December 13, 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

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Re: RIN 1210–AC03

To Whom It May Concern:

The U.S. Impact Investment Alliance ("the Alliance") writes in support of the proposed rule put forth by the Department of Labor ("the Department"), which provides greatly improved guidance to the managers of 401(k)s and private pension plans, governed under the Employee Retirement Income Security Act ("ERISA").

The Alliance is an organization committed to catalyzing the growth of impact investing in the United States. Members of our boards and councils include individual and institutional investors collectively owning hundreds of billions of dollars of invested assets, in addition to asset and fund managers collectively managing over one trillion dollars in assets. We define impact investing broadly to include those investments that create financial returns alongside measurable and positive social, economic and environmental impacts across asset classes.

The Alliance is supportive of the proposed reversal of a harmful pair of rules finalized during the prior administration that arbitrarily discouraged the consideration of material ESG factors to the detriment of retirement savers.[1] Instead, the proposed rules acknowledge the clear and growing evidence of the financial risks posed by the climate crisis[2], as well as the material importance of governance, workforce and other environmental, social and governance ("ESG") factors.[3]

The proposed rule will also represent an important step towards aligning fiduciary duty standards in the United States with emerging global private sector and regulatory standards. Other jurisdictions, such as the European Union, have moved rapidly to require investors and investment product managers to disclose and account for their consideration of ESG factors.[4] The demand for clear and comparable

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[1] U.S. Department of Labor, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (November 13, 2020); Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (December 16, 2020).
[2] U.S. regulators continue to acknowledge the climate-related risks to U.S. and global financial stability. As one indicator, a 2019 study revealed that 215 of the largest companies globally valued the climate change-related risks at approximately $1 trillion.
[3] For instance, a recent Morgan Stanley study of 11,000 mutual between 2004-2018 funds found no financial returns tradeoff for sustainable funds compared to traditional funds. Furthermore, the sustainable funds were shown to demonstrate a lower downside risk.
[4] In April 2021, the European Commission adopted the Sustainable Finance Package, which, among other things seeks to "ensure that financial firms, e.g. advisers, asset managers or insurers, include sustainability in their procedures and their investment advice to clients."

disclosure standards has accelerated the push for convergence around such ESG factors that impact "enterprise value."[5] By inhibiting the consideration of ESG factors, current rules place firms serving the ERISA-regulated market at a steep disadvantage, potentially reducing investor choice and increasing costs borne by retirement savers.

Support for Rescinding of Harmful Provisions

The Alliance applauds the Department's decision to rescind several harmful provisions from the 2020 rules that were widely opposed by stakeholders.[6] In our 2020 comments, the Alliance urged regulators to reassess several provisions that discouraged the consideration of ESG factors by retirement fiduciaries, given the growing evidence base that the integration of ESG into investment strategies helps mitigate risk and can drive outperformance.[7] Furthermore, accounting for systemic financial risks such as those posed by climate change is especially important to retirement savers whose investments are long-term in nature. In reversing the 2020 rules, the Department is reaffirming the economic relevance of ESG factors and removing barriers for their prudent consideration by retirement fiduciaries.

More specifically, the proposed rule would rescind several confusing and limiting provisions. First, the proposal appropriately removes the ill-defined requirement that fiduciaries consider only "pecuniary" factors. Similarly, the Alliance is encouraged by the Department's efforts to improve the "tie-breaker" test, which allows fiduciaries to consider certain collateral benefits as tie breakers between different investment options. The current "economically indistinguishable" standard for permitting the use of tie breaks is both seemingly impossible to meet and triggers overly burdensome documentation requirements, effectively discouraging fiduciaries from considering collateral benefits altogether.

The Alliance is also pleased to see the Department has proposed removing the restriction prohibiting plan sponsors from including ESG funds as qualified default investment alternatives ("QDIA"). If left to stand, this would unnecessarily exclude high-quality investment options for retirement savers, in a way that is out of step with the broader investment market. We agree with the Department's assertion that the same standards that apply to other investments should also apply to QDIAs.

Lastly, we are supportive of the proposed changes related to proxy voting. The Alliance has expressed significant concern that the 2020 rules would suppress the voices of retirement savers by discouraging fiduciaries from exercising appropriate shareholder engagement rights and voting relevant proxies – particularly those related to ESG factors. The proposed changes will better enable fiduciaries under ERISA to vote proxies in line with the best interests of their beneficiaries.

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[5] The International Financial Reporting Standards (IFRS) Foundation moved in November 2021 to create the International Sustainability Standards Board (ISSB) after extensive consultation with market participants and international regulatory agencies. The move suggests that there will be further, global convergence on reporting of ESG factors.

[6] According to an analysis by the Forum for Sustainable and Responsible Investment (US SIF), 95% of the 8,700 commenters wrote in opposition to the proposed rule.

[7] For more information, see the Alliance's comments to the Department in response to the Financial Factors in Selecting Plan Investments rule and the Fiduciary Duties Regarding Proxy Voting and Shareholder Rights rule.

Recommendations for the Final Rule

While the Alliance is broadly supportive of the direction taken by the Department in the proposed rule, we would emphasize a few recommendations looking forward to the final rule.

The proposal states that fiduciaries "can and should" consider ESG factors they deem material in investment decisions. While this is a significant step in the right direction, regulators should clarify the situations in which a fiduciary must consider material ESG factors.

The Alliance believes that the three example sets of ESG factors that may be material to a fiduciary's risk-return analysis – including climate change, governance and workforce-related practices – are helpful in this regard. Though the Alliance is supportive of their inclusion, we encourage the Department to carefully contemplate how to provide ample guidance to fiduciaries for considering additional ESG factors into their investment analyses. At a minimum, the Department should emphasize that these examples and any others offered in the future are non-exhaustive and provide flexibility for this and future guidance to account for emerging evidence of additional material ESG factors.

The Department should also consider mandating – either in the final rule or in future guidance – that fiduciaries outline and disclose their sustainable investment policies, including their use of ESG factors and shareholder engagement practices. This would help promote both clarity and flexibility for fiduciaries under ERISA, while better ensuring that they are prudently considering material ESG factors.

Finally, while the Alliance is supportive of the improvements made to the "tie-breaker" test compared to the 2020 rules, the Alliance encourages the Department to ensure fiduciaries have sufficient guidance to effectively use the test under the final rule.

Conclusion

The Alliance is strongly supportive of the proposed rule, which we believe is an important step toward aligning the regulations surrounding investor fiduciary duty with the mounting evidence regarding the materiality of ESG factors.

We believe the Department is right to cite concern regarding the "regulatory game of ping pong" that has plagued these regulations on this topic. This back-and-forth has created uncertainty for market actors and led to a chilling effect of fiduciaries considering material factors like climate change in their investment decisions under ERISA. The proposed rule goes a long way in rectifying the latest regulatory backsliding by reversing much of the 2020 rules. That said, we believe policymakers should examine what statutory amendments could be made to better codify these changes. While beyond the scope of the Department's regulatory authority, we urge policymakers to examine a broad set of policy tools to prevent further challenges to the prudent, sustainable investing of retirement assets.

Thank you for the opportunity to provide comment. We look forward to engaging with regulators throughout the remainder of the rulemaking process.

Sincerely,

Fran Seegull

Fran Seegull
President, U.S. Impact Investing Alliance