EVERSHEDS SUTHERLAND

Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703

D: +1 212.389.5000
F: +1 212.389.5099

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THE COALITION OF COLLECTIVE INVESTMENT TRUSTS

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Via Federal eRulemaking Portal:
www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: RIN 1210-AC03
Room N-5655
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

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

Dear Sir or Madam:

We appreciate the opportunity to respond to the request for comment issued by the U.S. Department of Labor (the "Department") regarding the proposed amendments to the Investment Duties regulation under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") to clarify the application of ERISA's fiduciary duties of prudence and loyalty to the selection of investments and investment courses of action and the exercise of shareholder rights ("the Proposal"). The Coalition of Collective Investment Trusts (the "Coalition") is a group of fund sponsors and money managers active in the collective investment trust industry. [1] With approximately 50 member companies, the Coalition collectively represents a sizeable presence in the industry. This letter represents the views of the Coalition but not necessarily those of individual member companies.

[1] The Coalition comprises a diverse group of fund sponsors, money managers and service providers. Additional information is accessible via: https://www.ctfcoalition.com.

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Background

The Proposal would amend two current rules finalized by the Department in 2020 – "Financial Factors in Selecting Plan Investments", 85 F.R. 72846 (Nov. 13, 2020) (the "Financial Factors Rule"), and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 F.R. 81658 (Dec. 16, 2020) (together, the "2020 Final Rules") – to address uncertainties regarding aspects of the 2020 Final Rules and associated preamble discussion relating to consideration by retirement plan fiduciaries of environmental, social and governance ("ESG") issues in making investment and proxy voting decisions. The Coalition previously provided comments regarding the then proposed version of the Financial Factors Rule in a letter dated July 30, 2020 ("July 2020 Comment Letter"), highlighting the following concerns shared by the Coalition and other industry groups:

- As an overarching matter, the Financial Factors Rule is unduly prescriptive and interferes with ERISA's well-accepted, principles-based approach with regard to investment evaluation in a way that may skew plan fiduciaries' judgement and impair their ability to satisfy their responsibilities;
- The scope and applicability of the Financial Factors Rule's specific rules regarding ESG investments is unclear;
- The requirement that a fiduciary compare each investment or investment course of action involving an option that could be deemed an ESG investment to "available alternative investments or investment courses of action" is confusing and unworkable;
- The requirement that investments be "economically indistinguishable" before a fiduciary can consider "non-pecuniary" factors, such as ESG factors, effectively subverts a fiduciary's best judgement in favor of a standard that is virtually impossible to meet; and
- The Financial Factors Rule's prohibition on an investment whose objectives, goals or principal investment strategies include, consider or indicate the use of one or more non-pecuniary factors, such as ESG factors, serving as a qualified default investment alternative ("QDIA") is inconsistent with the QDIA regulations and would add unnecessary costs and burdens on plan fiduciaries.

In its amendments to the 2020 Final Rules, we believe the Department's Proposal strikes the right balance between preserving ERISA's principles-based approach to evaluation of plan investments and investment courses of action, and providing sufficient guidance to inform a fiduciary's consideration of ESG and other factors in the context of this evaluation. For the reasons summarized below, we commend the Department's efforts in issuing the Proposal and strongly encourage the Department to finalize it in substantially the same form as proposed.

Coalition Comments

In the preamble to the Proposal, the Department notes its 2021 outreach efforts to hear views from interested stakeholders, which included many of the same concerns expressed by the Coalition in the July 2020 Comment Letter, and the Department's conclusion that the 2020 Final Rules may have created additional uncertainty regarding whether, under ERISA, a fiduciary may consider ESG and other factors in making investment and proxy voting decisions. As a result, the Proposal specifically provides that to meet the duty of prudence, a fiduciary's consideration of projected return in connection with an investment "may often require" an evaluation of the effects of climate change and other ESG factors on the investment. In addition, the Proposal adds a new paragraph to the 2020 Final Rules clarifying that a fiduciary may, depending on the circumstances, consider climate change and other ESG factors as material factors in its risk-return analysis and provides examples of the types of factors that may be considered in this regard.

As an initial matter, the Coalition expresses its gratitude for the Department's actions to address the valid and practical concerns expressed by industry groups, investment providers and plan fiduciaries alike in respect to the 2020 Final Rules and applauds the inclusion of provisions in the proposal clarifying the appropriate evaluation of climate change and other ESG factors among considerations in assessing an investment or investment course of action. We believe that the specific examples and affirmative statement in the proposed rule that prudence "may often require" consideration of ESG factors in evaluating investment alternatives should go a long way toward alleviating concerns created by the 2020 Final Rules among plan fiduciaries and investment providers that integration of climate change and other ESG factors in investment decision-making somehow might be inconsistent with fiduciary obligations. Further, we acknowledge and agree that the new language appears to be a recognition that ESG investments may provide a source of enhanced value and returns to plan investment portfolios and may improve portfolio resilience against the potential financial risks and impacts associated with climate change and other ESG factors. As such, the Proposal should help to remove perceived regulatory barriers to allow plan fiduciaries and investment providers to incorporate ESG factors into their investment processes.

The Proposal also includes a restatement of ERISA's exclusive purpose obligation and prudence duty[2], and casts a fiduciary's consideration of climate change and other ESG factors as among the material and risk-related factors that otherwise constitute part of a fiduciary's investment evaluation criteria. The Department notes that the substance of this analysis methodology is not new, but rather is the product of decades of sub-regulatory guidance interpreting and clarifying ERISA's principles-based statutory regime. Moreover, the Proposal reverts to the Department's historical "tie-breaker" standard with regard to plan investment decisions, making clear that a fiduciary is not prohibited from selecting an investment based on collateral benefits other than investment returns, so long as the fiduciary prudently concludes that the proposed investment and competing investment

[2] See ERISA §§ 404(a)(1)(A) and (B).

alternatives "equally serve the financial interests of the plan." Significantly, this new provision does not require competing investment alternatives considered by a plan fiduciary to be "economically indistinguishable," and the provision removes the 2020 Final Rule's specific documentation requirements for tie-breakers. The Coalition believes this provides a more flexible standard than that under the 2020 Final Rules, allowing plan fiduciaries to better exercise discretion and best judgment within the parameters of the ERISA exclusive purpose and prudence requirements.

Finally, the Coalition strongly supports the elimination of the 2020 Final Rules' special rule prohibiting a fund, product or model portfolio whose objectives, goals or principal investment strategies include, consider or indicate the use of one or more non-pecuniary factors, such as ESG factors, from serving as a QDIA. The QDIA regulations make clear that "selection of a particular qualified default investment alternative … is a fiduciary act and, therefore, ERISA obligates fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries." Thus, we believe it is appropriate that the same fiduciary standards generally applicable to a plan fiduciary's selection and monitoring of a plan's designated investment alternatives also apply with regard to the selection and monitoring of a plan's QDIA, including consideration of climate change and other ESG factors. Moreover, as noted in the Coalition's July 2020 comment letter, we are concerned that the 2020 Final Rules' effective prohibition on a QDIA including any ESG component would add unnecessary costs and burdens on plan fiduciaries, who would have to constantly monitor every investment decision within the QDIA, which typically is an externally managed fund, to ensure that it agrees that no "ESG" type investments have been included. Accordingly, we steadfastly concur in the Department's proper decision to eliminate the 2020 Final Rules' QDIA restrictions.

We thank the Department for this opportunity to comment on the matters addressed in the Proposal and look forward to the Department's issuance of final rules in this area in substantially the same form as the Proposal.

Clifford Kirsch

Carol McClarnon

FOR THE COALITION OF COLLECTIVE INVESTMENT TRUSTS