KALMANOVITZ INITIATIVE
for Labor and the Working Poor
GEORGETOWN UNIVERSITY

July 15, 2020

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

RE: Proposed rule on Financial Factors in Selecting Plan Investments (RIN 1210-AB95)

Dear Employee Benefits Security Administration:

I write in strong opposition to the Department of Labor's proposed rule, "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposal").

The Kalmanovitz Initiative for Labor & the Working Poor studies the problems of working people from the perspective of Catholic social teaching. We have watched with increasingly alarm the growing inequality that is ravaging the bonds of trust in our society. One of the best remedies to these disturbing trends has been the development of responsible investment strategies that had sought to reward those companies whose actions meet environmental, social, and governance (ESG) goals in line with advancing the common good. Georgetown University itself employs ESG criteria in its investment strategies.

The Proposal seeks to up-end decades of precedent allowing ERISA-regulated retirement plans to invest responsibly under appropriately strict conditions. This precedent has its origins in DOL guidelines around economically targeted investments ("ETIs") and more recently has focused on investments guided by ESG considerations.

The Proposal is fundamentally inconsistent with the purposes of ERISA which was adopted to protect retirement savers by setting high standards for retirement plan fiduciaries, requiring them to act with due care, skill, prudence, and diligence and to avoid conflicts of interest. The ultimate goal of ERISA is to maximize retirement savings for plan participants. The overwhelming majority of rigorous, peer-reviewed academic studies have concluded that ESG-guided investments have in general performed as well as or better than comparable conventional investments. This is backed up in reports by leading industry analysts such as Morningstar. Given this overwhelming evidence, issuing onerous regulations that narrowly and specifically target and burden this type of investment, as the DOL now proposes, undermines the purpose and intent of ERISA. By discouraging and deterring fiduciaries from investing in ESG-guided funds, the DOL is effectively narrowing the field of available investment options for ERISA plans which could force participants into potentially lower-performing investments resulting in lost long-term retirement savings. For decades, the DOL has allowed fiduciaries to consider ESG factors, whether or not they can be proven to be economically material, as tiebreakers in choosing among investments that are comparable from a risk/return perspective. The use of non-financial considerations as tiebreakers has been an essential part of ERISA practice, allowing fiduciaries to take into consideration factors, including some ESG factors, that cannot be conclusively shown on an individual basis to have a positive economic effect, but whose application does not diminish financial returns.

The proposed rule would require that fiduciaries to document that investments are "economically indistinguishable" in order be considered comparable for these purposes. There is no basis in real-world investment practice that supports the proposition that investments must be economically indistinguishable in order to be considered comparable on a risk/return basis. Since all investments have distinguishable economic characteristics this change effectively eliminates the possible use of an ESG factor as a tiebreaker. While the DOL's commentary states that the use of ESG factors as tiebreakers would be continued, the threshold for risk/return comparability would be raised to an unachievable level, preventing fiduciaries from considering important factors that cannot be translated neatly into return metrics.

This proposed rule would create special burden upon Catholic institutions that are embracing ESG investment principles in response to Pope Francis's call for protecting workers and the environment as outlined in his encyclical *Laudator Si'.*

ESG investing has been an effective, free-market tool for producing needed change and its popularity with investors is growing rapidly. Targeting ESG investing for onerous and burdensome regulatory treatment, inconsistent with ERISA's purposes, appears political and responsive to corporate interests that have longed opposed responsible investment. Interference in the investment preferences of retirement investors by the DOL on political grounds rather than to fulfill ERISA's purposes would be arbitrary and capricious, a violation of the economic rights of those investors and a potential violation of their First Amendment rights.

For these reasons, I respectfully request that the Proposal be immediately withdrawn from further consideration. Thank you for your consideration.

Sincerely,

Joseph A. McCartin

Joseph A. McCartin
Professor of History
Director, Kalmanovitz Initiative
for Labor & the Working Poor