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SUBMITTED ELECTRONICALLY

December 13, 2021

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

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

Ladies and Gentlemen:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to provide comments with respect to the proposed rule published by the Department of Labor ("Department") in the Federal Register on October 14, 2021 (the "Rule" or "Proposal"), which seeks to amend the "Investment Duties" regulation under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). The Proposal seeks to clarify the application of ERISA's fiduciary duties of prudence and loyalty to selecting investments and investment courses of action, including qualified default investment alternatives, exercising shareholder rights, such as proxy voting, and the use of written proxy voting policies and guidelines.

As Fidelity is one of the nation's leading retirement services providers and asset managers, the Department's Proposal provides employee benefit plan fiduciaries helpful clarity with respect to how they can incorporate environmental, social, and corporate governance ("ESG") factors in the consideration of investments and investment courses of action and the exercise of shareholder rights.[2] To that end, Fidelity believes the Proposal largely achieves the Department's original goal to "provide clarity and certainty to fiduciaries regarding their legal duties under ERISA section 404 in connection with making plan investments and for exercising shareholder rights."[3] Specifically, the following provisions of the Proposal are helpful in providing clarity and

[1] Fidelity was founded in 1946 and is one of the world's largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering more than 25 million participants and beneficiaries. Fidelity is the nation's largest provider of services to individual retirement accounts ("IRA") with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).
[2] The comments set forth in this letter primarily focus on the impact of the proposed regulation on investment options in participant-directed plans but many of the comments apply equally to investments in other employee benefit plans subject to ERISA, including defined benefit plans.
[3] 29 CFR Part 2550, pp. 57285.

consistency to plan fiduciaries:

Removal of "pecuniary" references while focusing on fundamental ERISA principles

The DOL's 2020 ESG Rule stated that ERISA plan fiduciaries must solely focus on pecuniary factors expected to have a material effect on an investment's risk and/or return and largely discouraged fiduciary consideration of non-financial investment objectives such as ESG aims without providing a clear definition of what constitutes ESG investing nor any clear framework for consistently applying a "pecuniary factor" assessment. The Proposal's removal of any reference to "pecuniary" factors and focus on long-standing ERISA principles including "the core principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on material risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan" provides the clarity the previous Proposal lacked. Additionally, the Proposal recognizes that a plan fiduciary can take participant preferences into account. We believe the Proposal sets forth appropriate standards for fiduciary investment analysis and outlined a clear and consistent standard framework.

Recognition of ESG factors as material to investment risk and return

In a clarification of the DOL's 2020 ESG Rule, the Department acknowledges in its Proposal that "[a] prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis," and specifically cites ESG factors as being material to the risk-return analysis. Furthermore, in the preamble to the Proposal, the Department correctly notes that "material climate change and other ESG factors are no different than other 'traditional' material risk-return factors…" As we have discussed with the Department, Fidelity believes ESG factors can impact long-term financial considerations for any investment. Therefore, Fidelity agrees with the Department's clarification that ESG factors are among the many factors a prudent fiduciary may consider as material to an investment's risk-return analysis.

Permitting a plan fiduciary to adopt the proxy voting policies of a pool investment manager

Revisions to the Proposal set forth clear standards by which fiduciaries should decide whether and when to exercise shareholder rights that are consistent with ERISA's general framework of loyalty and prudence. We appreciate the Department's revisions to simplify and permit plans participating in a pooled investment vehicle to accept the investment manager's investment policy before investing, so long as the investment manager's proxy policies are consistent with ERISA and the Proposal.

While the Proposal succeeds in its efforts to provide clarity, we nevertheless appreciate the Department's invitation to provide comments on the Proposal. We believe certain modifications to the Rule set forth below would provide further clarity and ease to plan fiduciaries as they incorporate these standards when considering plan investments and exercising shareholder rights.

I. Simplify or Remove ESG Factor Examples

As mentioned above, Fidelity supports the Department's acknowledgement that ESG factors can be material to the risk-return analysis when selecting investments. This is consistent with how most fiduciaries and fiduciary investment managers view ESG factors. However, as stated in our previous comment letter, we believe singling out any one specific investment factor may give it undue weight and increase the likelihood of further uncertainty in this area, which continues to evolve. Instead, we believe that the final rule should be as neutral as possible to reduce the likelihood of future modifications of the rule to provide clarity and confidence to plan fiduciaries. Additionally, ESG continues to be an evolving area of investment discipline. The term and acronym "ESG" do not have a uniform meaning and there may be future considerations or additions to what we now understand to be commonly understood ESG factors. For example, in the coming years, the investment industry might identify an additional factor that would expand the ESG acronym and likewise be considered material to an investment's risk-return analysis. For this reason, we believe that the Final Rule should simplify the examples by adding the underlined language in subsection (b)(4) and striking the examples provided in subsections (b)(4)(i)-(iii)), as follows:

> "(4) A prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis, <u>including, for example and without limitation, climate change-related factors, governance factors, and workforce practices</u>."

Because the investment world, and particularly what and how ESG factors are considered, continue to evolve, we believe this less specific approach would reduce the need for guidance in this area to be revised when circumstances change while continuing to provide clarity to plan sponsors that ESG considerations are permissible in the fiduciary decision-making process. If the Department does not agree that simplified examples would be appropriate, then we respectfully request that the examples be removed altogether.

II. Modify the Tie-Breaker Rule

Under the current rule, if an investment decision cannot be made based on "pecuniary" factors, the decision must pass a tie-breaker test that requires: (1) two alternative investments or investment courses of action to be "economically indistinguishable," and (2) the fiduciary to engage in a burdensome analysis and documentation of why, among other items, the pecuniary factors were not sufficient to select the investment.

The Proposal dispenses with the "economically indistinguishable" standard. In its place, the Proposal sets forth a revised tie-breaker approach pursuant to which a fiduciary may consider "collateral benefits" in selecting a plan investment if the fiduciary concludes that competing investments "equally serve the financial interests of the plan."

Fidelity appreciates the Department's recognition that two investments or investment courses of action will rarely, if ever, be economically identical, and that it can often be the case that more than one investment or investment course of action in a given asset class may be in a plan's best interest.[4] Thus a tie-breaker concept will only be of practical use if applied to similar investments or investment courses of action that are defined more broadly than those that are identical or "economically indistinguishable."

However, Fidelity believes that defining the relevant investments as those that "equally serve the financial interests of the plan" is still too narrow to adequately describe investments that should be eligible to be compared under the tie-breaker rule. We suggest that the Department instead define the investments or investment courses of action among which a tie-breaker approach can be applied by reference to the fiduciary's duty of prudence under subsection (b). In other words, to the extent that a fiduciary prudently determines that more than one investment is consistent with the plan's investment objectives and is reasonably designed to further the purposes of the plan, the fiduciary should be permitted to select from among those investments or investment courses of action based on collateral benefits. This formulation would make it clear that a fiduciary may only consider collateral benefits when choosing among investments or investment courses of action that satisfy the duty of prudence and would not introduce new terminology, such as "financial interests," that could be interpreted to require additional requirements beyond ERISA's duty of prudence to be met.

The Proposal also removes the current rule's burdensome documentation requirement because DOL is concerned that singling out one category of investment actions for a special documentation requirement may, in practice, chill investments based on ESG factors. Fidelity appreciates the Department's recognition that the explicit documentation requirement is unnecessary and may have negative consequences and fully supports its removal.

However, the Proposal's tie-breaker approach would impose a participant disclosure requirement for investments selected pursuant to the tie-breaker so that participants are "adequately apprised of such factors." Fidelity is concerned the proposed tie-breaker would subject only those funds with collateral benefits related to ESG principles to heightened disclosure, whereas riskier, non-diversified investments, or investments that are not designed to appeal to certain types of investors would not necessarily be subject to such heightened disclosures. We believe the current tie-breaker Proposal would result in an unnecessary and fundamentally unfair requirement of heightened disclosure for funds that consider collateral benefits related to ESG principles. Accordingly, we respectfully request that the Department remove the participant disclosure requirement.

[4] In the preamble to its Prohibited Transaction Exemption 2020-02, the Department noted that the "best interest standard also does not impose an unattainable obligation on Investment Professionals and Financial Institutions to somehow identify the single "best" investment for the Retirement Investor out of all the investments in the national or international marketplace, assuming such advice were even possible at the time of the transaction." 85 Federal Register 82821.

Alternatively, the Department should, at a minimum, suspend the current tie-breaker disclosure provision because the SEC is expected to propose rules or issue guidance with respect to prospectus disclosures for mutual funds and ETFs that focus on environmental, social, and governance principles. Until such SEC rule-making or guidance is finalized, the Department should refrain from "collateral benefit" disclosures in order to further clarify how a plan fiduciary might frame such disclosures by leveraging disclosures set forth in fund documentation. An SEC disclosure framework would enable the Department to create consistent standards and factors a fiduciary may want to consider in meeting any collateral benefit disclosure requirements in the future to the extent it determines such disclosures are necessary.

In sum, we respectfully request that the Department revise paragraph (c)(3) of the Proposal in accordance with the underlined and stricken language as follows:

> "(3) If, after the analysis in paragraph (c)(2) of this section, a fiduciary prudently concludes that competing investments, or competing investment courses of action, each meet the requirements of paragraph (c)(2), ~~equally serve the financial interests of the plan over the appropriate time horizon,~~ the fiduciary is not prohibited from selecting ~~the~~ a single investment, or investment course of action, from among such competing investments, or investment courses of action, based on collateral benefits other than investment returns. ~~However, if the plan fiduciary makes such a selection in the case of a designated investment alternative for an individual account plan, the plan fiduciary must ensure that the collateral-benefit characteristic of the fund, product, or model portfolio is prominently displayed in disclosure materials provided to participants and beneficiaries.~~ A fiduciary may not, however, accept expected reduced returns or greater risks to secure such additional benefits."

III. Modifications to Proxy Proposal Provisions

Fidelity values the Proposal's modifications to the current rule's proxy and shareholder rights provisions to adopt a less prescriptive approach that allows fiduciaries to exercise discretion and flexibility in proxy voting determinations. Further, we support the Department's intent to clarify that ERISA does not require plan fiduciaries to exercise the plan's voting or other shareholder rights in every circumstance. Additionally, Fidelity appreciates that the Proposal does not apply to shareholder rights that are passed through to plan participants or to the voting of underlying investments held through shares of registered investment companies. For the sake of clarity, though, Fidelity requests that language be added in subsection (d)(5) to provide that the rule does not apply to a mutual fund's exercise of shareholder rights on securities owned or held by mutual funds.

In addition, Fidelity agrees with subsection (d)(4)(B)(ii) which, consistent with the Department's prior guidance, provides that investment managers of pooled investment vehicles may develop their own investment policy statements consistent with ERISA and require participating plans to adopt the statement before they are allowed to invest. However, we request that the Department modify the Proposal to clarify that such an approach may also be taken by an investment manager of a separately managed account for a single plan. Accordingly, we respectfully request the Department modify the Proposal to add the underlined language to the second to last sentence of (d)(4)(ii) as follows:

> "(d)(4)(ii) ….. Such an investment manager <u>for a pooled investment vehicle, or an investment manager for another investment or investment course of action for a single plan, such as a separately managed account</u>, may, however, develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager's investment policy statement, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy statement and proxy voting policy are consistent with Title I of ERISA and this section before deciding to retain the investment manager."

We appreciate the opportunity to provide these comments and are available to discuss any questions you may have with respect to them.

Sincerely,

James Barr Haines

SVP & Deputy General Counsel