

**DAVID DINERMAN**  
**Attorney at Law**  
**850 Tanglewood Drive**  
**Lafayette, CA 94549**  
**(925) 878 4231**  
[dinerman@sbcglobal.net](mailto:dinerman@sbcglobal.net)

July 16, 2020

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

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

To Whom It May Concern:

I am writing to provide comments in response to the Department of Labor's proposed rule, "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) (the "Proposal").

I am the former chair of Hampshire College's board of trustees' Investment Committee, a role and title I held for seven years, from 2010 through 2013. Hampshire has a long record of thought leadership in education and innovative thinking in a number of areas. Its academic program has been broadly imitated by many other schools. The college was also an early advocate for divestment from South Africa, as part of a long tradition of socially responsible investing. In 2011, the college adopted an overtly environmental, social and governance ("ESG") based investment policy statement. Hampshire is a small college, with an enrollment that has varied from 600 – 1,500 students, and an endowment of under \$100 million. In my role as Chair of the Investment Committee, I led the board committee responsible for managing the college's endowment, so I am very familiar with the college's actions regarding its endowment, and the endowment's performance.

Having reviewed the Proposal, it is my view that there are a number of flaws in both the thinking and drafting of the Proposal, which lead me to ask that the Department withdraw the Proposal. This letter will detail a number of what I view as critical flaws in the Proposal.

The Department of Labor fails to articulate a rational connection between the relevant facts and the proposed rule. The Proposal reveals a fundamental misunderstanding of how professional investment managers use ESG criteria as an additional level of due diligence work and analysis in assessing potential investments, and in risk screening in the portfolio construction process. Investment managers increasingly analyze ESG factors precisely because they view these factors as material to financial performance, and achieving the best possible risk adjusted returns.

Having led the investment committee for seven years, I can speak directly to the impact that the college's overtly ESG based investment policy statement (the "IPS") had on the college endowment's financial performance. Over both the period of my leadership, and the usual 1, 3, 5, 7 and 10 year periods, the college's endowment broadly out-performed as compared to the full range of indices across all asset classes, beating these touchpoints in over 75% of these metrics. Our investment decision making process was driven by an IPS firmly rooted in ESG principles, and I can assure you that having the ESG considerations as part of our process significantly and materially improved the endowment's financial performance. This experience provides a real life example over a sustained period of time that ESG strategies not only do not sacrifice, but in fact, enhance investment returns. The proposed rule assumes the opposite to this piece of empirical evidence, and as a result, is fundamentally flawed<sup>1</sup>. The college's example is but one of far broader similar phenomena; The plain facts are that ESG investing not only does not involve any financial penalties, but instead, offers better returns and a lower risk profile<sup>2</sup>.

When properly utilized, ESG considerations should be viewed as an added set of risk screens, allowing investors to consider and assess risks, and factor those into their investment analysis. This can be seen by reading the cover story of Barrons, from October 8, 2016, entitled "The Top 200 Sustainable Mutual Funds". A reading of this article will reveal not only that top investment managers think along these same lines, *and* that this approach is widely accepted in the professional investment community, another consideration the proposed rule fails to consider.

The proposed rule misconstrues the meaning of being a fiduciary, not only in the United States, but internationally. The basics of being a fiduciary involves two duties, a duty of loyalty, and a duty of prudence. The duty of loyalty is simple in concept, a fiduciary must put the institution's interests ahead of her/his own. The duty of prudence roughly translates to requiring one to use business judgment in making decisions. In the realm of pension plans, much has been written and a number of rules have been enacted by your agency that further address this. Of note, Susan Gary, professor of law at the University of Oregon, who served as secretary of the Uniform Law Institute, wrote an article in which she concluded that the restatement of Trusts, UPIA and UPMIFA (the two uniform law schemas governing how endowments are managed), concluded that ESG considerations are entirely appropriate to take into account by fiduciaries in the management and investment of endowments<sup>3</sup>.

The proposed rule assumes that ESG considerations are not material. This is simply false. To highlight this in the least controversial aspect of ESG considerations (the "G"), a simple way to understand this is that with better governance, investors will have fewer Enron type failure of internal controls. Respectfully, that is just plain common sense. To preclude this kind of analysis

---

<sup>1</sup> Attached hereto is a report dating to 2017 which shows the college endowment's performance.

<sup>2</sup> See, for example, Morgan Institute for Sustainable Investing – Sustainable Reality Analyzing Risk and Returns of Sustainable Funds, 2019

[https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable Reality Analyzing Risk and Returns of Sustainable Funds.pdf](https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable%20Reality%20Analyzing%20Risk%20and%20Returns%20of%20Sustainable%20Funds.pdf)

<sup>3</sup> Gary, Susan N., Values and Value: University Endowments, Fiduciary Duties and ESG Investing, 42 Journal of College and University Law 218, (2016)

and filtering, the rule would encourage investment decision making based on a more limited set of screens, which would almost certainly impair investment performance and add risk.

In fact, there is abundant evidence that the companies that incorporate ESG considerations into how they operate produce better financial results, and as a result, better investment performance<sup>4</sup>. This is a mainstream and well accepted relationship, borne out by facts and data. No doubt, the Department is aware of Blackrock's efforts in this domain, and its efforts to urge companies to add ESG considerations to how they operate. As you almost certainly are aware, Blackrock is the largest asset manager in the country. Its CEO, Lawrence Fink has increasingly been advocating that ESG considerations are not only prudent, but imperative. In a February 2019 article, Blackrock said the following:

“Sustainable investing was once viewed as a trade-off between value and ‘values.’ Yet today, it’s something investors can no longer afford to ignore. What has changed? More granular data, more sophisticated analysis and shifting societal understanding of sustainability as well as growing awareness that certain factors — often characterized as environmental, social and governance, or ESG — can be tied to a company’s long-term growth potential.”<sup>5</sup>

This statement, its source and the amount of assets that Blackrock manages make it clear that ESG thinking in investment decisions is i) mainstream, ii) integrally tied to and aligned with better financial performance, iii) is integrally tied to fiduciaries' duty or prudence.

The Proposal is likely to have the perverse effect of dissuading fiduciaries, even against their better judgment, from offering options for their plans that consider ESG factors as part of the evaluation of material financial criteria. As a result, it will unfairly, and harmfully, limit plan diversification and perhaps compel plan participants to choose options that are either riskier or less profitable.

I respectfully request that the Proposal be withdrawn. Thank you for your consideration of these comments.

Sincerely,

David Dinerman  
Attorney at Law

---

<sup>4</sup> See, for example, From the Stockholder to the Stakeholder: How Sustainability can Drive Financial Outperformance, Gordon L. Clark, Andreas Feiner, Michal Viehs (2015) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2508281](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281), and Barrons, February 7, 2020 – These are the 100 Most Sustainable Companies in America - [https://www.barrons.com/articles/the-100-most-sustainable-companies-51581095228?mod=past\\_editions](https://www.barrons.com/articles/the-100-most-sustainable-companies-51581095228?mod=past_editions)

<sup>5</sup> Blackrock Investment Institute, February 1, 2019