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VIA ELECTRONIC FILING
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:

Impact Capital Managers, Inc. welcomes the opportunity to submit comments on the Department of Labor's (the "Department's") proposed rulemaking entitled, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (the "Proposed Rule"). The rulemakings finalized last year, "Financial Factors in Selecting Plan Investments" and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (the "current rules") created uncertainty and unnecessary complexity; they were approved despite overwhelming opposition from affected market participants along with a lack of evidence that prior guidance was ineffective.[1] While global investors accelerate their incorporation of climate and ESG factors into their investment and stewardship theories and decision-making processes, ERISA-regulated fiduciaries are hesitant to engage because of the regulatory uncertainty created by the current rules, thereby limiting their ability to fully consider all economically relevant investment factors.[2]

The Proposed Rule would remove the arbitrary and burdensome barriers established by the current rules and provide necessary clarification for ERISA-regulated fiduciaries in their consideration of environmental, social and governance ("ESG") factors.

Impact Capital Managers, Inc. (ICM) is a trade association representing the best-in-class private capital fund managers investing for superior returns and meaningful impact. Of our over 70 members – investing $15B+ across asset classes including venture capital, private equity, debt and real estate - many have successfully raised and closed multiple funds over several decades, to the benefit of ERISA fiduciaries and their beneficiaries. The fund managers in our network are focused on driving investor returns not in spite of an ESG or impact focus, but <u>because</u> of it. Their growing track record supports the thesis that ESG and impact factors can not only be material, but that "traditional" investors ignore ESG and impact factors at their peril. This is not about building investment products to meet a market demand -- although it is true that fiduciaries' beneficiaries are increasingly asking advisors to take ESG factors into account -- but about underlying business fundamentals.

[1] https://www.ussif.org/blog_home.asp?Display=148 .
[2] https://www.cnbc.com/2020/12/11/heres-why-401k-plans-lag-in-green-investment-options.html.

Based on the professional investing experience of our members, ICM believes that ERISA plan participants and beneficiaries will benefit economically should the Proposed Rule be enacted as fiduciaries will be able to exercise their duties of prudence and loyalty in appropriately considering environmental and social factors and impacts within investing.

Several academic studies support the proposition that consideration of ESG factors leads to equivalent or superior financial returns, especially on a risk-weighted basis. Our members repeatedly find in private capital markets that intentionally considering investment impacts leads to better planning and decision-making, thereby improving investment performance.

The Proposed Rule would provide necessary clarification that fiduciaries should consider ESG factors just as they would any other potentially relevant economic factor.

The current rules are out of step with market realities and place limitations on fiduciaries' ability to prudently consider ESG factors as potentially economically relevant to investment decisions.[3] Growing evidence shows that climate change presents new challenges to global economies, local markets and most every company around the world. The COVID-19 global pandemic has highlighted the importance of risks related to worker health and safety and human capital management more generally, and an abundant literature[4] finds links between ESG factors and company performance.

The Department's guidance has long established that fiduciary duty includes consideration of all potentially economically relevant factors that could affect risk and return and long-term plan success.[5] It falls directly within the duty of prudence for fiduciaries to consider the possible risks and opportunities created by climate change and other ESG factors for investments, portfolios and long-term returns. The Proposed Rule would support fiduciaries in their consideration of potentially economically relevant ESG information by removing arbitrary barriers and clarifying duties to consider all factors appropriately within their risk-return assessments.

The Proposed Rule would appropriately remove barriers to considering ESG factors when selecting default investment vehicles.

The current rules unnecessarily prevent fiduciaries from selecting a Qualified Default Investment Alternatives (QDIA) that considers non-pecuniary (assumedly targeting ESG) factors, regardless of their economic relevance. Specifically, the current rules prohibit an investment alternative from being used as a QDIA "if it, or any of its components, has investment objectives or goals or principal investment strategies that include, consider, or indicate the use of one or more non-pecuniary factors."[6] There is no justification for this disparate treatment of QDIAs; an investment, along with the process used to make the investment, is either a prudent offering or not. And, again in our members' experience (although none have been QDIAs), consideration of impact factors has more often enhanced than inhibited financial performance – especially so when risk is considered along with return.

Furthermore, the lack of clarity around the definition of pecuniary and the new considerations for QDIA inclusion have made fiduciaries more cautious to the detriment of participants and beneficiaries. We

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[3] https://dwtyzx6upklss.cloudfront.net/Uploads/f/n/b/pricomment_dolerisaproposedrule30july2020_986374.pdf

[4] *E.g.,* in a literature review of more than 2000 studies, a majority of studies found a positive relationship between ESG and corporate financial performance, and about 90% of the studies found a non-negative relationship. Friede, G., Busch, T., Bassen, A. 2015. ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies, Journal of Sustainable Finance & Investment, 5:4, 210-233, https://doi.org/10.1080/20430795.2015.1118917

[5] https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01

[6] Investment Duties, 29 CFR § 2550.404a-1(d)(2)(ii) (Dec. 16, 2020), available at https://www.law.cornell.edu/cfr/text/29/2550.404a-

support rescission of this limitation and the maintenance of prior QDIA rules for all investment options being utilized as a default.

The Proposed Rule's clarification of the "tie-breaker" test would appropriately allow fiduciaries to consider collateral benefits without making the unrealistic determination that investment choices are "economically indistinguishable."

The current rule requiring investments based on collateral benefits to be "economically indistinguishable" sets an exceeding high bar that is in practice impossible for fiduciaries to surmount, given the existence of differences among even very similar investments. The Proposed Rule's requirement that the investments "equally serve the financial interests of the plan" to support selection of an investment with collateral benefits would better facilitate fiduciaries discharging their duties when making choices among investments with various risk-return characteristics.

Additionally, the Proposed Rule appropriately eliminates the specific documentation requirements imposed by the current rule, which excessively burden fiduciaries using the tie-breaker and create a stigma around considering ESG or impact factors in investment decision-making. Fiduciaries require autonomy to set strategy and execute investment decisions in line with that strategy without excessive regulatory scrutiny spurred by hostility to ESG or any other kind of potentially relevant considerations.

The Proposed Rule would remove inappropriate obstacles to fiduciaries' exercise of their stewardship responsibilities.

While our members manage private debt and equity and thereby are not involved in proxy contests, we do agree that fiduciaries should not be unnecessarily hindered or burdened in exercising their shareholder rights.

Added documentation requirements not only impose an unnecessary time and cost burden, they also create doubt about the propriety of fiduciaries' stewardship activities. We support the removal of these increased documentation provisions and addition of clarifying language that is in line with prior Department guidance on when and how fiduciaries should exercise shareholder rights and engage in the proxy voting process.

In sum, the Proposed Rule would amend numerous confusing, contradictory and burdensome provisions of the current rules that display a prejudice against climate-related and other ESG and impact considerations. This clear prejudice against economic information is outside the investment mainstream. It could force fiduciaries to fail to consider - or willfully ignore - information that can, in many circumstances, provide lower risk and/or higher returns. The Proposed Rule further provides fiduciaries the clarity and autonomy necessary to appropriately utilize information on climate-related and ESG factors to make investment decisions and exercise shareholder rights in line with their fiduciary duties and overarching investment strategy.

Thank you for the opportunity to comment and share our views on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights".

Yours sincerely,

Marieke Spence
Executive Director, Impact Capital Managers, Inc.