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

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

On behalf of BNY Mellon Investment Management, thank you for the opportunity to submit comments on the notice of proposed rulemaking entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights"[1] (the "Proposal") published by the U.S. Department of Labor (the "Department"). We strongly support the Department's efforts to clarify the regulatory treatment of environmental, social, and governance ("ESG") factors under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") following the publication of ''Financial Factors in Selecting Plan Investments''[2] and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights''[3] (together, the "Current Rules"). To continue the Department's efforts to add clarity to the use of ESG factors by fiduciaries we suggest the Department add clarification in the rule or preamble that a fiduciary can use a screen to consider ESG factors based on the fiduciary's determination that a particular ESG factor will impact investment value consistent with Section 2550.404a-1(c)(2) of the Proposal.

I. About BNY Mellon Investment Management

BNY Mellon Investment Management is a division of BNY Mellon, one of the world's largest financial services groups. With a presence in 35 countries, BNY Mellon looks to connect investors with opportunities across every major asset class. BNY Mellon Investment Management encompasses BNY Mellon's affiliated investment firms and global distribution companies, constituting over $2.3 trillion in AUM (as of September 30, 2021).

BNY Mellon Investment Management follows a multi-boutique investment management model that weds the specialist expertise from its investment firms offering solutions across every major asset class, backed by the strength, stewardship, and global presence of BNY Mellon. Each investment firm has its own unique culture, investment philosophy, and proprietary investment processes, and provides a global perspective. Our seven majority owned investment firms, are as follows (all AUM figures as of September 30, 2021): Alcentra ($41.0B), ARX ($7.0B), Dreyfus Cash Investment

[1] 86 FR 57,272 (Oct 14, 2021).
[2] 85 FR 72,846 (Nov. 13, 2020).
[3] 85 FR 81,658 (December 16, 2020).

Strategies[4] ($342.7B), Insight Investment ($1,100.0B)[5], Mellon[6] ($448.6B), Newton Investment Management ($139.1B), and Walter Scott ($99.9B).

At BNY Mellon Investment Management our Responsible Investment (RI) approach varies across our investment firms, but the effective stewardship of our clients' assets is common to all and core to our own purpose. Many products or solutions offered by BNY Mellon Investment Management examine ESG factors in their investment processes and decision-making to better manage risk and generate sustainable long-term returns. Six of our investment firms—Alcentra, ARX, Insight, Mellon, Newton, and Walter Scott—are signatories of the Principles for Responsible Investment ("PRI").

II. The Proposal Provides Significantly More Clarity to the Current Rules

As we have noted in a previous comment letter,[7] over the past decades, fiduciaries and investment managers have come to appreciate the materiality that ESG factors can have on investment value. We welcome the Department's clarifications to the Current Rules regarding the use of ESG factors and the exercise of shareholder rights. The acknowledgement by the Department that climate risks and other ESG factors can be and often are material to investment risk and returns will better allow fiduciaries to mitigate risk and enhance returns based on evaluating ESG factors.

Within the last decade, a deep body of research has been produced that demonstrates the material influence of ESG factors on the profitability of an enterprise and the performance of its securities. For example, weak control of environmental activities such as pollution, over-consumption of raw materials or lack of recycling of waste materials readily leads to volatile or lower achieved margins or financial penalties that reduce investor returns. Similarly with social issues: high staff turnover, high strike rates or absenteeism or death or injury rates have all been linked to lower productivity and poor quality control. Regarding governance, we know from years of empirical observation that poorly managed issuers can seriously damage investor returns. To ignore the entire category of information and analysis that comprise ESG factors, therefore, could be deemed an abrogation of a fiduciary's responsibility to consider all material information when assessing the risk and return of any investment opportunity.

The Proposal appropriately balances the materiality that ESG factors can have on investment value with the Department's longstanding principles that a fiduciary's duties of prudence and loyalty require the fiduciary to consider factors that are material to investment value. In particular, a fiduciary should not subordinate the interests of plan participants and beneficiaries to other objectives, nor sacrifice investment return or take on additional investment risk to promote goals unrelated to the plan and its participants and beneficiaries. We specifically believe that the proposed removal of the definition of "pecuniary factors" and the revision to the Current Rules providing that a fiduciary's evaluation of an investment or investment course of action should be based on factors that "are material to investment value"[8] both clarifies the rule and ensures that the rule reflects the analysis performed by fiduciaries when making investment decisions.

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[4] A division of Mellon Investments Corporation.
[5] Insight's assets under management (AUM) are represented by the value of cash securities and other economic exposures and are calculated on a gross notional basis.
[6] A division of Mellon Investments Corporation.
[7] Comment from BNY Mellon Investment Management at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00513.pdf.
[8] 86 FR 57,272 at 57,303 (29 C.F.R. § 2550.404a-1(c)(2)).

We also support the removal of the special rule prohibiting certain investment alternatives from being considered qualified default investment alternatives (QDIA) because the investment references ESG factors. The QDIA restrictions in the Current Rules add uncertainty and would be difficult to apply. We agree with the Department that there is not a reason to prohibit fiduciaries from prudently selecting a fund that meets the QDIA requirements and includes the consideration of ESG factors.

III. Suggested Clarifications Regarding the Use of Screens Based on ESG Factors

We support the Department's efforts to reduce the uncertainty in the market caused by the Current Rules and we suggest additional clarification regarding the use of screens. We believe this clarification could further reduce uncertainty that might otherwise prevent fiduciaries from considering ESG factors which are expected to enhance investment value and performance or improve investment portfolio resilience against the potential financial risks.

As noted above, we support the removal of "pecuniary factors" and that a fiduciary's evaluation of an investment or investment course of action should be based on factors that "are material to investment value"[9]. We think that the Department could add additional clarity to the rule or preamble by clarifying that the proposed rule does not *per se* prohibit a fiduciary from using a screen on investments based in whole or in part on ESG factors.

A common method used by investment managers to incorporate ESG factors into the assessment of investment risks and returns is the use of screens. As described in the Proposal, "negative screening refers to the exclusion of certain sectors, companies, or practices from a fund or portfolio based on ESG criteria."[10] The Proposal's discussion of the benefits that can occur from the use of ESG factors in the assessment of investment risks and returns relies on sources that studied the impact of investment managers using screens based on ESG factors.[11] However, the Current Rules and some past guidance regarding the use of ESG factors could be read to preclude the use of screens based on ESG factors.

We suggest that the Department clarify in the final rule or its preamble that the investment prudence duties and the investment loyalty duties under Sections 2550.404a-1(b) and 2550.404a-1(c), respectively, do not *per se* prohibit the use of screens. For example, it should be permissible for a plan fiduciary to select investment managers and funds that use screens to the extent that doing so would otherwise be consistent with its duties. It should similarly be permissible for any such investment manager to select an "investment course of action" that uses a screen to the extent that the resulting investment strategy would otherwise be consistent with its duties. Such a clarification would provide certainty to fiduciaries seeking to use ESG factors in the assessment of investment risks and returns in accordance with their prudence and loyalty duties. It would further ensure that plan participants realize the full benefits of fiduciaries using ESG factors as described in the Proposal.

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[9] *Id.*
[10] *Id.* at 57,290, fn. 99.
[11] See, e.g., *Id.* At 57,290 ("Some specific studies have shown that ESG investing outperforms conventional investing. Verheyden, Eccles, and Feiner's research analyzes stock portfolios that used negative screening to exclude operating companies with poor ESG records from the portfolios" (*Citations omitted*)). *See also id.*, fn. 100 (*citing* Tim Verheyden, Robert G. Eccles, and Andreas Feiner, *ESG for all? The Impact of ESG Screening on Return, Risk, and Diversification*. 28 Journal of Applied Corporate Finance 2 (2016)).

We strongly support the Department's efforts to bring clarity to the use of ESG factors and the exercise of shareholder rights by plan fiduciaries. We believe the Proposal and the changes suggested here will promote retirement income security and further retirement savings by allowing fiduciaries to better manage risks and improve investment returns.

Sincerely,

Hanneke Smits

Hanneke Smits
Chief Executive Officer
BNY Mellon Investment Management