis. Finally, as the preamble of the Proposed Rules notes, participants who find their values in alignment with investments that consider ESG factors may increase their participation in plans that incorporate investments that consider such factors.

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[1] 86 Fed. Reg. 57,272 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550).

Affirmation of bedrock principles

Voya is supportive of the tone of the Proposed Rules. Taken as a whole, the Proposed Rules reaffirm fundamental fiduciary obligations that, even when it is appropriate to consider climate change and other ESG factors, fiduciaries may not subordinate the financial interests of the participants and beneficiaries under plans to achieve unrelated objectives.[2] The adherence to fundamental fiduciary obligations foremost in the Proposed Rules is in line with current and previous regulations and guidance from the Department, and the inclusion of ESG factors as financial factors, depending on facts and circumstances, does not override the core principles. Voya believes that investment decisions made after consideration of all material factors, including ESG factors, is in the best interest of retirement savers.

In addition, Voya believes that investment options that reflect consideration of ESG issues are consistent with the objectives of increasing retirement savings by potentially encouraging more participants to participate in plans.[3] We strongly support a system that allows plan fiduciaries and participants to choose from a wide variety of products and investment information to achieve this goal. We also believe that ESG factors may help identify material financial risks and opportunities, and to meet fiduciary responsibility.

Voya research supports these beliefs. In a 2020 Voya survey, we found that 76% of investors find the overall idea of ESG investing appealing.[4] More specifically, in 2021, Voya found that 70% of 401(k) participants are interested in retirement plan investment options focused on having a positive impact on ESG.[5]

Plan sponsors also recognize this desire of their potential participants. For example, in a 2020 Voya survey of higher education retirement plan sponsors, 50% of sponsors considered providing investment

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[2] *See* ERISA § 404(a)(1)(A); Interpretive Bulletin (IB) 94-1; IB 2008-01; IB 2015-01.
[3] In this regard, Voya notes footnote 73 of the preamble to the Proposed Rules, which cites research on the increase in assets invested "sustainable funds" from 2015-2020.
[4] Voya Consumer Insights and Research, July 2020.
[5] Voya Consumer Insights and Research, 2021.

options to participants that focus on companies that have a positive social or governance impact to be a top 5 plan priority.[6]

New Section (b)(4) – ESG Factors

With respect to the Department's request for comments on new section (b)(4) of the Proposed Rules, Voya supports the Department's view that providing clarifying examples is helpful to fiduciaries to illustrate ESG factors that may be appropriate to consider. As the Department readily acknowledges, non-regulatory guidance issued in the past has created confusion as to whether ESG factors may be appropriately considered by fiduciaries in making investment decisions or deciding upon investment courses of action.[7] Voya applauds the Department's decision that clarity is necessary and much appreciated by the many ERISA fiduciaries that strive to meet the needs of retirement savers. Regardless of whether a fiduciary does or does not incorporate ESG factors into its decision-making process, the Department is correct in making a clear statement on an issue that has been unduly complicated with inconsistency in the past. Voya believes, however, that placing such clarifying examples in the preamble, rather than in the Proposed Rules, may better serve to keep the Proposed Rules flexible to address unforeseen developments.

In our view, the Department strikes the correct tone in new section (b)(4) of the Proposed Rules as it states, or perhaps reiterates, that fiduciaries may consider any factor material to risk-return analysis, including, for example, the enumerated ESG factors. Voya believes that the examples of ESG factors provided in new section (b)(4) are aligned with an investment risk-return analysis. Embedded in Voya's investment point of view is that ESG factors have become a transformative force around the globe that may impact economic growth and may present material information that can be used by investors to manage risk and identify opportunities. When evaluating market megatrends influencing global capital flows, we recognize that environmental and social issues have become increasingly important for investors to understand when formulating macro forecasts. While the time horizon over which

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[6] Findings based on the results of a Voya Financial survey conducted by Greenwald Research among 297 higher education plan sponsor retirement plan decision makers from July 22-September 11, 2020.
[7] *See* Interpretive Bulletin (IB) 94-1; IB 2008-01; IB 2015-01; Field Assistance Bulletin (FAB) 2018-01.

environmental perils, such as water stress, biodiversity, and climate change, may be very long-term and difficult to triangulate when the events will occur that do leave economic impressions, we are confident that they exist and matter. Similarly, social challenges, such as human rights, poverty, and income inequality, are directly correlated to geopolitical stability. As countries and regions become more or less socially secure, economic prospects and assets with linkages thereto are likely to benefit or suffer accordingly. In a Harvard Business School report from 2019, Rogers and Serafeim[8] outline a pathway by which sustainability issues might become financially material to companies and their investors and cite several examples in support of their argument. ESG megatrends are connected to economic outcomes and should be considered as part of a rigorous top-down analysis.

In bottom-up analysis, we think ESG issues are even more tightly tied to financial factors: revenues and costs, assets and liabilities, and cost of capital. The amount of academic literature on the linkage between ESG and corporate financial performance has grown rapidly in recent years. While conclusions may differ, meta analyses we reviewed[9] show that the overwhelming majority of studies find there is a positive correlation between ESG and corporate financial factors, suggesting that they are indeed worthy of investors' attention. Which ESG issues matter and how much are industry- and company-specific and are considered material depending on facts and circumstances. However, we believe that all companies have some exposure to ESG issues and, therefore, companies with well-calibrated sustainable business strategies will be better able to manage costs, optimize efficiencies, and identify new opportunities and respond to changing customer demand. Ultimately, all of this could lead to improved profitability and better returns to investors.

Although we strongly believe that ESG issues matter for investors, they are among a universe of factors that contribute to company performance and security returns – all of which should be considered when making investment decisions. As with any one risk factor, attributing performance/underperformance to

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[8] Jean Rogers and George Serafeim, Pathways to materiality: how sustainability issues become financially material to corporations and their investors, Harvard Business School, Working Paper 20-056 (2019). Available at: http://www.revelio.com/wp-content/uploads/2019/11/Pathways-to-Materiality_2019_SSRN-id3482546.pdf

[9] Deutsche Asset Mgmt., ESG & Corporate Financial Performance: Mapping the Global Landscape (2015), ESG-and-Corporate-Financial-Performance.pdf (unepfi.org). *See, also,* Glob. Research Inst., Digging Deeper Into the ESG Corporate Financial Performance Relationship (2018), https://download.dws.com/download?elib-assetguid=714aed4c2e83471787d1ca0f1b559006

specific ESG factors may be difficult. Nevertheless, because ESG factors may be material to financial outcomes, we think, depending on facts and circumstances, fiduciaries have a duty to at least consider them as potentially economically meaningful.

<u>Requirement to "prominently" display collateral benefits in disclosure materials.</u>

Voya is supportive of the changes to section (c) of the Proposed Rules to remove the requirement that only pecuniary factors may be considered. The discernment or selection of factors to consider, and weight given thereto, needs to reflect a prudent assessment of the impact any factor or related factors, depending on facts and circumstances, may have on the value of the investment or investment course of action.[10] The pecuniary factor requirement in the current rule is not helpful or necessary as it imposes additional layers to an analysis that are not additive to the investment decision process but may be detrimental as fiduciaries may be concerned about substantiating a factor as both material and pecuniary when merely prudently selecting the material factors is sufficient. The Proposed Rules take a more efficient and practical approach to providing guidance to fiduciaries in fulfilling their fundamental fiduciary obligations.

Section (c)(3) of the Proposed Rules requires that, in the event investment options *equally serve the financial interests of the plan,* then a fiduciary may consider collateral benefits of an investment option in addition to its financial risk-return to make a choice between competing investment options.[11] (The so-called "Tie-Breaker" provision.) The Proposed Rules also add a new requirement in section (c)(3) that, when an investment option is selected as a designated investment alternative ("DIA") under a plan using the Tie-Breaker process, the collateral benefit be prominently displayed in disclosure materials provided to plan participants.[12] In response to the Department's request for comments on this new requirement, Voya submits that the existing regulations governing DIA disclosures – the so-called 404a-5 rules – adequately address the issue and adding an additional regulatory requirement may not provide

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[10] *See* ERISA § 404(a)(1)(B); Current and Proposed Labor Regulation § 2550.404a-1(c)(2).
[11] Proposed Labor Regulation § 2550.404a-1(c)(3).
[12] Proposed Labor Regulation § 2550.404a-1(c)(3).

plan participants with more helpful disclosure.[13] As discussed in the preamble to the Proposed Rules, the current DIA disclosure regulation under Labor Regulation § 2550.404a-5 "already entitles participants in participant-directed individual account plans to receive sufficient information regarding designated investment alternatives to make informed decisions with regard to the management of their individual accounts."[14]

Voya is in favor of clear and transparent disclosures for plan participants so that investment options can be evaluated in light of material facts and circumstances. While the new requirement in section (c)(3) is not limited to ESG factors that are collateral factors to an investment decision, given the scrutiny, attention and regulatory inconsistencies in the past, fiduciaries may be more concerned about the perception of ESG as collateral factors even when the relevant ESG factors are deemed by fiduciaries to be material financial factors, thus causing an over-disclosure or disproportionate focus on ESG factors in plan disclosure materials. The existing regulations governing DIAs provide sufficient and even-handed guidance regarding disclosure requirements.

Climate risk and other ESG factor integration has become a staple of fundamental investment analysis and as more and more investment strategies expressly disclose integration of ESG in investment processes, fiduciaries, solely in reaction to complying with this new requirement, may have concerns around prudently describing ESG factors as financial factors rather than collateral benefits or vice versa. Consider an example in which a fiduciary selects a large cap value fund from among available options, each of which equally serve the financial interests of the plan as a DIA. If the fiduciary selected the fund for financial reasons, and the fund also happens to describe ESG integration and climate risk evaluation as part of its strategy, should the fiduciary prominently display that the fund was selected for collateral benefit or be concerned that not including such prominent disclosure is a violation of section (c)(3)? If a statement is not prominently displayed and the product/strategy discusses ESG integration, but the option was selected solely for financial reasons, does that leave the fiduciary exposed to risk? Does this "prominently" disclosed requirement have the consequence of over-disclosing the ESG integration of all

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[13] *See* Labor Regulation § 2550.404a-5.
[14] 86 Fed. Reg. at 57,280.

products/strategies selected as DIAs? Voya believes that the existing disclosure regulations governing DIAs provide sufficient and even-handed guidance regarding disclosure requirements.

Changes to paragraph (e)(2)(ii)

Voya also agrees with the Department's decision to eliminate the statement in paragraph (e)(2)(ii) that "the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right." Voya believes that exercising shareholder rights, including voting proxies, play a key role in expressing shareholders' views with the issuer. Voting proxies permits shareholders and fiduciaries the opportunity to annually inform the issuer if the shareholder believes the board and corporate management is properly accountable to shareholders. Accordingly, fiduciaries should generally vote on proposals in a conscientious manner not solely based on the plan's total investment assets. Voya believes that proxy voting and investment decisions made after consideration of all material factors, including ESG factors, are in the best interest of retirement savers and are consistent with the objectives of increasing retirement savings.

In summary, Voya submits this comment memo to support the Department's decision to craft "investment duties" regulations that provide clarity to plans, plan sponsors and investment fiduciaries and that reflect a recognition of the importance of climate change and other ESG factors as financial factors that prudent fiduciaries may properly consider when making investment and voting decisions that impact the investment portfolios of retirement savers.

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Voya appreciates the opportunity to comment on the Proposed Rules and would be happy to answer any questions or provide additional assistance to the Department.

Sincerely,

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