Heartland Capital Strategies
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December 13, 2021

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: Employee Benefits Security Administration, Department of Labor
Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights Proposed Regulation (RIN 1210-AC03)

Greetings:

Heartland Capital Strategies strongly supports the proposed regulations referenced above. We believe that these regulations are essential to clarifying for ERISA fiduciaries that economically targeted investments (ETIs) and investments guided by environmental, social, and governance (ESG) factors can be appropriate for ERISA-regulated retirement and benefit plans, subject to the normal ERISA requirements of prudence, care, and loyalty.

For too long, a cloud of uncertainty has hung over these types of investments among ERISA fiduciaries even as they have become the fastest growing segment of the larger investment world. This growth reflects not just investors' interest in the broader impact of their investment decisions, but also a long overdue recognition of how central environmental, social, and governance factors and economic impacts beyond shareholder returns are to investment risk, particularly over the long term.

Consistent with its support, Heartland does have specific changes to recommend to the proposed regulations as currently drafted. We believe these changes would further strengthen them in providing the necessary guidance to plan fiduciaries. These are discussed below.

Based in Pittsburgh, Heartland is a partnership launched by the Steel Valley Authority, an innovative regional organization that has been successfully restructuring troubled manufacturing firms for more than 30 years. Heartland's purpose is to harness the power of workers' capital – particularly pension assets – to invest prudently in good jobs and revitalize industrial communities. Since its founding, Heartland has striven to mobilize workers' capital by highlighting responsible investment opportunities in the real economy, educating capital stewards, convening events, and laying the foundation for bringing together a new generation of responsible investors. Heartland advocates for the adoption and growth of responsible investments before pension funds and the institutional investment community at large, particularly investments that: (i) demonstrate competitive investment returns over the long term; (ii) yield over-sized, positive economic impacts in a city or region or industry; and (iii) incorporate ESG criteria into investment decisions.

Consistent with its strong support for the proposed regulations, Heartland recommends the following modifications to the regulations as currently drafted:

- Economically targeted investments (ETIs) should be expressly identified in the regulations, *in addition to ESG-guided investments*, as potentially appropriate plan investments, subject to normal ERISA protocols. ETIs overlap with investments applying ESG considerations, but they are not the same. The concepts should not be merged. ETIs are typically private investments that achieve direct impacts in terms of local job creation, community economic development, and affordable and workforce housing construction. ETIs have a long history under ERISA; they were expressly allowed in tie-breaker situations in DOL guidance issued in 1994,[1] before the "ESG" nomenclature was in wide use, and were referenced positively again in guidance issued in 2015.[2] They have been the backbone of responsible pension investment by union pension plans for the past three decades.

- In subsection (b)(4) of the regulations, the examples provided of factors a prudent fiduciary might consider should be expanded. The three factors listed – climate change factors, governance factors and workforce practices – are valid but too narrow, even as examples, to suggest the full range of ESG factors that can and should be considered by fiduciaries as potentially financially relevant or useful as tie-breakers among comparable investments. Given the uncertainty among fiduciaries that has chilled these types of investments in ERISA plans for decades, a more robust and inclusive set of examples would be extremely helpful. A broader list is attached as an Exhibit to this letter as a suggestion.

- There should be express recognition in the regulations that ERISA plans typically have very long-term funding obligations and investment time horizons. Plan fiduciaries should be encouraged and supported in moving beyond the short-term thinking typical of much standard investment analysis. Applying a long-term frame to investment analysis makes considerations of climate change and other ESG factors more clearly relevant to investment decision-making. The following is a possible edit of subsection (b)(2)(ii)(C) of the proposed regulations to accomplish this:

[1] DOL Interpretive Bulletin 94-01

[2] DOL Interpretive Bulletin 2015-01

(C) The projected return of the portfolio relative to the funding objectives of the plan applying investment time horizons commensurate with the long-term funding obligations of the plan, which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.

- The final rule should eliminate references to "material factors" in describing permissible ESG and ETI considerations. Use of the word "material" risks importing into the regulations contested baggage from the worlds of accounting, valuation, and securities law. As an example, a relatively short-term perspective of ten years or less is virtually universal to the concept of materiality in these venues. Plan fiduciaries should apply ERISA standards, particularly those set forth in Section 404(a) of ERISA and related law, in determining which factors they believe are relevant to portfolio performance in light of plan obligations. Therefore, we recommend that the final regulations should refer to "relevant factors" rather than "material factors."

Heartland commends the Department of Labor and Secretary Marty Walsh in moving expeditiously in drafting and circulating for comment the proposed new regulations. They are much needed.

Thank you for your consideration of these comments.

Sincerely,

HEARTLAND CAPITAL NETWORK

Tom Croft, Managing Director

David Keto, Member of the Governing Board

Exhibit to Letter from Heartland Capital Strategies to Department of Labor, Employee Benefits Security Administration, Office of Regulations and Interpretations, December 13, 2021

Proposed substitution for subsection b(4) of the proposed regulation:

(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 relevant to the risk-return analysis, including as a collateral benefit under subsection (c)(3) of this section, which might include, without limitation:

- (i) Economically targeted investment considerations including the potential for achieving economic benefits such as—
  - (A) local job creation;
  - (B) community economic development; and
  - (C) affordable and workforce housing construction.
- (ii) Social considerations including—
  - (A) characteristics of workforces employed by entities in which the plan invests, including compensation and benefits, health and safety, diversity and demographics, skills and training, retention and turnover, full-time and part-time employment, and the use of independent contractors;
  - (B) labor and human rights compliance by entities in which the plan invests, including workers' freedom of association, the right to collectively bargain, and the prevention of employment discrimination, child labor, and forced labor in company operations and supply chains, and policies and practices regarding the offshoring of operations, supply chains, and jobs;
  - (C) due diligence and practices regarding supply chain management, including environmental, human rights, and worker compensation considerations; and
  - (D) the implementation of practices which enhance diversity; and and inclusion within the workforce, senior leadership, business procurement, and philanthropy.
- (iii) Environmental considerations including—
  - (A) the potential to reduce and ultimately eliminate net greenhouse gas emissions associated with business activities and to mitigate exposure to climate-related risks to the businesses, assets and properties of entities invested in by the plan;
  - (B) the potential to mitigate other climate-related and associated environmental harms and risks, such as industrial pollution, habitat destruction, deforestation, species endangerment and extinction, and other forms of environmental degradation;
  - (C) the potential to address and rectify issues of environmental justice and the inequitable environmental impacts of certain business operations on historically disadvantaged communities; and
  - (D) the potential to provide workers affected by the shift to a low carbon economy with a just transition by creating decent work and quality jobs.
- (iv) Governance considerations including—
  - (A) corporate governance practices by entities in which the plan invests, including executive compensation, board diversity, worker board representation and

codetermination, the independence of board chairs, political spending and lobbying disclosure; and

(B) tax practices of entities in which the plan invests, including international tax avoidance strategies and tax payment disclosure.