

July 30, 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 submit this comment on the Proposed rule on Financial Factors in Selecting Plan Investments (RIN 1210-AB95) (the "Proposal") as a faith-based investor who participates in my employer's 401k.

**The Proposal Violates the Religious Freedom Restoration Act**

I note that the Proposal has failed to consider or even mention its impact on freedom of religion under the Religious Freedom Restoration Act ("RFRA"). It appears to me that the Proposal violates religious freedom rights of ERISA plan members under the RFRA, as applied by the US Supreme Court in the recent *Little Sisters of the Poor* decision.<sup>1</sup>

When enacting the RFRA (codified at 42 USC ch. 21B s. 2000bb et seq.), Congress stated its findings that a religiously neutral law can burden a religion just as much as one that was intended to interfere with religion; therefore the Act states that the "**Government shall not substantially burden a person's exercise of religion** even if the burden results from a rule of general applicability." (Emphasis added.)

The RFRA provides an exception only if two conditions are both met. First, the burden must be necessary for the "furtherance of a compelling government interest." The second condition is that **the rule must be the least restrictive way in which to further the government interest.**

The Proposal, by prohibiting inclusion of investment options in defined contribution pension plans like mine for retirement savers whose beliefs and values dictate that they take material environmental and societal effects of corporate activities into consideration (i.e., use an integrated ESG approach) in stewarding their worldly riches, the Proposal **will result in many people of faith being forced to support economic activities which violate their religious beliefs.**

While it might be possible for some religious plan participants to use "brokerage window" options in their 401k plans (when they are offered) to invest in ESG-aligned strategies even

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<sup>1</sup> *Little Sisters of the Poor and Paul Home v. Pennsylvania* 591 U.S. \_\_\_\_ (2020) 2020 WL 3808424.

when there are no ESG investment options offered, forcing religious investors to do so would presume an unrealistically high degree of personal investment expertise and impose extra fees and administrative burdens on them. By singling out ESG investment options as raising “heightened concerns under ERISA” whenever an option ambiguously might involve “one or more environmental, social, and corporate governance-oriented assessments or judgments,” despite the availability of numerous prudently managed and outperforming ESG investment options for ERISA pension plans, the Proposal would have the practical effect of unnecessarily limiting access by of people of faith to prudent pension investment options aligned with their religious beliefs.<sup>2</sup>

To illustrate the Proposal’s broad conflict with religious beliefs, I cite two out of many religions’ statements of belief which address climate change.

- **The official US Catholic Bishops teaching on climate change provides:** “In the case of global climate change, we know enough to understand that scientific arguments for action on the reduction of greenhouse gases cannot be easily dismissed. It seems prudent then, not only to continue to research and monitor this phenomenon, but to take steps now to mitigate possible negative effects in the future. The efforts of our Church then are focused on the needs of the poor, the weak and the vulnerable, as inaction and inadequate or misguided responses to climate change may potentially pose greater burdens on the poor, particularly the poor in developing nations.”
- **The 2016 Resolution of the United Methodist Church on Climate Change and the Church’s Response** contains a similar religious directive: “As the church we witness firsthand the consequences of climate disruption in our communities and in the lives of those Christ calls us to be with in ministry. Recognizing our complicity and responsibility, we seek to chart a new path rooted in economic and ecological justice. We understand climate justice not simply as an environmental or economic concern but rather as a deep ethical and spiritual concern that the Church must address so that abundant life is ensured for our children and future generations.”

The Proposal fails to consider a less restrictive means of implementing ERISA fiduciary duty standards under the RFRA. In order to eliminate unwarranted intrusion on religious freedom, at a minimum, the DOL should take current research on ESG performance into consideration (rather than relying only on outdated findings which do not relate to modern ESG integration investment practices) and require plan sponsors to accommodate religious beliefs of plan participants by including prudently managed ESG investment options that are more closely aligned with

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<sup>2</sup> Prudently managed ESG integration funds are available. For example, Morgan Stanley research on 11,000 mutual funds from 2004 to 2008 shows no financial trade-off in the returns of sustainable funds compared to traditional funds, and they demonstrate lower downside risk. Moreover, during a period of extreme volatility, the study found “strong statistical evidence that sustainable funds are more stable.” *Sustainable Reality: Analyzing Risk and Returns of Sustainable Funds*, [Morgan Stanley Institute for Sustainable Investing](#), 2019.

participants' religious beliefs.<sup>3</sup> In addition, **the regulation should require use of a mechanism for fund participants to request and employers to offer investment options that are more consistent with participants' religious beliefs.** Plan education, disclosure and reporting practices could also be clarified to ensure that participants are provided with the tools to make informed choices that reflect their religious beliefs and values.

The US Supreme Court's *Little Sisters of the Poor* decision supports this conclusion. On July 8, 2020, two weeks after the Proposal was issued, the US Supreme Court applied the RFRA to Federal rulemaking under Obamacare to strike down birth control health insurance coverage regulations in *Little Sisters of the Poor*. The Supreme Court's analysis supports a compelling argument that the DOL's Proposal would violate RFRA provisions. For example, the *Little Sisters of the Poor* opinion states:

“[We] made it abundantly clear that, under RFRA, the **Departments must accept the sincerely held complicity-based objections of religious entities.** That is, they could not “tell the plaintiffs that their beliefs are flawed” because, in the Departments' view, “the connection between what the objecting parties must do . . . and the end that they find to be morally wrong . . . is simply too attenuated.” (Emphasis added; Citations omitted.)

“If the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that **the rules were arbitrary and capricious for failing to consider an important aspect of the problem.**”

Accordingly, I believe that the Proposal constitutes an arbitrary and capricious exercise of regulatory powers and request that the Department withdraw it.

Respectfully submitted,

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<sup>3</sup> The integration of material ESG factors into investment analysis is far more common amongst mainstream investors than recognized by the Department. For example, 73 percent of global investors surveyed by the CFA Institute in 2015 said they take ESG factors into account in their investment analysis and decisions. <https://blogs.cfainstitute.org/marketintegrity/2015/08/17/cfa-institute-survey-how-do-esg-issues-factor-into-investment-decisions/>, visited July 27, 2020.