December 10, 2021

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

Attn: RIN 1210-AC03
Notice of Proposed Rulemaking on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights
Via: Federal eRulemaking Portal: www.regulations.gov

DALBAR appreciates the opportunity to comment on the *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* ("*Proposed Regulation*").

DALBAR Background

DALBAR has a 45-year history and is recognized by industry and government as an independent third-party expert in the business of providing audits, evaluations, ratings, and due diligence. DALBAR certifications are recognized as a mark of excellence in the community of financial services in general and specifically for retirement plans.

In 2020 DALBAR launched an initiative to enhance the effectiveness of retirement plans by establishing standards that reflect both ERISA best practices and the goals of Environment, Social and Governance practices ("ESG"). We certify plans that meet these standards and thus encourage responsible plan fiduciaries to enhance their plans by managing costs, providing greater benefits to participants, and adopting high standards of governance.

This DALBAR initiative differs from the ESG Investments that are the subject of the *Proposed Regulation.* The DALBAR certification is based on the overall success of the plan in achieving retirement security for the maximum number of workers. A description of this initiative has been submitted to Office of Regulations and Interpretations for review.

Regarding the Proposed Regulation

The *Proposed Regulation* removes a portion of the harm caused by the 2020 proposal but remains flawed in the discriminatory treatment of ESG investments.

By detailing and giving examples of how ESG investments are to be evaluated, the proposal declares that such standards do not apply to other investments. Details include the impractical requirement for each fiduciary to separately evaluate the "*economic effects of climate change and other ESG factors*" on each plan. Such prescriptive measures are unprecedented in ERISA, which has historically outlined principles that are refined into practices and adapted by investment professionals and honed by competitive forces.

As it stands, the *Proposed Regulation* relegates ESG to being a second class citizen of the investment world.

> **If the *Proposed Regulation* is to be applicable to all investments, as its title states, the level of detail and examples should either be omitted or expanded to encompass all investments.**

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Suggested Alternative

The emergence of ESG investments has identified a missing component of ERISA regulation. For decades regulations have relied on diversification as a boundary that protects investors, but ESG has raised the question of survival of investment alternatives. Past survival failures include businesses such as American Motors, Arthur Anderson, AT&T, Blackberry, Blockbuster, Borders, Circuit City, Enron, F. W. Woolworth, Kodak, Pan Am, Polaroid, Radio Shack, US Steel, Western Union. As was true with diversification, there exists sufficient history of businesses that survive and those that fail to identify warning signs and measure the probability of survival.

The *Proposed Regulation* should introduce the need for protection from the threats to survival as diversification addressed the threat of concentration risk. Survival threats have caused hundreds of businesses to literally disappear or become mere shadows of their former existence. While ESG is not the only determinant of survivability, it is one of the most important.

> **Regulatory changes to address threats to survival would be inclusive of ESG, but also other precursors of survival dangers that the investment community would identify.**

For example, survival factors may include but are not limited to resource depletion, obsolescence, deployed survival strategies, public opinion, competition, legal/governmental risks as well as social responsibility, environmental protection and governance practices.

The explicit addition of a survivability consideration will secure a place for ESG in ERISA plans and provide workers access to ESG investments.

Additionally, adopting a survivability standard as suggested here, will protect all plan participants for the decades of their working and retirement lives with no material increase in expenses or any forfeiting of investment returns.

Regards,

Louis S Harvey
President & CEO