



July 30, 2020

Assistant Secretary Jeanne Wilson
Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Re: RIN1210-AB95, Financial Factors in Selecting
Plan Investments Proposed Regulation (the
“Proposed Regulation”)

Dear Secretary Wilson:

The Securities Industry Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Department of Labor’s (“Department”) proposed amendments to the “Investment Duties” regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). The preamble states that the amendments are intended to clarify that ERISA requires plan fiduciaries to select investments based solely on financial considerations.² Since the enactment of ERISA the duty of prudence has been based on a prudent process and not on the end results.³ The Department has often stated that the duty of prudence is based on a prudent process and is neither results oriented nor “Monday Morning Quarterbacking.”

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² 85 Fed. Reg. 126, p. 39116 (June 30, 2020).

³ See James D. Hutchinson, The Federal Prudent Man Rule under ERISA, 22 Vill. L. Rev. 15, 43 (1976) (“Much of the emphasis under ERISA is on the procedures which should be followed in properly managing assets or selecting and monitoring investment managers. This emphasis is based upon the fact that sound management of employee benefit plan assets and proper fiduciary conduct under ERISA’s prudent man rule are tied to a standard which focuses upon the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.”).

In the Department’s own publications designed to help fiduciaries meet their responsibilities, the Department recognizes the duty of prudence to be one of process.⁴ We are concerned that the amendments depart from that standard by suggesting that investments that consider environmental, social, and governance (“ESG”) factors are suspect, regardless of the process a prudent fiduciary follows in considering those investments. We think that is a mistake and departs from the Department’s long-held guidance on those issues as well as the statutory framework of ERISA.

I. A Prudent Process Should be the Focus

While we appreciate the Department may be interested in providing greater certainty regarding fiduciaries’ responsibilities when considering economically targeted investments or those that incorporate ESG factors into the investment process, changes to the prudence regulation are, in our view, unwarranted. ERISA does not dictate which metrics a plan fiduciary may or may not or should or should not consider in making a plan investment decision, whether that decision relates to a particular investment, investment strategy or investment course of action. Nothing in ERISA suggests that it is within the Department’s role to develop a list of favored or forbidden factors, or factors to which fiduciaries should be skeptical. Instead, a fiduciary could satisfy its obligation under Section 404 of ERISA by following a prudent process and a careful evaluation of all relevant facts and circumstances. When coupled with ERISA’s other safeguards, which include a statutory duty of loyalty and stringent conflict-of-interest prohibited transaction rules, we believe the fully developed statutory framework sufficiently guards against the opportunity for abuse. Congress decided to leave plan investment decisions to fiduciaries and avoided a list of permissible or impermissible investments. Instead, ERISA includes principles designed to ensure that a fiduciary acts in the interests of plan participants and beneficiaries and adopts appropriate processes in reaching decisions. Respectfully, the Department has neither the expertise nor the authority to substitute its judgment for that of plan fiduciaries regarding which factors a plan fiduciary should consider and the weight such factors should be given in its investment process, nor should the Department seek to encourage or discourage fiduciaries to adopt or avoid adopting any particular investment thesis.

The Department notes that “[p]roviding a secure retirement for American workers is the paramount, and eminently-worthy, ‘social’ goal of ERISA Plans” and that “[p]lan assets may not be enlisted in pursuit of other social or environmental objectives.”⁵ That formulation suggests an inappropriate assumption as to the “pursuit” of fiduciaries that consider ESG factors in making

⁴ U.S. Department of Labor, Employee Benefits Security Administration, Meeting Your Fiduciary Responsibilities, p.2 (Sept. 2017) available at: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf> (“The duty to act prudently is one of a fiduciary’s central responsibilities under ERISA. It requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions. Prudence focuses on the process for making fiduciary decisions. Therefore, it is wise to document decisions and the basis for those decisions. For instance, in hiring any plan service provider, a fiduciary may want to survey a number of potential providers, asking for the same information and providing the same requirements. By doing so, a fiduciary can document the process and make a meaningful comparison and selection.”).

⁵ Proposed Regulation, p. 39116.

decisions. Fiduciaries that consider ESG factors in assessing investments do so because of their view that those factors can be indicators for long-term performance.

For example, an asset manager considering an investment in a company's equity or debt could view ESG factors as important indicators of the long-term performance of the company's share price or bond value. Fiduciaries generally are not, as the Department seems to suggest, analyzing ESG factors in order to pursue personal environmental or social goals. Fiduciaries consider ESG factors because they considered economic research that supports the conclusion that those factors can help them identify investments that will deliver long-term value to plan participants. The proposed amendments inappropriately suggest instead that ESG factors are by definition not pecuniary. That suggestion is simply untrue. The current regulation correctly states that a fiduciary must employ a prudent process solely in the interest of the plan participants. We agreed with that statement in 1975 and we agree with it now. We do not believe it requires an ESG-specific amendment.

ERISA has always required a plan fiduciary to look at the long term in investing plan assets to promote a secure retirement for plan participants. Fiduciaries and, increasingly, plan participants, share that view and recognize that investing for the future entails looking at economic challenges over a long-term investment horizon. Subject to meeting their obligation to act prudently and to diversify assets so as to minimize the risk of large losses, ERISA, by design, gives plan fiduciaries appropriate discretion and latitude to take investment risks *they* determine are appropriate and suitable for their plans based on circumstances prevailing at the time of the decision. Allowing for that flexibility means that managers who twenty years ago favored certain new investment markets that some might have thought to be inappropriate have been rewarded for their foresight and vision. As one recent example, some investment managers were able to anticipate changes in dietary preferences – changes rooted in social and environmental factors – and invested in companies like Beyond Meat who produces' plant based beef and sausage alternatives (cumulative return of 408.84% in little more than a year). Investing history is replete with examples of ESG factors foreshadowing lucrative investment trends: Amazon foresees social trend effects on retailing (cumulative return since 1997 IPO approx. 12,000%), Exact Sciences foresaw older Americans' needs for better colon cancer testing (cumulative return approx. 2,612%), etc. ESG factors also assist managers in controlling portfolio risk.⁶

The benefit of allowing fiduciaries to make investment decisions based on their judgments about what will result in long-term value, unconstrained by arbitrary regulatory constraints, ultimately will continue to be beneficial for plan participants. As an example, some believe that electric cars, solar energy and wind farms will drive future economic returns, while others believe that a diverse array of traditional and non-traditional energy investment is necessary to weather market swings. Fiduciaries that follow a prudent process, looking at the long-term financial prospects of investments might reasonably reach different conclusions, and it is not appropriate, nor is it consistent with Congress' intent, for the Department to put its thumb on the scale in favor of either. As plan fiduciaries and participants seek to maximize risk-adjusted returns based on demographic, macroeconomic, societal, environmental and geopolitical considerations, their research may prudently lead them to the conclusion that environmental, social or governance

⁶ For example, investment managers may have foreseen E, S or G risks and reduced portfolio risk by reducing exposure to certain stocks due to, for example, water contamination issues or C-suite management issues.

concerns or how an issuer is managed can drive economic outcomes and/or reduce portfolio risk. Either way, ERISA requires plan fiduciaries to act prudently and in so doing they are responsible for determining opportunities, concerns and factors that they should consider. Section 404(a) of ERISA requires fiduciaries to act:

“With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

ERISA intentionally did not include a specific approved or disapproved list of investments and instead deferred to the judgment of prudent fiduciaries.

Investment managers are ultimately successful if they deliver returns for investors: poor performers cannot continue to retain the confidence of investors. Most investment managers that seek to utilize ESG factors in their investment strategy offer an economic value proposition. The Department’s proposed amendments, however, seem to suggest that investment managers that consider ESG metrics are somehow short-changing investor returns. Investment managers are not immune to the laws of economics, where the primary economic key to survival is economic success measured by having positive investment returns. Investment managers that put collateral issues ahead of investment performance will not be successful over the long-term. In any case, the Department does not need to amend the regulations under Section 404 of ERISA to prohibit plan fiduciaries from seeking to place collateral interests ahead of investment performance. Plan fiduciaries who decide to forgo economic opportunity for purely perceived societal or communitarian benefits and that do not produce competitive economic results would violate section 404(a) of ERISA.

By regulating in a manner that restricts, or at a minimum, calls into question, fiduciaries’ abilities to make investment decisions based on considerations the fiduciaries believe can impact returns, the Department is limiting choice and damaging potential opportunities for investors. The Department should place no restrictions or other special rules on fiduciaries’ investment decisions beyond those of prudence and loyalty and ERISA’s other strong self-dealing prohibitions.

II. Proposal Fails to Recognize the Financial Benefit of ESG Factors

We believe that the Department should clarify the distinction between ESG-themed investment funds, where the primary investment or principal purpose is to promote impermissible collateral benefits, and those investment funds that are not primarily focused on ESG factors, but instead use one or more ESG factors as part of their overall investment analysis.⁷ Today, investment

⁷ See Department Field Assistance Bulletin 2018-01, fn. 8. (“For purpose of this bulletin, ESG-themed funds (e.g., Socially Responsible Index Fund, Religious Belief Investment Fund, or Environmental and Sustainable Investment Fund), should be distinguished from non-ESG-themed investment funds in which ESG factors may be incorporated

funds that use ESG factors are very different from early-entry ESG funds that may have been marketed as an opportunity for participants to improve society. Early-entry ESG-themed funds may have been regarded by some as involving a trade-off of lower performance for wider societal and environmental benefits.

As the Department has stated consistently, a fiduciary's decision to accept lower expected risk-adjusted returns in order to satisfy collateral goals is prohibited under ERISA.⁸ However, since ESG-themed funds were first introduced, a growing body of evidence makes clear that the use of ESG factors can improve investment performance and reduce investment risks, and any perceived "social benefit" would be, at most, an incidental benefit to core economic returns. Fiduciaries turn to these funds for return and risk management, not a perceived social benefit. Because an increasing number of investment managers believe that incorporating one or more ESG factors into their investment process makes sense from a fundamental investment management strategy standpoint, hindering the plan fiduciary's ability to choose among them in an unfettered way would be inappropriate and potentially harmful to plan participants and beneficiaries.

We believe that the Department has attempted to distinguish between ESG-themed investment strategies that focus on ESG factors that may not be tied to pecuniary factors on the one hand, and the many other strategies that incorporate one or more ESG factors into their investment process on the other hand. For example, we believe that the former category is the object of Paragraph (c)(3) of the Proposed Regulation. If this is correct, we ask the Department to clarify how fiduciaries should distinguish between those strategies, so they have more certainty in applying the Proposed Regulation.

Most active investment managers analyze companies by considering a range of factors. Although the factors and the weight given them may differ, the use of multiple inputs by active managers is neither new nor controversial. In analyzing companies, some investment managers look at one or more ESG factors as potential indicators of future performance. For example, in service-based companies that are dependent on highly educated and mobile talent, an investment manager may give weight to the company's compensation structure, bonus pool, and other retention tools. They may also look to the strength and depth of customer loyalty, the longevity of key service providers, and strong leadership. Many investment managers look at governance factors as potential indicators of a business' success. And many investment professionals conclude that those companies that are able to attract the best talent, build loyal customer bases, prosper through strong corporate governance oversight, mitigate risk, and drive profitable growth by investing in sustainable innovations are the companies that are the most sustainable for the long term, driving shareholder value, and better returns. For example, when investment managers conclude that diverse management produces better decisions and higher future returns, it should not be surprising that investment managers seeking companies in which to invest may

in accordance with IB 2015-01 and IB 2016-01 as one of many factors in ordinary portfolio management decisions.”).

⁸ Proposed Regulation, p. 39114 (“Thus, each Interpretive Bulletin, while restating the “all things being equal” test, also cautioned that fiduciaries violate ERISA if they accept reduced expected returns or greater risks to secure social, environmental, or other policy goals.”).

take into account diverse representation on the board or in senior positions at the company.⁹ In fact, the New York Stock Exchange in its Corporate Governance Guide embraces ESG considerations in corporate governance.¹⁰ Many investment managers increasingly view ESG factors as significant indicators of a company’s sustainable long-term performance. In turn, ESG data has increasing importance for its use in helping plan fiduciaries and managers allocate investment capital most effectively.

Investment managers that consider ESG factors in their strategies engage in significant research. Investment managers have unique perspectives, and the Department’s position that ERISA fiduciaries should categorically dismiss (or even approach with extreme caution) ESG factors as a component of an investment thesis is inappropriate and akin to the Department’s mandating that they dismiss US equity in favor of global equity, small or mid cap in favor of large cap or value in favor of growth. The Department may have overlooked or unfairly undervalued the substantial resources investment managers commit to investment research, including applying critical thinking in evaluating ESG-related factors.¹¹

There are numerous empirical studies and reports indicating there is a positive correlation between financial returns and ESG performance.¹² Further, consistent with the fiduciary duty of prudence to act “under circumstances then prevailing”, it is an appropriate best practice to consider these factors. In January 2019, the CFA Institute issued a policy paper, Positions on Environmental, Social and Governance Integration, which expressed that the consideration of ESG information and risks “is consistent with an asset manager’s fiduciary duty.”¹³ The

⁹ See, e.g., Catalyst, Why Diversity and Inclusion Matter: Financial Performance (Aug. 1, 2018), (collecting studies that demonstrate the financial benefits of workplace gender diversity); Sylvia Ann Hewlett et al., How Diversity Can Drive Innovation, Harv. Bus. Rev. (Dec. 2013); Dieter Holger, The Business Case for More Diversity, Wall St. J. (Oct. 26, 2019); Katherine W. Philips, How Diversity Makes Us Smarter, Sci. Am. (Oct. 1, 2014); Julia Dawson et al., The CS Gender 3000: The Reward for Change, Credit Suisse Res. Inst. at 22–25 (Sept. 2016); Sundiatu Dixon-Fyle et al., Diversity Wins: How Inclusion Matters, McKinsey & Co. at 13–20 (May 2020).

¹⁰ See, e.g., NYSE Corporate Governance Guide p. iv (“Boards are expected to . . . Set high standards of social responsibility for the company, including human rights, and monitor performance and compliance with those standards . . .”) and case studies at Chapters 7B (Annie’s) and 7C (Hershey Company).

¹¹ In 2015, the Journal of Sustainable Finance & Investment published an analysis that examined academic studies completed with regard to the ESG-to-corporate financial performance relationship. Out of the 2,200 studies they examined, 90% show either a positive relationship to corporate financial performance (CFP) or at least no-negative relationship. See ESG and Financial Performance: Aggregate Evidence From More Than 2000 Empirical Studies, Journal of Sustainable Finance & Investment, Vol. 5, Issue 4, p. 210-233 (Dec 2015).

¹² See, e.g., MSCI ESG Ratings, Providing Institutional Investors With a More Robust ESG Integration Tool to Help Them Mitigate Risk and Enhance Long Term Value Creation (2019) available at: <https://www.msci.com/documents/1296102/15233886/MSCI-ESG-Ratings-Brochure-cbr-en.pdf/7fb1ae78-6825-63cd-5b84-f4a411171d34>; USSIF, The Forum for Sustainable and Responsible Investment, Report on US Sustainable Responsible and Impact Investing Trends (2018), available at: <https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf>; Russell Investments, 2019 Annual ESG Manager Survey, available at: <https://russellinvestments.com/-/media/files/us/insights/institutions/governance/2019-annual-esg-manager-survey-results.pdf?la=en&hash=B25D3B7BA44EFD9B1611C74DC5650815BB7D2C66>.

¹³ CFA Institute, Positions on Environmental, Social and Governance Integration (January 10, 2019), available at: <https://www.cfainstitute.org/en/advocacy/policy-positions/positions-on-environmental-social-governance-integration>; see also CFA Institute, Global Perceptions of Environmental, Social, and Governance Issues in Investing (2017), available at: <https://www.cfainstitute.org/en/research/survey-reports/esg-survey-2017> (finding that

Department should not be (and should not encourage fiduciaries to be) skeptical of incorporating ESG considerations as a potential indicator of long-term investment returns. We urge the Department not to depart from its long-standing position that “[w]hether a particular fund or investment alternative satisfies [ERISA’s prudence] requirement[] ... is an inherently factual question, and ... [t]he appropriate plan fiduciaries must make this determination, based on all the facts and circumstances of the individual situation.”¹⁴ In the past, the Department has been concerned with attempts to regulate such restrictions “that would mandate specific investment options — limiting the ability of employers and workers together to design plans that best serve their mutual needs.”¹⁵ We urge it not do so here.

III. The Proposal Fails to Appreciate Investor Interest in ESG-Focused Funds

Just as the Department’s comments overlook empirical studies that demonstrate the potential benefit of incorporating one or more ESG factors, the proposal also inadvertently signals a significant misunderstanding of what many investors today – particularly younger investors— seek in their retirement plans. Many investors today want to invest in investment strategies that make economic sense because they pay attention to ESG factors that they believe would have a positive outcome on their post-retirement economic future, even if they also provide incidental benefits such as improving the environment, supporting equity and fairness in hiring or other societal impacts that result from economically driven corporate decisions. While there may be personal motivations to do good, participants still want to maximize risk-adjusted returns. They believe that ESG factors will help them achieve their investment goals. For example, one study found that 73 percent of participants surveyed believe that companies that provide clean water and clean energy present significant opportunities for asset growth.¹⁶ Not only investment professionals, but also plan participants, understand that ESG factors may promote prudent, long-term investing including in cases where the investment fund’s focus is on ESG factors.

According to a recent GAO study, investors consider ESG factors when reviewing companies to make financial investments. Ten of 14 investors said that their focus on long-term factors that drive value leads them to monitor or influence companies’ management of ESG issues to protect their investments. Investors generally said they use ESG disclosures to determine which ESG issues companies monitor and to assess how companies manage those risks. Nearly all investors said ESG issues can be important to a company’s operations and performance over time. For example, seven of 14 investors said they used ESG disclosures to identify companies that were less transparent than their peers or appeared to be outliers in their industries, such as having less board diversity than their peers. Investors then engaged with these companies to discuss their

the majority of CFA Institute members (73%) take ESG issues into account in their investment analysis and decisions, and the top reason they do so is “to help manage investment risks.”).

¹⁴ Department, Advisory Opinion 98-04A (May 28, 1998).

¹⁵ Department, Testimony to the Committee on Ways and Means, U.S. House of Representatives (Oct. 30, 2007).

¹⁶ Natixis Investment Managers, Global Survey of Individual Investors compiled by CoreData Research (February 2016) (survey included 7,100 investors in 22 countries of whom 750 were in the US).

risk-management strategies, encourage disclosure on ESG issues, or provide information about what kind of disclosure they would find useful.¹⁷

As that study indicated, there is strong demand for investment choices in plan lineups that apply ESG factors to further enhance investment returns. The Department seems to ignore the fact that plan participants want choice, including investment options whose investment objectives incorporate ESG considerations. Particularly in a 401(k) plan, many plan participants expect their plan fiduciaries to apply a prudent process to include a broad spectrum of choices, including those that apply ESG factors to help bolster performance. A belief that climate change poses a threat to a supply chain or that scandals that could arise from a discriminatory workplace may have a dramatic impact on a company's future performance is not purely theoretical, as we have seen in 2020.¹⁸

IV. Specific Terms and Definitions to Improve

Should the Department choose to continue to move forward with this proposal, our comments on the specific proposed revisions to Section 404 are focused on several main areas of concern:

- **ESG Should Not Be Singled Out**

The Department should rely on the longstanding general principles under Section 404 of ERISA and the regulations promulgated thereunder to permit plan fiduciaries to make judgments based on the interests of plan participants and beneficiaries. First, the Department is incorrect in its implication that fiduciaries who take into account one or more ESG factors, or that choose investment strategies that may use one or more ESG factors, breach their standard of care under ERISA or their duties of prudence and loyalty. We think that the Department is dismissing fiduciaries' reasonable conclusions that ESG factors are a potential indicator of financial performance and instead suggesting they are motivated by inappropriate collateral benefits. The mere fact that an investment strategy incorporates one or more ESG factors should not lead to a conclusion that a fiduciary is violating Section 404 of ERISA or using plan assets in violation of Section 406 of ERISA. The Department's existing sub-regulatory guidance is on point and clear. A fiduciary cannot select an investment to get some impermissible collateral benefit. By contrast, where a fiduciary engages in a prudent process that focuses on pecuniary factors without seeking to get such a collateral benefit, the fiduciary has not violated ERISA, even if there is an incidental collateral benefit.

¹⁷ GAO study 20-530 (July 2020): <https://www.gao.gov/assets/710/707950.pdf>

¹⁸ It is worth noting that research indicates resiliency in ESG funds during COVID 19. See e.g. Hedgeweek, [New Blackrock Research Points to ESG Resilience During Coronavirus Downturn](https://www.hedgeweek.com/2020/05/19/285741/new-blackrock-research-points-esg-resilience-during-coronavirus-downturn) (May 19,2020), available at: <https://www.hedgeweek.com/2020/05/19/285741/new-blackrock-research-points-esg-resilience-during-coronavirus-downturn>; S&P Global, Market Intelligence, [Major ESG Investment Funds Outperforming S&P 500 During COVID-19](https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103) (April 13, 2020), available at: <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103>

Second, while we disagree with the Department’s implication that ESG factors are not ordinarily pecuniary in nature, we further believe that the Department should not single out ESG factors for special regulatory consideration. When plan fiduciaries evaluate competing investment options they should be encouraged to consider a variety of empirical factors, including concerns about particular market sectors, geographic risks, or other valid metrics for consideration. The determination of what those factors are, or their respective levels of materiality, should be left to the plan fiduciary exercising its obligations under Section 404 of ERISA.

Third, Congress put this decision with the plan fiduciary, and not with the Department, so that the Department would not substitute its judgment for the judgments of plan fiduciaries, including fiduciary professional investment advisers, investment managers, and consultants, subject to the highest standard known under the law in guiding plan investments. Merely because a given investment strategy might advance a particular collateral goal is insufficient to conclude that it, in fact, will do so by sacrificing long-term risk-adjusted returns, or that the potential advancement of a particular collateral goal warrants the additional proposed burdens on plan fiduciaries deciding whether to consider such a strategy. Concluding that one or more ESG factors are not ordinarily utilized as pecuniary factors is an overstatement for which the Department offers no support.

So long as plan fiduciaries and investment managers assessing investments consider ESG factors that they reasonably believe will enhance economic value or manage investment risk, that should be considered appropriate by the Department. An example of Department rules that have avoided prescribing, but focused instead on contributing to a prudent process, would be the Department’s fee disclosure rules. These rules were intended to give plan fiduciaries more insight into factors the Department considered important. The Department’s approach there was not to regulate or proscribe any particular type of strategy or investment vehicle, but simply to make it easier for plan fiduciaries to compare “apples to apples” and “oranges to oranges” by prescribing that certain information be disclosed and reported.¹⁹ Plan fiduciaries already are aware of the case law concerning inattention to a prudent process, and the Department’s own long-held position that plan fiduciaries that are not expert enough to make investment decisions must hire professional experts to assist them.²⁰ Those cases and the long-standing position are instructive enough for the purposes the Department seeks to achieve.²¹ Directly or indirectly restricting fiduciaries’ investment choices will harm plan participants in the long run. Therefore, we do not believe there is a need for a change to the regulations under Section 404.

¹⁹ The Department’s changes to Schedule C of Form 5500, its revised regulations under Section 408(b)(2) of ERISA and regulations in connection with Section 404(c) plans are all examples of initiatives the Department has undertaken in the past decade. None of these proscribed any particular investment strategy or vehicle.

²⁰ See Katsaros v. Cody, 744 F.2d 270, 279 (2d Cir. 1984) (fiduciaries who were ill equipped to make investment decisions for the plan were required to seek outside assistance).

²¹ See e.g., Howard v. Shay, 100 F.3d 1484 (9th Cir. 1996) (a plan fiduciary’s failure to follow reasonable procedures is enough to show a breach of fiduciary duty); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) (Supreme Court held that fiduciary decisions must be reviewed de novo with no deference to plan fiduciary decisions).

- **Differentiate Between ESG-Themed Investment Strategies and Those That Use One or More ESG Factors as Part of a Holistic Analysis.**

Should the Department determine that they need to move forward with this Proposed Regulation, then the Department must provide additional clarification and distinction. We believe that in certain sections of the Proposed Regulation (such as paragraph (c)(3)), the Department is trying to differentiate between those investment strategies that are “ESG-themed,” or which utilize ESG factors as the primary purpose of the strategy without a focus on pecuniary factors, and those investment strategies that may merely use one or more ESG factors as part of an overall empirical process or investment thesis. Assuming this is the case, we believe that certain terms like “ESG,” “ESG-themed,” and “ESG factors” need to be better defined and better differentiated for these purposes. If the Department is convinced that ESG-themed investment strategies are cause for particular concern in the context of individual account participant-directed plans, we strongly suggest that the Proposed Regulation be clarified so that the provisions affecting participant-directed plans do not cover or otherwise single out investment strategies that merely integrate ESG factors.

- **Recognize the Benefit of Rating Systems, including ESG Rating Systems**

The Department’s expressed skepticism about ESG rating systems and its assertion that “[t]here is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent,”²² is unfair. Its belief, articulated in footnote 24 - that “fiduciaries should also be skeptical of ‘ESG rating systems’- or any other rating system that seeks to measure, in whole or in part, the potential of an investment to achieve non-pecuniary goals—as a tool to select designated investment alternatives, or investments more generally”, is inappropriate. Such a call out casts a pall on the use of ESG ratings and substitutes the judgment of the Department for that of plan fiduciaries who may find one or more of these ratings an appropriate investment tool. This position runs afoul of the Department’s longstanding position not to interfere with a fiduciary’s otherwise prudent process.

For investment managers, the addition of data and information around ESG factors helps shine a spotlight on what otherwise would be hidden potential risks. Those tools are appropriate for an investment manager or fiduciary to use when considering an investment. While rating systems and metrics all have benefits and limitations, a variety of data is important in engaging in an empirical investment analysis. Plan fiduciaries should be able to decide for themselves how to use ratings and other tools. We believe fiduciaries should be able to utilize ESG ratings systems when acting as prudent fiduciaries, much in the same way as they use other metrics with appropriate degrees of confidence or skepticism. Indeed, ESG rating systems are often used as a helpful tool for providers and consumers to understand how one investment strategy may compare to another – including on a pecuniary basis. A fiduciary’s use of an ESG ratings system does not somehow limit its other responsibilities: it still must prudently apply a ratings system and evaluate when, how and why ratings and other objective criteria are to be used and what weight they should be given. In this respect, the use of one or more ESG ratings systems, is no

²² Proposed Regulation at 39115.

different than when a plan fiduciary uses any number of common ratings in the industry or otherwise.

We believe that, as with any rating system or metric, fiduciaries should be able to consider the criteria that form the inputs for any particular ratings system and decide for themselves how to use that as part of their investment analysis. Considerations in connection with ESG ratings are no different than any other considerations used in an analysis of potential investments, including those the Department has sanctioned for retail investors when it comes to investment education under Interpretive Bulletin 96-1.²³ It is the investment manager’s job to determine whether these rating systems, or the factors used within them, translate into enhanced economic value or management of investment risk. It is inappropriate for the Department to suggest in a regulation that ESG ratings are designed to rate the potential of an investment to achieve non-pecuniary goals because, as described above, we believe that ESG goals are in fact pecuniary goals: they can and are used by many plan fiduciaries and investment managers to improve returns by focusing on key risk factors that direct investment dollars to better operated companies. Further, ESG ratings systems, like other tools, are evolving and advancing.²⁴ Fiduciaries should be entitled to utilize them insofar as they are doing so as part of the prudent process.

- **For QDIAs, Focus on Prudent Process for Investment Strategies Integrating ESG Factors**

As noted above, we believe that the Department should clarify certain key definitions, including “ESG,” “ESG factors,” “ESG-themed” and “ESG components” and their usage throughout the Proposed Regulation, given that it appears the Department is seeking to distinguish among different types of ESG investment products. We understand that the Department may have general concerns about the motivations that plan fiduciaries may have when considering investment options, especially where the investment option under consideration utilizes ESG factors. However, we strongly believe that ESG factors should continue to be valid considerations for investment decisions – including for QDIAs and their components- - so long as they are evaluated in a manner consistent with a prudent process. The Department should confirm that investment options that use ESG factors should be permissible as a QDIA, or a component of a QDIA, when appropriate and consistent with the fiduciary’s duty of prudence. Stated differently, at a minimum, the Department should clarify that the special considerations for paragraph (c)(3) in the context of QDIAs should extend only to ESG-themed investment funds where the primary investment or principal purpose is to promote ESG that is not pecuniary in nature.

²³ The Bulletin is “designed to ensure that participants and beneficiaries will have adequate information to enable them to make their own, informed asset allocation decisions.” In the context of interactive investment materials and asset allocation models, IB 96-1 is clear that investors can make appropriate decisions where disclosure of appropriate “material facts and assumptions” is made. We do not see why a prudent fiduciary could not reach a similar determination with respect to a prudent investigation of material facts and assumptions it deems prudent with respect to ESG or other metrics.

²⁴ In fact, the Sustainability Accounting Standards Board and Global Reporting Initiative announced on July 13, 2020 a plan to collaborate with regards to how their standards may be used together. See SASB, GRI, Promoting Clarity and Compatibility in the Sustainability Landscape (July 13, 2020), available at: https://www.sasb.org/wp-content/uploads/2020/07/GRI-SASB-joint-statement_2020_07_13_FINAL.pdf.

- **Clarify What the Department Considers Objective vs. Subjective**

The Department should properly distinguish between necessarily objective considerations and considerations that can have subjectivity for purposes of a plan fiduciary's analysis. For example, Section (c)(3)(i) of the Proposed Regulation contains a list of criteria that the Department indicates are "objective." Those include "benchmarks, expense ratios, fund size, long-term investment returns, volatility measures" as well as "mix of asset types". We do not believe that "investment philosophy" or "experience" are necessarily objective factors and question how they would fit in with an objective analysis. Similarly, Paragraph (b)(ii) requires that a fiduciary in the consideration of its investment duties must evaluate investments and investment courses of action solely on pecuniary factors that have a "material effect on the return and risk." It is unclear how such a materiality threshold should be evaluated. We also suggest that the Department is again unfairly singling out those investment strategies using ESG factors with a specific requirement to compare them against other investment options. No similar express requirement applies between fixed income securities versus equity securities, or for that matter, between domestic mandates versus international portfolios, or even small cap investment strategies versus midcap strategies. To require a comparison seems to oversimplify the investment process, in that sometimes an investment is a good investment on its own.

- **Eliminate Burdensome Documentation Requirements.**

We believe that the Proposed Regulation's requirements of documentation will be burdensome, as well as inappropriately singling out ESG, which could be a strong disincentive to its use. It should be eliminated. Further, the Department did not include a sufficient analysis with regard to the economic burden of this provision in its economic analysis. It should do so before moving forward. Instead of adopting the principles based approach already embedded in Section 404 of ERISA, which allows each fiduciary to determine what it should consider and what it needs to document, the Proposed Regulation adds a requirement that the fiduciary affirmatively document the basis for concluding that a distinguishing factor could not be found and why the selected investment was chosen. There are many reasons and factors that prudent fiduciaries consider in the exercise of their judgment as fiduciaries, but they do not write a treatise each time an investment decision is made. While many fiduciaries as a matter of practice document many of their decisions, they have not generally been required to do so by law or regulation. The Department has in the past left it to the judgment of fiduciaries to determine a prudent process for selecting investments, including what documentation they may retain with respect to their decisions. Introducing such a specific documentation requirement will have the negative impact of limiting investment opportunities for plan participants because it could discourage the plan fiduciary's use of ESG. Given ERISA's broad fiduciary responsibility provisions, the existing provisions of Section 404 should be enough to meet the Department's concerns. We are not aware of any other federal regulator who mandates the level of documentation with respect to investment alternatives of this type. Nor are we aware of such a specific ESG documentation requirement for those investment managers charged with making portfolio level decisions under the Investment Advisers Act or the Investment Company Act. Even the recently promulgated Securities and Exchange Act of 1934 Regulation Best Interest leaves it up to individual firms to

determine how best to memorialize decisions of brokers that are in the “best interest” of their customers.

The Proposed Rule states that where investment alternatives are economically indistinguishable, and where the investment selected is based on non-pecuniary ESG factors, fiduciaries should document why the investments are determined to be indistinguishable and why the investment is chosen. In doing so, the Department retains the “all things being equal test” while noting the Proposed Regulation’s requirement that fiduciaries document their decision-making process.

The Department explained its view in the preamble that the documentation requirement is necessary to safeguard against fiduciaries making decisions based on non-pecuniary factors without proper analysis or rigor. We do not understand why that necessarily follows. Decision-making and record-making are two distinct exercises. While we appreciate the Department’s dedication in seeking to assure that fiduciaries make decisions solely in the interest of plan participants and beneficiaries, we are not clear why a lack of rigor is somehow synonymous with a lack of writing, and why the standards are different for ESG factors than any other factor a fiduciary considers in making an investment judgment.

V. Grandfathering to Protect Plan Participants

We believe that the Proposed Regulation should include a grandfather provision to apply to existing investment options utilizing ESG factors in all plans covered by ERISA since they are already well covered under the existing regulatory framework, including the duty to monitor, among other duties. We believe that many plan fiduciaries will be concerned that they may not have otherwise been able to demonstrate compliance with all of the requirements of the Proposed Regulation. To the extent that the Proposed Regulation’s requirements are adopted in final form without any such grandfathering protections, we would anticipate that many plan fiduciaries would feel compelled to exit those strategies that utilize any ESG factor, including removing popular investment options from participant-directed plans. It is also worth noting that sometimes the ESG factor is so subtle that plan fiduciaries may be unaware that it was considered. That sudden decision to redeem would negatively impact pricing and damage pecuniary outcomes. It would also have negative implications for individual investors who would not necessarily be exiting a fund at the optimal time. This could create the forced realization of unrealized losses, as well as challenges to the market with regard to potentially significant trading.

We believe that a grandfather provision is appropriate because ERISA already contains protective rules governing plan participants, and ERISA’s prudence standard and its other exclusive benefit and prohibited transaction rules ensure ongoing compliance with a deliberative investment process that is designed to serve the best interest of plan participants. At a minimum, we would propose that the provisions of any final regulation not be made with respect to investments made on or prior to the effective date of any final regulation, as we believe that ERISA’s strong protections already provide sufficient safeguards against abuse. In the alternative, we would ask that the Department permit those investments that have been made on

or preceding such effective date not to become subject to the provisions of any final rule for a period of one year following such effective date.

VI. Foreign Regulators Have Reached an Opposite Conclusion Regarding the Importance of ESG Factors

In today's global economy, regulators often work with foreign regulators where interests are aligned. Here, as the interests of US investors are shared with other global investors, the Department may wish to consider the steps taken by European regulators with regard to the consideration of ESG factors. The European Union ("EU") and its Member States are beginning to take formal action with respect to ESG as applied to investment managers, with such actions starting to have the force of law.²⁵ There is indeed growing and widespread industry support for the view that ESG factors are and will become even more integral to the future of investing itself and the ability to provide compelling returns to investors. In the alternative, there is concern that the rift between regulatory regimes could lead to some investment managers choosing to leave the ERISA market thus limiting the products available to plans, and potentially leading to higher investment costs. In the Appendix we have included some of the more recent advances in investment theories, practices and other tools.

We believe that the Department should look to these developments favorably, or at minimum acknowledge that to reach the opposite conclusion may lead to conflicts of law for investment managers. To the extent that these trends offer fiduciaries the opportunity to evaluate investment options appropriately, they should not be limited by the Department.

VII. Conclusion

We appreciate the Department's effort in issuing this proposal; however, we strongly urge the Department to reconsider the need for the proposal. In the alternative, we hope the Department will consider these comments to ensure that any final rule recognizes the focus should be on ensuring a prudent process focused on the economic benefits to investors, which will necessarily require the consideration of many factors, possibly including ESG. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Lisa J. Bleier

Lisa J. Bleier

²⁵ The developments summarized in this outline consist of various regulations and directives applicable in the EU. EU regulations do not require national implementing legislation to be effective. Instead, such regulations have direct effect upon adoption. However, EU directives must be transposed into national law (that is, require implementing legislation at the EU Member State level) to be effective. See Appendix I.

APPENDIX

- **EU Disclosure Regulation.** The EU Disclosure Regulation, which applies from 10 March 2021, is one of a number of European Union (“EU”) legislative initiatives that seeks to enhance disclosure relating to ESG related activities of asset managers in relation to the products they manage. The objective being to facilitate harmonization of the disclosure thereby providing investors with information that is a basis for comparison between products and to ensure the level of disclosure is consistent with the degree to which ESG criteria and objectives are actually considered and pursued in respect of the product. The Disclosure Regulation requires in scope market participants (“FMPs”), such as portfolio and fund managers, to implement policies and make certain disclosures on a “comply or explain basis” with regard to sustainability risks and sustainability factors related to their investment activities. This means that FMPs will be required to assess and disclose how environmental, social or governance events or conditions could cause an actual or a potential material negative impact on the value of the investment as well as how the investment decisions impact on environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters. The disclosure obligations apply regardless of whether the FMP manages products with a sustainable investment strategy or not. However, where a product “promotes, among other characteristics, environmental or social characteristics” or has “sustainable investment as its objective”, the FMP is subject to additional disclosure obligations. This includes providing detailed information as to how exactly these characteristics are met by way of pre-contractual and website disclosures to end investors as well as continuous monitoring, throughout a product’s lifecycle, in order to ensure the management of the product complies with the disclosed environmental or social characteristics, or sustainable investment objective.

Where environmental or social characteristics are promoted by the product, FMPs need to provide the detailed information as part of the pre-contractual disclosure – the proposed template for providing this information has at least 40 fields of data to complete. To give an example of the level of detail, if a product promotes environmental or social characteristics, amongst other disclosures required, there needs to be: (a) a description of the environmental or social characteristics that are promoted, (b) a narrative and graphical representation of the investments of the product; and (c) a reference to the webpage where the information can be found.

In addition to the pre-contractual disclosures which would normally be included with a managed account agreement or in an offering document, there are specific requirements relating to website product disclosure. FMPs need to provide very detailed information covering 12 separate areas including (i) a summary of the information referred to in the Disclosure Regulation that relates to the product, (ii) a description of the environmental or social characteristics or the sustainable investment objective and information on the methodologies used to assess, measure and monitor them, (iii) a description of how the environmental or social characteristics are monitored throughout the lifecycle of the product and the related internal or external control mechanisms, (iv) a description of the methodologies to measure the attainment of the social or environmental characteristics promoted by the product using the sustainability indicators, (v) a description of due

diligence carried out on the underlying assets of the product, including the internal and external controls on that due diligence and (vi) a description of the engagement policies implemented if engagement is part of the environmental or social investment strategy.

- **European Securities and Markets Authority.** The European Securities and Markets Authority (“ESMA”) published technical advice on integrating sustainability risks and factors into the Markets in Financial Instruments Directive 2014/65/EU (also known as the “MiFID II”), Alternative Investment Fund Managers Directive 2011/61/EU (also known as “AIFMD”) and the Undertakings for Collective Investment in Transferable Securities Directive 2009/65/EC (also known as the “UCITS Directive”). Among other advice, ESMA (i) recommended that sustainability risks be taken into account in organizational procedures and managing conflicts of interest, and (ii) proposed that “alternative investment fund managers” and management companies be required to consider resources and expertise for the integration of sustainability risks and consider sustainability risks when selecting and monitoring investments. Following the publication of this technical advice, the European Commission issued proposed draft amendments to the MiFID II, AIFMD and UCITS Directive in June 2020. If adopted these amendments would require sustainability risks to be taken into account in organizational procedures, the management of conflicts of interest and risk management policies, in addition to placing an obligation on AIFMs and UCITS management companies to consider sustainability risks and factors when undertaking investment due diligence. Amendments to MiFID II will also require investment firms to take client sustainability preferences into account when selecting financial products to offer and integrate sustainability risks into risk management policies. It will require financial product manufacturers to consider sustainability preferences when identifying the target market and financial product distributors to ensure products/services are compatible with sustainability preferences to target market.
- **The Low Carbon Benchmark Regulation.** The Low Carbon Benchmark Regulation is intended to improve the transparency of ESG benchmark methodologies and to advance standards for the preparation of low-carbon benchmarks. It amends the existing Benchmarks Regulation²⁶ and impose minimum standards for the methodologies for two new categories of benchmarks: EU Climate Transition and Paris Climate-aligned benchmarks. The Benchmark Regulation also imposes an obligation for benchmark administrators (other than those of interest rate or foreign exchange benchmarks) to make certain disclosures.²⁷
- **The Shareholder Rights Directive II.** The Shareholder Rights Directive II (“SRD II”)²⁸ aims to encourage long-term shareholder engagement and transparency between traded

²⁶ The final text of the existing Benchmark Regulation, as published in the Official Journal of the European Union, can be found at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&from=EN>.

²⁷ Specifically, they require disclosure of: (i) the key elements of how the benchmark methodology reflects ESG factors, (ii) a statement in the benchmark statement on how ESG factors are reflected in the benchmark, and (iii) a statement in the benchmark statement regarding the extent of alignment with the target carbon emission reductions or attainment of long-term global warming target of the Paris Climate Agreement.

²⁸ The final text of the Shareholder Rights Directive II, as published in the Official Journal of the European Union, can be found at <https://eur-lex.europa.eu/eli/dir/2017/828/oj>.

companies and investors. As a result of SRD II, focusing on amendments introduced that relate to ESG, asset managers must disclose how they make investment decisions on the basis of an evaluation of the medium to long-term performance of the investee company, including its non-financial performance. SRD II requires institutional investors and asset managers to develop an engagement policy that describes how they integrate shareholder engagement in their investment strategy and describe how investee companies are monitored, including in relation to social and environmental impacts and corporate governance. Other key elements of SRD II include provisions to assist companies in identifying their shareholders, the exercise of shareholder rights, cost transparency, remuneration of directors, and related party transactions. On an annual basis, institutional investors and asset managers must publicly disclose how their engagement policy has been implemented or publicly disclose a clear and reasoned explanation why they have chosen not to implement a policy.

- **The Non-Financial Reporting Directive.** The Non-Financial Reporting Directive (“NFRD”) requires certain entities²⁹ to include a non-financial statement in their annual report. The NFRD is the key source of mandatory reporting by portfolio companies in Europe of non-financial information on which European based asset managers will need to draw on in order to meet their disclosure and reporting obligations under the Disclosure Regulation and other sustainable finance regulations.

Recent consultations on the NFRD have highlighted certain short-comings such as (i) non-financial information is not sufficiently comparable or reliable; (ii) information reported is not always relevant, and the relevant information is not always reported upon; (iii) information is not always easily findable and (iv) non-financial reporting often results in companies incurring unnecessary and avoidable costs. The European Commission recognizes that these are potential weaknesses of the NFRD and is looking at how to address these short comings. Policy options that are being considered to revise the NFRD include specifying in more detail what non-financial information companies should report and requiring some or all in-scope companies to use a non-financial reporting standard. The legislative proposal is expected to be issued in 1Q 2021.

- **German Federal Financial Supervisory Authority.** In addition to the formal regulatory actions discussed above, a number of EU Member States and countries outside the EU have also taken steps that affect an investment adviser’s use of ESG strategies for clients in those jurisdictions. For example, a January 2020 Guidance Note³⁰ provided by the German Federal Financial Supervisory Authority (“BaFin”) defines “sustainability” on the basis of ESG criteria, and illustrates physical and transition risks that may unfold with increasing intensity through existing risk types. BaFin expects supervised entities to ensure that the relevant risks are adequately considered.

²⁹ Entities are “public interest entities” (as defined in the NFRD) with more than 500 employees and that have either a balance sheet total of more than EUR 20 million or a net turnover of more than EUR 40 million.

³⁰ BaFin also recently published its key supervisory priorities for 2020. Of the four key areas cited, two relate to ESG: (i) sustainable business models and (ii) the sustainability of the financial system and sustainable finance in particular. Found at:

https://www.bafin.de/SharedDocs/Downloads/EN/Broschuere/dl_Aufsichtsschwerpunkte2020_en.html

- **Stewardship Codes.** Certain jurisdictions—including the United Kingdom,³¹ Japan and Singapore—have also developed “stewardship” codes designed to enhance the quality of engagement between investors and companies. In practice, stewardship codes such as these will require investment managers to disclose ESG factors that they consider.
- **Proposed Monetary Authority of Singapore Guidelines on Environmental Risk.** Monetary Authority of Singapore (“MAS”) Proposed Guidelines on Environmental Risk (Asset Managers) are currently under consultation. In the guidelines, asset managers are instructed that they "should embed relevant environmental and risk considerations in research and portfolio construction processes if they have assessed them to be material. In addition to considering the investment horizon, risk and return profile of an investment and fundamental factors, such as economic conditions, central bank policy, sectors trends and geopolitical risks, asset managers should also evaluate the potential impact of relevant environmental risk on an investment's return potential."³²
- **Swiss Funds & Asset Management Association.** In Switzerland, the industry association Swiss Funds & Asset Management Association (“SFAMA”) has also recently published a guideline that states "[a]ccording to the concept of fiduciary duty, an asset manager takes all necessary measures to achieve the best possible risk-adjusted return on investment, taking due care and protections of the client's interests and requests into account. Risk assessment is not limited to traditional risk categories but also covers emerging risks resulting from ESG factors"³³

³¹ A revised U.K. Stewardship Code, which includes a focus on asset owners, such as pension funds; insurance companies; services providers; and asset managers, entered into force on January 1, 2020. The text of the U.K. Stewardship Code can be found at <https://www.frc.org.uk/investors/uk-stewardship-code>.

³² Monetary Authority of Singapore, P005-2020: *Proposed Guidelines on Environmental Risk Management (Asset Managers)* (June 2020), available at: <https://www.mas.gov.sg/-/media/MAS/News-and-Publications/Consultation-Papers/Consultation-Paper-ENRM-Guidelines-AM.pdf>

³³ SFAMA, *Swiss Funds & Asset Management Association Makes Clear Commitment to Sustainable Finance* (July 2020), available at: <https://www.sfama.ch/en/latest/swiss-funds-asset-management-association-makes-clear-commitment-to-sustainable-finance>