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SUBMITTED ELECTRONICALLY

July 30, 2020

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

Re: RIN 1210-AB95 Financial Factors in Selecting Plan Investments

Ladies and Gentlemen:

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to provide comments with respect to the proposed rule published by the Department of Labor (“Department”) in the Federal Register on June 30, 2020, which seeks to amend the “Investment Duties” regulation under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) to confirm that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action (the “Rule” or “Proposal”). As one of the nation’s leading retirement services providers and asset managers, Fidelity has a deep and long-standing commitment to working with the Department on its rulemaking in the area of fiduciary investment selection and monitoring.

While Fidelity appreciates that the Department’s Proposal is intended to provide employee benefit plan fiduciaries with additional guidance regarding the duty of loyalty and environmental, social, and corporate governance (“ESG”) factors that may be considered as a fiduciary discharges his or her duties, the Proposal would result in far-reaching, harmful consequences for ERISA plans and participants, as well as a burdensome effect on plan fiduciaries if it is implemented in its current form. In particular, the Proposal’s mandate that only “pecuniary” factors may be considered for ERISA plans when evaluating investments and investment courses of action calls into question many common and important practices by fiduciaries today, such as taking into account participant preferences, making available plan investment in company stock and other examples set forth in more detail below.²

¹ Fidelity was founded in 1946 and is one of the world’s largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering more than 25 million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts (“IRA”) with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

² The comments set forth in this letter primarily focus on the impact of the proposed regulation on investment options in participant-directed plans but many of the comments apply equally to investments in other employee benefit plans subject to ERISA, including defined benefit plans.

Further, the Proposal's assumptions that ESG investment strategies sacrifice returns, increase risks and promote goals unrelated to financial performance are not well grounded or supported by much of the emerging data on ESG investing. The Proposal's attempts to "single out" ESG investing as being subject to special requirements and constraints, without defining ESG investing, is inconsistent with the statutory framework of ERISA and its promulgated regulations over the past 46 years. Moreover, the Proposal's prescriptive approach lacks clear definition of key factors fiduciaries are to consider and the investment strategies to which such factors are to apply. As such, Fidelity believes the Proposal will not achieve the Department's goal to "provide clarity to fiduciaries in fulfilling their responsibilities by describing when and how fiduciaries can factor in ESG and similar considerations as they select and monitor investments, and when they may not."

Accordingly, Fidelity requests the Department refine its proposed modifications to ERISA's duty of loyalty to adopt a more straightforward definition of ERISA's investment duties and modify its Proposal to remove references to any particular investment type or strategy. If this approach is not adopted, we then ask the Department to, at a minimum, engage in information gathering on ESG investing to further consider the basis for the Proposal's focus on ESG investment strategies. Such information-gathering would not only permit the Department to articulate a commonly accepted definition of – and terminology for – the evolving world of ESG investing (which the Proposal's preamble acknowledges does not yet exist), but also to incorporate forthcoming guidance from the SEC on the standards for ESG disclosure and better define factors specific to ESG investing in order to supply the additional clarity the Proposal currently lacks.

To the extent the Department intends to implement the Proposal without modifying it to adopt a less prescriptive definition of ERISA's investment duties, Fidelity requests the Department to allow plan fiduciaries adequate time to prepare the documentation and analysis required by the Proposal to identify, assess and consider alternative investment options in accordance with the Proposal. Fidelity believes the Proposal greatly underestimates the time required for plan fiduciaries to consider and implement the new framework set forth by the Proposal in its current form. Plan fiduciaries should be afforded at least 12 months before the Rule becomes effective to mitigate hastened decision-making and potential financial losses resulting from modifying investment strategies that may inadvertently harm plan participants in the current volatile and uncertain market environment.

I. Impact and Unintended Consequences of Proposal on Investment Fiduciaries' Responsibilities.

For more than 40 years, ERISA's statutory framework and guidance thereunder has consistently interpreted the duty of loyalty to prohibit plan fiduciaries from subordinating the interests of plan participants and beneficiaries to the fiduciaries' interests or the interests of others. Moreover, ERISA has always required investment fiduciaries to act with the care, skill, prudence and diligence a prudent person familiar with such matters would use. However, ERISA does not establish specific or detailed requirements for carrying out these core duties. This approach has worked well for fiduciaries given the evolution of retirement plans and market dynamics which drives the nature of situations that need to be addressed. In the preamble to the Proposal, the Department states that it "intends, by this proposal, to reiterate and codify long-established principles of fiduciary standards for selecting and monitoring investments, and thus to provide clarity and certainty regarding the scope of fiduciary duties surrounding non-pecuniary issues." However, for the reasons set forth below, the Proposal would not clarify the long-established principles and framework that have worked well without prescribed steps to date. Instead, the Proposal has far-reaching consequences

that have not been fully addressed in the Proposal both for ESG investing and ERISA plan investment selection generally.

A. Broader Implications beyond ESG

1. Prohibition On Use of Non-Pecuniary Factors.

The Proposal has far-reaching implications that will significantly alter the factors currently considered by ERISA fiduciaries in the plan investment context. Specifically, the Proposal provides that ERISA's exclusive purpose rule and duty of loyalty prohibit fiduciaries from considering any non-pecuniary factors when evaluating investments and investment courses of action. However, ERISA investment fiduciaries routinely consider non-pecuniary interests as part of their fiduciary process as they are appropriate considerations. For example:

- Many plans offer company stock. Fidelity data shows that, as of 12/31/2020, 45% to 64% of corporate individual account plans with 5,000 or more participants offer company stock in their plan investment line-ups. Is a plan fiduciary required to justify the inclusion of company stock based solely on "pecuniary" factors and, on a related note, what comparable "available alternative investments or investment courses of action" would a typical fiduciary be required to consider?
- Participants often express strong preferences for certain investments to be included in plans designed for them to exercise control. Indeed, for some participants, these preferences may be based upon their religious or other deeply held beliefs. Where preferred investments are not made available, there is a disincentive for the participant to participate in the plan or to invest in appropriate ways (e.g., a participant may invest in a cash equivalent fund where he or she does not find other investments attractive). Is a plan fiduciary prohibited from taking such participant preferences into account when selecting a plan fund lineup?
- Investment funds are organized in a variety of ways, including as registered investment companies, collective investment trusts or simply as separately managed accounts. These alternative structures differ in a variety of ways, including the disclosures they are required to make, the regulatory oversight they are subject to, and whether the investments they make constitute plan assets under ERISA. Is a plan fiduciary prohibited from considering the form of an investment fund and the foregoing differences when selecting an investment alternative for a plan fund lineup?
- Reasonable and necessary plan administrative expenses are commonly offset with payments or credits attributable to the plan's investment options upon investment expenses. Is a plan fiduciary prohibited from considering the administrative fee offset the plan would receive when selecting an investment option?
- Certain plan fiduciary or administrative services may only be made available in connection with, or to the extent that, a limited universe of investments is made available under the plan. Is a plan fiduciary prohibited from considering the availability of these services in connection with selecting the funds to be made available for the plan?

The answer to each of the questions posed above should be an emphatic "no." In fact, reasonable plan fiduciaries have long considered all of the above factors, as well as many others, to be relevant and appropriate when evaluating investments and investment courses of action for retirement plans. Given that non-pecuniary factors have been and will continue to be appropriate considerations for fiduciaries when

reviewing investments, the current subsection (b)(1)(ii) should be eliminated from the proposed changes under the Rule and revised in accordance with the language set forth below.

2. Circular Definition of What a Fiduciary Must do to Satisfy Duty of Loyalty.

Beyond amending the Department's existing regulation to provide a prohibition on the consideration of non-pecuniary factors, the Proposal amends the existing regulation that defines what an investment fiduciary must do to satisfy the duty of loyalty, in relevant part, as follows:

“With regard to the consideration of an investment or investment course of action taken by a fiduciary of an employee benefit plan pursuant to the fiduciary's investment duties, the requirements of section 404(a)(1)(A) and 404(a)(1)(B) of the Act set forth in paragraph (a) of this section are satisfied if the fiduciary:

...

(iii) Has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to unrelated objectives, or sacrificed investment return or taken on additional investment risk to promote goals unrelated to those financial interests of the plan's participants and beneficiaries or the purposes of the plan;

(iv) Has not otherwise acted to subordinate the interests of the participants and beneficiaries to the fiduciary's or another's interests *and has otherwise complied with the duty of loyalty*; and

(v) Has acted accordingly.” (Emphasis Added)

Thus, in defining the duty of loyalty, the Proposal provides that an investment fiduciary may not subordinate the interests of participants to its interests and that the investment fiduciary must also have “otherwise complied with the duty of loyalty.” That is, the provision effectively states that a fiduciary satisfies his or her duty of loyalty by complying with the duty of loyalty. Using this circular catch-all phrase provides no guidance as to what is actually required by the duty of loyalty. On the one hand, it suggests that something more than not subordinating the interests of participants and beneficiaries is required. Since no indication of what such additional requirements could be, the highlighted language seems certain to lead to litigation and enforcement actions without sufficient guidance as to what the Department intended.³

As indicated above, however, for decades plan fiduciaries have understood that the duty of loyalty requires that a fiduciary not subordinate the participant's interest to his or her own. This well established and understood principle is in fact set forth in subsections (b)(1)(iii) and (iv) above. Accordingly, Fidelity believes the Department's goal can be accomplished by combining (iii) and (iv) into a new subsection (b)(1)(ii) as follows:

“(ii) Has not subordinated the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to the fiduciary's or another's interests or unrelated objectives.”

³ These challenging definitions would cause confusion not only for plan fiduciaries, but for ERISA 3(21) investment advisers, 3(38) investment managers, consultants and service providers as well.

We urge the Department to change the Proposal accordingly.

B. Impact of ESG-Specific Factors

In addition to the broader implications described above, Fidelity believes that the Proposal inappropriately targets ESG investments by imposing heightened scrutiny to this specific category of investments in subsection (c) of the Proposal. In particular, the Proposal inappropriately singles out ESG investments by imposing additional loyalty tests and recordkeeping requirements on fiduciaries when evaluating ESG investments which do not exist for other types of investments. As discussed in more detail below, ESG investments have increasingly incorporated financially material ESG factors to mitigate risk with increased and improved data disclosures and such factors are designed to align with participant investment objectives and strategies. For the reasons set forth below, therefore, Fidelity requests the Department eliminate subsection (c) of the Proposal (other than the first sentence of subsection (c)(iii) for the reasons described below).

1. Pecuniary Factors Only

In particular, the Proposal specifies that ESG factors can be pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories. As further discussed in section II of this letter, the Proposal fails to appropriately acknowledge the extent to which plan fiduciaries increasingly utilize environmental, social or corporate governance considerations *specifically as* critical pecuniary factors in any investment strategy. ESG factors can incorporate long-term financial considerations that investors may not take into account when solely considering an investment's quantitative earnings model. As such, the Proposal appears to require plan fiduciaries to disregard the pecuniary factors now utilized by global and domestic asset managers to assess both long- and short-term investment risk in selecting underlying securities for any prudent portfolio. In addition, the Proposal does not seem to permit a plan fiduciary from taking participant preferences into account when selecting a plan fund lineup and therefore may inadvertently discourage investment by millions of participant-employees given that a recent study found that two-thirds of Fidelity's retail customers cited social impact is key to their investing decisions.

2. Remove Section on Proposed Individual Account Plan Rules for ESG Investing

Subsection (c)(3) of the Proposal describes the requirements for the prudent consideration of designated investment alternatives for defined contribution individual account plans that include one or more ESG related investments. Among other requirements, the Proposal requires that pecuniary interests be determinative and that certain documentation supporting the decision must be developed and maintained. These requirements do not apply to non-ESG investments options which results in inconsistent treatment between types of investments.

This provision of the Proposal further provides that ESG-related investments are not permitted as qualified default investment alternatives ("QDIAs"), even if selected on objective, economic risk/reward criteria. Thus, a plan fiduciary may properly select, for example, a balanced fund for a plan fund lineup that participants may affirmatively choose to invest in, but it may not use that same fund as a default investment into which participants would be invested if the requirements of the QDIA regulation are met. There appears to be no reason why the combined provisions of the Investment Duties and the QDIA regulations would not serve to protect participants' interests so as to justify this prohibition. Moreover, as a practical

matter, precluding ESG investments from qualifying as QDIAs will impose significant costs on all plans using QDIAs, since such preclusion would require plan fiduciaries to engage in additional review the marketing materials, disclosures and organizational documents of potential QDIA options. If the Rule is implemented, plan fiduciaries must avoid not only options specifically marketed as ESG, but also options that include any express consideration of ESG factors in their mandates. Moreover, they must continually watch for changes to selected QDIA investments over time in case those changes introduce some component of an ESG investment.

For the reasons stated above, and due to the general lack of clarity on how fiduciaries are to satisfy these requirements, Fidelity requests that subsection (c)(3) of the Proposal (other than the first sentence of subsection (c)(3), for the reasons set forth below) be stricken as it is overly prescriptive. Rather, we believe that the general framework of ERISA's duty of loyalty set forth in our position above should suffice as a more appropriate standard to preserve the interests sought to be protected by ERISA for participants, while also balancing the voluntary nature of establishing employee benefit plans by plan sponsors. Moreover, as proposed, this provision also seems certain to lead to unnecessary litigation and enforcement actions due to its lack of clarity and overly prescriptive nature.

II. ESG Investing Generally and the Function of ESG Factors in Plan Fiduciary Investment Selection and Participant Investment

While ERISA neither compels employers to establish employee benefit plans nor dictates the substantive features of any voluntarily established plan⁴, the Government Accountability Office ("GAO") recently noted in its 2018 report "*Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful*" (the "2018 GAO ESG report") the number of defined contribution plans had increased to more than 648,200 from 207,700 in 1975.⁵ This dramatic increase in defined contribution plan investing in the United States has provided American workers with the freedom to choose among investment alternatives offered within their plans based on that worker's investment philosophies, objectives, strategies and circumstances.

Retirement plan fiduciaries have recognized the need to address and respond to the specific needs and desires of their employee-participant population when creating defined contribution investment plan menus. Though the universe of investment types, themes and structures have changed over the past 46 years, the Department has not discouraged or promoted any philosophy, style, concept or characteristic of fiduciary investment decision-making or participant investment demand, until its June 30, 2020 Proposal. This Proposal seemingly reverses almost half a century of deference the Department, Congress and the Courts have been careful to afford fiduciaries in their decision-making process. Instead, it singles out ESG investing and prescribes that plan fiduciaries must justify and document any investment that includes environmental, social or corporate governance considerations and prohibits such considerations in the selection of a plan's Qualified Default Investment Alternative. Moreover, it does so without providing a clear definition of what constitutes ESG investing nor any clear framework for consistently applying a "pecuniary factor" assessment.

Remarkably, earlier in June 2020, the Department issued an Information Letter in which it stated: "Whether a particular fund or investment alternative satisfies the requirements set forth in sections 403 and 404 of

⁴ *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 71, 78 (1995)

⁵ By 2015, the number of defined benefit plans had decreased to about 45,600 from 103,300 in 1975.

ERISA is an inherently factual question upon which the Department will not issue opinions.” The Information Letter, issued in response to a plan fiduciary who expressed concern about fiduciary liability in private equity investment plan offerings, opined that “a plan fiduciary would not violate the fiduciary’s duties under section 403 and 404 of ERISA solely because the fiduciary offers a professionally managed asset allocation fund with a private equity component as a designated investment alternative for an ERISA covered individual account plan.” In contrast to the Proposal, that Information Letter never states a plan fiduciary must evaluate private equity investments based solely on pecuniary factors (in fact, the word pecuniary is never used in the letter). This guidance highlights why the Proposal is surely to cause fiduciary confusion: Would a private equity investment plan offering with certain ESG characteristics be subject to the Proposal’s heightened standard of review?

As the 2018 GAO ESG report noted, retirement investors are reported to increasingly use ESG factors to assess a wider range of risks and opportunities that may otherwise not be taken into account in financial analysis. Those factors may be of relevance to the investor based on their religious, moral or scientific beliefs, but increasingly, the American investor implements ESG strategies to improve investment option financial performance and value over the long-term.

Moreover, as the Proposal notes in its preamble, “there is no consensus about what constitutes an ESG investment.” Indeed, it is important to consider that ESG is not a type of investment, *per se*. Instead, ESG investing can be viewed in myriad ways. ESG factors can be:

- A type of investment *data*, e.g. data on a company’s emissions, pay ratios, board composition, etc. Some data is financially material, some is not, depending on the individual investor’s point of view or personal, social or ethical values.
- A *style or thesis* of investing practiced by professionals, e.g. investing in companies that are strong or are improving their performance on ESG issues as a way to enhance returns and reduce risk.
- A *theme* designed to benefit from societal shift, e.g. investing in companies with diverse board composition and company leadership, low greenhouse gas emissions, or companies with high labor standards and commitments to workplace accident and safety management. These themes may appeal to investor affinities, preferences, or religious beliefs, but they may also appeal to investors who fundamentally believe such themes will improve investment return in the long-term.
- An *ancillary objective*, e.g. an investment option that invests in companies that promote environmental sustainability or have strong female leadership or with the primary objective of long-term growth of capital.
- A *primary objective*, e.g. an investment option that explicitly and intentionally invests in organizations for social goals or religious characteristics that may subordinate returns in an effort to achieve those religious or social investment goals. For instance, investments with ESG factors as their primary objective may be created to comply with Sharia law or the beliefs held by the Church of Jesus Christ of Latter-day Saints.

In addition, the Proposal fails to appropriately consider several important points involving the nascent subject of ESG investing including, but not limited to, the following:

A. The Proposal Fails to Appropriately Acknowledge the Extent to which ESG Factors are also “Pecuniary” Factors that May Bear on an Investment’s Value

Investment managers and plan fiduciaries increasingly utilize environmental, social or corporate governance considerations *specifically as* critical pecuniary factors in any investment strategy. For example, the GAO reported, “climate change... could have a material impact on its investment returns” and European retirement plans “use ESG factors to address a range of

investment risks, in particular climate change and poor corporate governance.” The plain reading of the Proposal, however, puts fiduciaries between a rock and a hard place in this regard. By assuming environmental, social or corporate governance considerations are non-pecuniary, the Proposal appears to suggest that plan fiduciaries should disregard the pecuniary factors now incorporated by asset managers globally in their investment process to assess both long- and short-term investment risk in selecting underlying securities for any prudent portfolio.

Issues like potential carbon or sugar taxes, litigations from unsafe products or work environments, and false accounting practices would have clear financial impact of an investments. Combining the financially material ESG factors alongside traditional financial factors potentially allow for more prudent and holistic assessment of any investment. Companies that consider factors beyond traditional financial factors are better prepared to weather a financial storm when a crisis hits, such as the pandemic currently plaguing domestic and global financial markets. Therefore, the Proposal’s discouragement of plan fiduciaries from considering “non-pecuniary” factors when selecting investment options for a plan may serve to eliminate sound investment options that may generate better investment returns in the long run.

Additionally, the Proposal’s examples of criteria a plan fiduciary *can* consider for Individual Account Plans includes arguably non-pecuniary factors as “objective risk-return criteria” such as “fund size... and investment manager investment philosophy and experience” among other things. The broad and vague definitions of objective criteria, pecuniary and non-pecuniary factors in the Proposal will likely serve to confuse plan fiduciaries.

B. ESG Considerations are Not Limited to Funds Marketed as “ESG” in Nature

As Fidelity recently noted in a response to a Request for Comment from the SEC,⁶ the focus of any one ESG mutual fund can vary greatly from any other (is it an E, S, or G Fund, or a combination thereof?), and differ on what securities qualify as ESG securities (is the Fund investing in stocks, bonds, real estate, derivatives, tax-exempt securities, European securities, etc.?). The view Fidelity expressed to the SEC was that it is more appropriate to define ESG through the Fund’s prospectus disclosure instead of trying to capture the myriad possibilities in the Fund’s name alone. Therefore, the assumption in the Department’s Proposal that a fiduciary would be able to identify and isolate any particular investment option as “ESG” in its investment mandate or component is flawed, given that many investment options available on the market today incorporate ESG factors into their overall investment strategies.⁷ To the extent

⁶ SEC Request for Comment on the framework for addressing names of registered investment companies (“Funds”) pursuant to 17 CFR 270.35d-1 (“Rule 35d-1” or the “Names Rule”) under the Investment Company Act of 1940 (the “Request for Comment”)

⁷ Additionally, the Proposal was published after the GAO’s July 2020 Report entitled *Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* (the “2020 GAO ESG Report”). The 2020 GAO ESG Report reviews companies’ disclosures of ESG information and examines, among other things, (1) why investors seek ESG disclosures, (2) public companies’ disclosures of ESG factors, and (3) the advantages and disadvantages of ESG disclosure policy options and found that most institutional investors GAO interviewed (12 of 14) said they seek information on environmental, social, and governance (ESG) issues to better understand risks that could affect company financial performance over time. These investors added that they use ESG disclosures to monitor companies’ management of ESG risks, inform their vote at shareholder meetings, or make stock purchasing decisions. Most of these institutional investors noted that they seek additional ESG disclosures to address gaps and inconsistencies in companies’ disclosures that limit their usefulness.

the Department formalizes the Rule without engaging in an information-gathering process, Fidelity suggests that the Department make clearer the distinction between ESG-themed investment strategies and those ESG-integration investment strategies that use one or more ESG factors in an otherwise holistic analysis of pecuniary opportunities.

C. The Proposal Inappropriately Assumes ESG Investing Results in Lower Investment Performance

The Department appears to assume that some or all investments with ESG factors in their investment objective, prospectuses or profiles may perform differently, forgo investment opportunities or accept risks other investments would not. The preponderance of industry and academic studies have shown ESG investing does not inherently necessitate a sacrifice in returns versus an appropriate broad benchmark; and many have shown incorporating ESG factors leads to lower risks.⁸ The Department stated it is concerned that “ESG investing will present a growing threat to ERISA fiduciary standards and ultimately to investment returns.” Based on observations of plans that offer investment options which incorporated ESG factors, Fidelity sees no strong evidence to support this concern. Also, it is worth noting that the underperformance of any particular investment option could be attributable to other factors (pecuniary and non-pecuniary, such as investment style) than ESG factors.

D. The Proposal Fails to Appropriately Consider Participant Investment Strategies and Goals

Giving customers diversified investment choices to align their capital with their investment objectives represents the heart of investing. In Fidelity’s view, the Proposal fails to appropriately consider that some participants, and particularly those with strong religious and moral viewpoints, may be inclined to refuse to invest in their employer-sponsored plans altogether to the extent their plan fiduciaries determine not to offer investment options with ESG considerations in light of the Proposal’s heightened standard of review and documentation. In a defined contribution plan, the future benefit the plan participant receives depends on two factors: (1) the level of that participant’s contributions to the plan; *and* (2) the performance of the investment options he or she selects. A participant may choose to reduce or forgo contributions to their employer-sponsored plan if the plan’s investment menu does not offer options consistent with their religious, social or moral values. Therefore, the Proposal may inadvertently result in a disincentive for the participant to participate in the plan altogether or to invest in ways that could be inappropriate for their circumstances (e.g., a younger plan participant may invest in a cash equivalent fund where he or she does not find other investments attractive).

E. The Proposal’s Heightened Standard of Review for ESG Investing Without a Clear Definition of ESG Investing Will Create ERISA Plan Fiduciary Confusion

⁸ See, e.g. “*ESG and Financial performance: Aggregated Evidence From More Than 2000 Empirical Studies*” Friede, Busch & Bassen (2015); *Journal of Sustainable Finance & Investment*, 5:4, 210-233, DOI: 10.1080/20430795.2015.1118917; “*Do Social Responsibility Screens Matter When Assessing Mutual Fund Performance?*” *Financial Analysts Journal*, 73:3, 53-66, DOI: 10.2469/faj.v73.n3.2 Marie Brière, Jonathan Peillex & Loredana Ureche-Rangau (2017); *Global Financial Stability Report* IMF 2019 Chapter 6 “Sustainable Finance”; “*How ESG affects equity valuation, risk, and performance*”, *Journal of Portfolio Management*, vol. 45, #5 (Jul 2019) Giese, Lee, Melas, Nagy & Nishikawa (2019).

The Department acknowledges “various terms have been used to describe this and related investment behaviors, such as socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, impact investing, and economically targeted investing. The terms do not have a uniform meaning and the terminology is evolving.” Subjecting plan fiduciaries to a heightened standard of review to additional scrutiny and burdensome documentation requirements will only serve as a roadmap for plaintiff’s firms to bring unnecessary claims against ERISA fiduciaries. How can a fiduciary navigate the evolving area to potentially avoid these claims? Why should a fund designed to invest only in securities issued by corporations with strong corporate governance and fuel efficiency be subject to additional scrutiny and burdensome documentation requirements but not a fund designed to invest in nascent or emerging industries? If both funds have an objective of capital appreciation, just because the corporate governance fund also has a potential social benefit, the Proposal would likely penalize the corporate governance fund in favor of the emerging industries fund, with arguably higher risk potential.

Additionally, the Proposal’s documentation provisions underestimate the cost small ERISA-covered plans (< 100 participants) would incur in documenting the use of ESG factors when selecting/monitoring investment. The Department cited a 2019 survey by Plan Sponsor Council of America showing that only 1.7% of corporate DC plans with less than 50 participants offered an ESG option that would be affected by the proposed rule and further noted that most plans with ESG investments are large plans. Fidelity’s data shows that as much as 14.5% of corporate DC plans with less than 50 participants have an ESG option. Such factors are notably higher in plans with more than 1,000 participants. Further, the proposal does not consider that many companies have committed to the United Nations-supported Principles for Responsible Investment (“UNPRI”), an international network of investors working together to put the six Principles for Responsible Investment into practice. Its goal is to understand the implications of sustainability for investors and support signatories to incorporate these issues into their investment decision-making and ownership practices. The Principles are voluntary and aspirational. They offer a menu of possible actions for incorporating ESG issues into investment practices across asset classes tailored to fit each organization’s investment strategy, approach and resources. As such, some plan fiduciaries may be forced to reconcile commitments made in plan documentation to incorporate financially material ESG issues into their investment practices and spend time and effort to remove such references for fear of fiduciary liability exposure.

III. ERISA Sections 403 and 404 Properly Apply to Designated Investment Alternatives and Not to Non-Designated Investment Alternatives

In the first sentence of subsection (c)(3), the Proposal helpfully clarifies that sections 403 and 404 of ERISA apply to the selection and monitoring of designated investment alternatives in individual account plans. Fidelity requests that the Department retain this clarification and provide further clarification in its final Rule to affirmatively state that ERISA sections 403 and 404 *do not* apply to investments made available in a participant-directed plan that are not Designated Investment Alternatives. Fidelity also notes that the term “designated investment alternative” is not defined within the Proposal and requests that the Department provide a definition.

IV. The Proposal Should Not Take Effect Until Fiduciaries Have Time To Prepare

To the extent the Department intends to implement the Rule without modifying to adopt a less prescriptive definition of ERISA's investment duties, Fidelity requests the Department to allow plan fiduciaries adequate time to prepare the documentation and analysis required by the Proposal to review investment options in accordance with the Proposal. The Proposal currently underestimates the time required for plan fiduciaries to identify, assess and remove investment options from plan investment line-ups. Currently the Rule contemplates an effective date of 60 days after the final rule's publication. Plan fiduciaries should be afforded at least 12 months before the Rule becomes effective to mitigate potential financial losses resulting from modified investment strategies that may inadvertently harm plan participants in the current market environment. This is particularly needed in light of the fact that plan sponsors and plan fiduciaries are under unprecedented economic and regulatory pressures in the current global environment.

* * *

We are available to discuss any questions you may have with respect to these comments or ESG investment factors generally.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Barr Haines". The signature is fluid and cursive, with the first name "James" being the most prominent.

James Barr Haines
SVP & Deputy General Counsel