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

Attention: Prudence and Loyalty in Selecting Plan Investment and Exercising Shareholder Rights
RIN 1210-AC03

Ladies and Gentlemen:

This letter provides comments on behalf of T. Rowe Price Associates, Inc. and its affiliates (collectively, "T. Rowe Price") with respect to the proposed regulation entitled Investment Duties (the "Proposal").

T. Rowe Price

T. Rowe Price Associates, Inc. serves as investment adviser to the T. Rowe Price family of mutual funds, and provides advisory services to collective funds maintained by its affiliate, T. Rowe Price Trust Company. Through mutual funds and collective trusts, as well as its sub-advisory and separate account management services, T. Rowe Price provides investment services to retirement plans of all sizes. T. Rowe Price is the largest provider of actively-managed target date funds[1] and is known for its consistent investment process and strong investment performance at below average cost.[2] As of December 31, 2020, over half of T. Rowe Price's total assets under management of $1.47 trillion were held in defined contribution retirement plans.

Overview

We appreciate the Department's careful evaluation of reaction to the rule on prudence and loyalty in investing, Financial Factors in Investments (the "2020 Rule"). We share the Department's view that the 2020 Rule reflected skepticism about fiduciaries' use of environmental, social and governance ("ESG") factors in decisions, and we agree that regulatory skepticism on this point could dampen fiduciaries' willingness to accept investment vehicles that use ESG factors appropriately to evaluate risk and return characteristics. The Department should be commended for addressing the inherent skepticism while avoiding radical changes. T. Rowe Price, and other investment firms like us, evaluate ESG factors relevant

[1] Data as of September 30, 2021. Source: Strategic Insights' Simfund Mutual Fund Database; Morningstar, Inc.
[2] As of September 30, 2021, 70% of all T. Rowe Price mutual funds in existence for at least one year (excluding money market, index funds or funds that are clones of other funds) had outperformed the median fund in their Morningstar peer group on a 1-year basis, 75% on a 3-year basis, and 68% and 78%, respectively, on a 5- and 10-year basis. As of 9/30/2021, over 90% of funds over six-months old offered to individual investors have expense ratios below their Lipper per category averages. Except for tax-advantaged funds, these funds are also used in defined contribution retirement plans.

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to risk and expected return as part of our fundamental research. The Proposal appropriately continues the path charted in the 2020 Rule by recognizing that ESG factors relevant to risk and expected return should be part of a prudent fiduciary's consideration set.

While the Proposal is measured and appropriate in many respects, we do have two principal concerns with it, both of which relate to defined contribution plans. First, we are concerned that the Proposal inappropriately prohibits consideration of participant investing preferences in defined contribution plan menu construction, unless there is a tie. Second, we believe that the requirement to disclose the collateral benefit characteristics of defined contribution plan investments selected after a tie is unnecessary and will not enhance participant understanding. We urge the Department to revise the Rule, as described below.

The Importance of Participant Preference in Defined Contribution Menu Construction

Participant preference has become increasingly important to retirement savings in the forty-seven years since ERISA's enactment. Defined contribution plans have largely supplanted defined benefit plans, and in 2020 more than three-quarters of the private workforce with access to employer-sponsored plans were covered by defined contribution plans alone.[3] Today's defined contribution plans are largely voluntary—participants must either affirmatively enroll, or if automatically enrolled, can opt out. Once terminated or retired, most participants have the choice whether to retain balances in the plan (including through retirement years), or whether to remove the assets to another plan, IRA or taxable account. In each case, the question whether to participate initially and to the fullest extent possible, or whether to remain as a participant after termination from employment or retirement is an individual choice.[4]

Investment line-ups can have a meaningful impact on an individual's decision to participate, to contribute more, or to remain a participant in the Plan after termination.[5] When constructing a plan menu, it is important for fiduciaries to evaluate the extent to which investment offerings will shape participant decisions to participate or remain in the plan. Fiduciaries promote participants' retirement income and interest in financial benefits under the plan when they prudently and loyally consider the extent to which the plan's investment choices will encourage initial and ongoing participation. This means that fiduciaries should design plan menus that address participant investing preferences, where consistent with prudence and the obligation to focus exclusively on participants and beneficiaries. Accommodating these preferences in the creation of defined contribution plan menus is key to addressing and furthering participants' interests in deferring salary into their defined contribution plans, and remaining invested in the plan even after the amounts become distributable. In short, how well a plan addresses participant investing predilection is among the factors that will determine how successful participants will be in saving for retirement and how

[3] Bureau of Labor Statistics. https://www.bls.gov/opub/ted/2021/67-percent-of-private-industry-workers-had-access-to-retirement-plans-in-2020.htm

[4] Changes in law in recent years have provided more opportunities for in-service distributions, whether in the form of qualified disaster distributions and qualified birth and adoption distributions outlined in the SECURE Act of 2019, or coronavirus-related distributions created by the CARES Act of 2020. As opportunities increase to use retirement assets for non-retirement purposes, it is even more important to make employer-sponsored retirement plans attractive to participants.

[5] The Department has long recognized the important role that participant choice over investments plays in participant-directed plans. With its first regulation under ERISA Section 404(c), the Department stressed the ability of participants to exercise meaningful control over investment choices.

likely it is that the plan will meet their retirement income needs. Nothing could be more clearly connected to participants' and beneficiaries' "interest in retirement income or financial benefits under the plan" which both the 2020 Rule and the Proposal place at the heart of loyal fiduciary analysis.

Despite the importance of participant investing preference to retirement income and financial benefits under the plan, the 2021 Proposal prohibits fiduciaries from considering participant preference except in the case of a tie.[6] The Department cites as justification for this view advisory opinions and information letters dating from the 1980's and 1990's. These pieces of guidance addressed "socially responsible investing" or "economically targeted investing" in the context of defined benefit plan investments or other commingled vehicles, and did not address the question in the context of participant-directed plans. The letters and opinions focused on situations in which a proponent of an investing approach sought to promote its assessment of societal value as an appropriate investment consideration, or situations in which cited benefits were closely tied to participants' interests as employees or workers and only tangentially related to retirement income (e.g., continued employment for union workers if a plan invested in projects for which union labor would be needed). This decades-old guidance does not offer meaningful precedent for today's fiduciaries in charge of defined contribution plan menus. In summarizing those time-worn pronouncements touching on increased contributions, the Department has not distinguished the tangential outcome of increased contributions due to greater employment for workers described in these letters and advisory opinions from the potential for increased contributions when participants enroll (or do not opt out) because they like the investment choices the plan offers. While the former involves outcomes that are attenuated from retirement, the latter is central to participants' likelihood of saving successfully for retirement through their employer-sponsored plan.

Fiduciaries of self-directed defined contribution plans make a host of prudent and loyal decisions that are designed to accommodate participant preferences. They provide funds with conservative objectives to address participants seeking more predictable investment returns, funds with aggressive growth objectives to accommodate participants who prioritize investment growth over risk avoidance, index funds for populations that value low cost and market average returns, actively managed funds for those who believe that skilled investment professionals with quality fundamental analysis can outperform the market average net of fees, sector funds for those seeking exposure to specific industries, annuity products for those seeking guaranteed income in retirement, and target date funds for those who do not want to do their own asset allocation. The common thread in this approach to menu construction is the desire to prudently and loyally provide options that will encourage participants to save for retirement in the voluntary retirement savings vehicles their employers offer. Fiduciaries addressing defined contribution menu construction in this way are seeking to address participants' and beneficiaries' interest in retirement income and financial benefits under the plan. These are the principles at the heart of the duty of loyalty.

The 2020 Rule appears to accommodate this appropriate fiduciary conduct by creating a special rule for fiduciaries selecting investment options for defined contribution plans. Although the Department concluded in 2020 that participant preference was non-pecuniary,[7] the 2020 Rule nonetheless allows defined contribution plan fiduciaries to consider participant preference. Subsection (d)(2) of the 2020 Rule

[6] See subsection (c)(2) of the Proposal: "A fiduciary's evaluation of an investment or investment course of action must be based on risk and return factors that the fiduciary prudently determines are material to investment value."
[7] See 85 Fed. Reg. at 72860, 72862.

provides that a defined contribution plan fiduciary is "not prohibited from considering or including an investment fund, product or model portfolio as a designated investment alternative solely because the fund, product or model portfolio promotes, seeks, or supports one or more non-pecuniary goals…." so long as statutory prudence principles are followed and self-dealing is avoided.[8]

The Proposal eliminates the 2020 Rule's subsection (d) in its entirety. In so doing, the Proposal eliminates one portion of the skepticism about ESG embedded in the earlier rule, and that is appropriate. If fiduciaries meet the basic duties of prudence and loyalty, then there should be no special constraint on those investment vehicles used as (or in) qualified default investment alternatives. But, in eliminating the deleterious provision forbidding use of ESG-themed investments as qualified default investment alternatives, the 2021 Proposal—perhaps inadvertently--eliminates the only section of the 2020 Rule that seems to accommodate prudent and loyal consideration of participant preferences as part of the factors that enter into defined contribution menu construction.

This defect in the Proposal is not cured by allowing collateral benefits, such as participant investing preference, to be used only in the event of a tie between investment courses of action "that equally serve the financial interests of the plan."[9] The construction of defined contribution menus is not a zero sum game where the choice of one investment option must necessarily eliminate another choice. A rule requiring a tie before participant investing preference can be legitimately considered by a fiduciary means that this important aspect of a participant's interest in his or her financial benefits under the plan cannot be acknowledged for its own sake.

It is worth considering how such a constraint would operate. Imagine a plan with a substantial population that has expressed an interest in having access to a guaranteed income product. If the interest is sincerely held, participants will be less likely to participate, and will withdraw their assets more quickly if they do not have access to an investment product that will guarantee income. Unconstrained by the construct of the 2021 Proposal, a fiduciary who understands this preference among plan participants might begin to investigate in-plan annuities and, after prudently evaluating their features, cost and the financial soundness of the issuer (and focusing exclusively on participants' and beneficiaries' interest in retirement income), might select an annuity product to be offered in the plan. Under a literal interpretation of the 2021 Proposal, the fiduciary's instinct of considering participant preference would serve as instant proof of disloyalty. Instead, the fiduciary could only honor the expressed preference of the plan's population if it

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[8] The preamble to the 2020 Rule makes clear that the Department intended the 2020 Rule to allow consideration of non-pecuniary participant preferences in the context of defined contribution plan menus: "[D]efined contribution fiduciaries can satisfy their duties ***even if they consider or select an investment… because it supports one or more non-pecuniary goals***" provided that the prudence and loyalty standards were met. In the Department's view, this meant that investments considered and selected because they met participant preferences would need to be "justified solely on the basis of pecuniary factors." 85 Fed. Reg. at 72864

[9] The phrase "financial interests of the plan" Is not defined in the Proposal. Some of the commentary in the Proposal's preamble raises questions as to whether participant preference is included. See 86 Fed. Reg. at 572279 ("For instance, should the rule require that any collateral benefit relied upon as a tie-breaker be based on an assessment of the shared interests or views of the participants, above and beyond their financial interests as plan participants, such as the investment's likely impact on participants' jobs or plan contribution rates?") For all the reasons set forth in our letter, the Department should remove any doubt by clarifying that meeting participant investing preference in creating a defined contribution plan menu is in the financial interests of the plan.

stumbled upon an annuity when investigating some other investment choice selected without regard to participant preference and found both choices to equally serve the financial interests of the plan.

Rules that discourage consideration of participant investing preferences are likely to be particularly short-sighted as younger generations join the workforce. A recent survey of plan participants commissioned by T. Rowe Price shows the marked preference among younger workers, especially Millennials, for ESG-focused investments.[10] The surveyed participants reported being willing to allocate on average 20% of their portfolio to ESG-focused investments, but Millennials reported an even higher percentage (25%). As a mark of commitment to ESG principles, about a quarter of survey respondents reported that they were willing to prioritize ESG principles over investment performance, but that percentage was markedly higher for Gen Z (at 35%) and Millennials (at 29%). These findings are not quoted to support the premise that fiduciaries should disregard the possibility for long-term performance, but rather to illustrate the level of commitment that some workers, especially those who are younger, have to ESG investing. If younger generations are not at least offered a choice of prudently selected ESG-themed investments within their employer-sponsored retirement plans, then they may forego participating in the plan at all. Instead, these individuals may give up the benefits of fiduciary oversight and invest outside the plan in funds they find appealing.

Participant preference should not be the only consideration in defined contribution menu construction. Determination of an investment preference among participants and the amount of weight to be given to any such preference will be matters for careful and prudent fiduciary consideration. But, so long as participant investment preference is not a ruse for a sponsor's or fiduciary's own interests, nothing should prohibit consideration of that preference as part of defined contribution menu creation, regardless of whether there is a tie.

It is critical to acknowledge the role that participant investment preference plays today in addressing retirement income adequacy. Participants will not use their voluntary participant-directed savings plans to save for retirement, or will leave those plans earlier, if they cannot get access to investment choices they find attractive. Fiduciaries should not be faced with failing a loyalty litmus tests when they include participant investment preferences in their consideration set. Since participant preference can impact participants' and beneficiaries' interest in retirement income or benefits under the plan, fiduciaries should be allowed, prudently, to consider and weigh these factors alongside "financial" or "pecuniary" factors involved in risk-return analysis, giving them such weight as the fiduciary deems appropriate.[11] We

[10] The survey of 3,420 individuals contributing to or eligible to participate in a 401(k) plan was conducted by a third-party firm from June 5-24, 2021. The survey was double-blind, meaning that survey respondents did not know on whose behalf the survey was conducted, and T. Rowe Price had no role in selecting survey respondents. Individuals were considered Millennials if they were born between 1981 and 1996, and Gen Z members if they were born 1997 or later.

[11] We note that the newly added paragraph (4) to subsection (b) on investment prudence also addresses only "factors material to the risk-return analysis." Because that paragraph is permissive (i.e., "[a] prudent fiduciary ***may*** consider…"), we do not believe that the paragraph precludes consideration of factors other than those bearing on the risk-return analysis. Nonetheless, we encourage the Department to clarify that consideration of participant preference as one of many other factors, including those related to risk and return characteristics, does not automatically violate prudence duties, just as it does not automatically violate loyalty duties.

urge the Department to revise the Proposal to accommodate consideration of participant investment preferences even when there is not a tie.

The Tie-Breaker Disclosure Rule Does Not Aid Participant Understanding and Is Unnecessary

The Proposal, like the 2020 Rule, allows fiduciaries to use collateral benefits as tie-breakers so long as the fiduciaries disclose the "collateral benefit characteristic" of the selected alternative to participants, in the notice required under 29 C.F.R. § 2509.404a-5 or elsewhere. Because the disclosure requirement is embedded in a regulation establishing the parameters of fiduciary prudence and loyalty, the Proposal implies that failure to satisfy the disclosure requirement would constitute a breach of fiduciary duty regardless of how carefully the fiduciary considered its choices or how participant-centered the ultimate choice was.

The Proposal appropriately broadens the definition of a tie, recognizing that it is rare that two choices will be exactly equivalent on all risk and return dimensions. That broader definition, however, means that a fiduciary choice from among a number of contenders will often constitute a "tie" as defined in the Proposal. As a result, this new disclosure rule may result in the need to enumerate collateral benefit characteristics used as decision factors in many instances in which a fund is selected over other possibilities.

Disclosure of the collateral benefits characteristics of the selected investment is unlikely to aid participant understanding. Instead, disclosure of this sort is likely to make an already daunting fee and investment disclosure document more opaque.[12] It is not unusual for annual 404a-5 disclosures created for a client by T. Rowe Price's recordkeeping arm, T. Rowe Price Retirement Plan Services, Inc., to exceed ten pages in length. It is hard to imagine that the introduction of additional nuance about investment characteristics would make the disclosure more accessible. The disclosure is also unnecessary; if fiduciaries have done their jobs, the investment choice that wins the tie will have been selected through a prudent and loyal fiduciary process, and the exact collateral benefits swaying the decision should not matter. Further, the collateral benefit characteristics of a particular choice may be evident from the many materials already made available to participants, including fund fact sheets and prospectuses.

The inclusion of collateral benefit characteristics in current disclosures under 29 C.F.R. § 2509.404a-5 would likely increase the time and expense of this disclosure. These disclosures are often created by plan recordkeepers. The investment attributes disclosed under current 404a-5 regulations are factual and objective, and as a result, material about a specific investment option prepared for one plan can be used for any plan with the same investment option in its line-up. If the collateral benefit attributes that resolved a tie must be included, recordkeepers will not be able to access that information without communicating with the investment fiduciary for each plan, and the descriptions will not be identical from plan to plan. This will make the disclosure process longer and more expensive for every plan. To the extent the Department contemplates requiring additional disclosure, we urge you to take that step through a rule-making devoted to disclosure topics, where the impact of a specific addition can be understood in context.

Finally, the new disclosure requirement in the Proposal creates a fiduciary tightrope. By requiring disclosure of collateral benefit characteristics, the fiduciary will have to precisely itemize all of the non-

[12] The Government Accountability Office's 2021 review of 401(k) participant fee and investment disclosures found that participants do not understand the fee information they are given, and that "many Americans have limited financial literacy."

financial attributes that weighed in favor of the final choice. To the extent that the fiduciary omits one, it will be subject to claims of fiduciary breach based not on the prudence or loyalty of the selection, but on the foot-fault of failing to identify the "collateral benefit characteristic" even though the investment was deemed to serve "the plan's financial interests" equally as well as the alternative under consideration. Further, it may not be easy to discern which of the factors that motivated a decision were relevant to risk and return analysis, and which were "collateral." An attribute that one fiduciary might consider important to risk and return analysis, such as an investment manager's solid reputation and brand, might be viewed by another fiduciary as a "collateral benefit." It will not improve a participant's understanding of their plan's investments to see a laundry list of positive attributes that influenced a particular choice.

We encourage the Department to eliminate any additional disclosure requirements in the final rule. There is substantial information available to participants about the investment objectives of investment options. Additional disclosure is unlikely to aid participant decision-making and will only pose unnecessary new burdens on fiduciaries.

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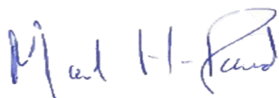
We appreciate the opportunity to provide our perspectives on the Proposal. The Proposal, if finalized, would achieve the worthy goal of removing regulatory skepticism about the use of ESG factors in investment decisions, but unless improved, will have negative impacts on defined contribution plan fiduciaries. We urge the Department to confirm that a defined contribution plan fiduciary may consider participant investing preferences along with risk and return factors without violating the duty of loyalty, even when there is no tie between choices. We also encourage the Department to remove any new disclosure requirement relating to collateral benefit characteristics for investments selected after a tie. These important adjustments to the Proposal will result in a final rule that will encourage increased retirement readiness among the private workforce by allowing fiduciaries to select investment line-ups that encourage participants to enroll and remain invested in the plan.

Very truly yours,



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