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

RE: RIN 1210-AC03: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

To Whom It May Concern:

I am writing on behalf of the North American Securities Administrators Association, Inc. (“NASAA”)¹ in response to the proposal by the Employee Benefits Security Administration of the U.S. Department of Labor (the “Department”), entitled *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* (the “Proposal”).² The Proposal would amend the “Investment Duties” regulation at 29 C.F.R. § 2550.404a-1 (the “Proposed Rule”) to clarify the extent to which environmental, social and governance (“ESG”) factors can inform investment decision-making under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). NASAA supports the Proposal because it would remove barriers – both overt and subtle – that inhibit ERISA fiduciaries from analyzing investments fully. NASAA also recommends a revision to the Proposal to support the principle of allowing fiduciaries to approach questions of materiality and risk-return analysis broadly.

I. The Proposal Frees ERISA Fiduciaries from Unnecessary Limitations on the Consideration of ESG and Related Factors in Investment Selections.

In 2020, the Department adopted a rule that broke with decades of prior Department non-regulatory guidance that allowed ERISA fiduciaries to consider ESG factors and related considerations when selecting investments, and instead limited the analysis to so-called “pecuniary

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, U.S. Dept. of Labor Proposed Rule, 86 Fed. Reg. 57272-57304 (Oct. 14, 2021), *available at* <https://www.regulations.gov/document/EBSA-2021-0013-0001>.

factors.”³ NASAA supports the Proposal both because it would reintroduce and elevate the Department’s prior non-regulatory guidance into rulemaking, and because it would effectively eliminate a false distinction that suggests that ESG and related considerations are not germane to pecuniary analyses of investments. The 2020 rule caused investor confusion and raised questions as to whether factoring ESG considerations into investment decisions might run afoul of ERISA, even if doing so would yield better investment returns. The truth is that climate change and other ESG considerations are financially material to many investments, and a rule that divides considerations into pecuniary and non-pecuniary buckets stunts comprehensive fiduciary analyses of materiality.

The Proposed Rule text both recognizes and compensates for this narrow view of materiality by stating that (1) a “projected return ... may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action,”⁴ and (2) that “[a] prudent fiduciary may consider any factor in the evaluation of an investment or investment course of action that ... is material to the risk-return analysis.”⁵ NASAA agrees that “material climate change and other ESG factors are no different than other ‘traditional’ material risk factors,”⁶ and we support the Department’s efforts to “remove any prejudice to the contrary.”⁷

Further, while we certainly agree that an ERISA fiduciary cannot sacrifice investment returns or take on additional investment risks to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan at issue,⁸ we also recognize that maximizing long-term investment returns has always been the *sine qua non* duty of ERISA fiduciaries. The time horizons of retirement investments require a particular focus. The Department has traditionally recognized that maximizing long-term portfolio value may require considering issues that are not immediately quantifiable. It is therefore entirely

³ See *id.* at 57272 (discussing the adoption of the 2020 rule through two releases, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846-72885 (Nov. 13, 2020), and Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658-81695 (Dec. 16, 2020)). The 2020 rule defined a “pecuniary factor” as “a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and the funding policy established pursuant to section 402(b)(1) of ERISA.” See Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72884. The Proposal explicitly removes this term from the rule. See Proposal, 86 Fed. Reg. at 57304. NASAA also notes and supports the Department’s decision to eliminate other barriers to the integration of ESG factors into investment management including the removal of the statement that a fiduciary does not have to vote on every proxy, the removal of the duty to maintain records on proxy voting activities, and the chilling language that fiduciaries should not choose ESG-themed funds “too hastily.” See *id.* at 57275.

⁴ Proposed Rule at ¶ (b)(2)(ii)(C).

⁵ *Id.* at ¶ (b)(4).

⁶ Proposal, 86 Fed. Reg. at 57277.

⁷ *Id.*

⁸ See *id.* at 57293.

reasonable for an ERISA fiduciary to make investment decisions that take into consideration climate change and other ESG factors.⁹ NASAA agrees with the Department’s assessment that “[c]limate change is particularly pertinent to the projected returns of pension plan portfolios that, because of the nature of their obligations to their participants and beneficiaries, typically have long term investment horizons,”¹⁰ and we believe that a comprehensive approach to materiality and risk-return analyses facilitates the search for value over long-term investment horizons.

II. Subparagraph (b)(4) of the Proposed Rule Should Be Revised to Protect the Power of Fiduciaries to Conduct Comprehensive Risk-Return Analyses.

The Department makes clear that the background behind the Proposal is (1) the 2020 rule that undermines previous non-regulatory guidance on the consideration of ESG and related factors, and (2) Executive Orders 13990 and 14030, which required the Department to consider publishing a proposed rule to suspend, revise, or rescind the 2020 rule.¹¹ It therefore makes sense that the Proposal is directed both in approach and examples toward removing confusion and prejudice around the consideration of ESG factors in investment selections, efforts that NASAA strongly supports. The integration of these concepts into materiality and risk-return analyses is overdue.

NASAA suggests that the enduring value of the Proposal will be found in the language of subparagraph (b)(4) because it articulates a principle that a fiduciary has broad authority – within the confines of its duties of prudence and loyalty – to determine what aspects of investments are material to the fiduciary’s risk-return analyses. That principle should be clarified and protected from political and ideological vicissitudes; *i.e.*, the Department should strive to make sure that fiduciaries remain free to make clear-eyed investment analyses.

Accordingly, NASAA recommends a change to subparagraph (b)(4) of the Proposed Rule. Although it is stated clearly in subparagraph (b)(4) that a prudent fiduciary may consider “any factor in the evaluation of an investment or investment course of action that ... is material” (emphasis added), it would better serve the purposes of that principle if the paragraph ended with the words “including but not limited to” rather than “which might include, for example.” This change would help ensure that the listed factors do not (1) become misconstrued as exclusive (which can sometimes happen with safe harbor provisions), (2) compel the Department to add new examples in response to evolving issues, and (3) leave the principle vulnerable to curtailment through edits made to the list by future administrations.

⁹ *Id.* at 57272. NASAA therefore also supports the proposed requirement to “prominently display[]” the “collateral-benefit characteristic of the fund, product, or model portfolio” chosen in a tie breaker scenario under the Proposed Rule. In NASAA’s view, not only does the disclosure requirement provide transparency to investors about such selections, but the disclosures may also give investors insights into the quality of a fiduciary’s analysis overall.

¹⁰ *Id.* at 57276.

¹¹ *See id.* at 57273.

To buttress this point, we also suggest that the preamble to the adopting release should make clear that subparagraph (b)(4) is a principles-based provision that stands for the proposition that fiduciaries who act pursuant to their duties of prudence and loyalty are empowered broadly to determine what factors are material to the risk-return analyses supporting their investment selections. Doing so would protect the principle from being modified and curtailed by simple editing, and it would instead require a full notice and comment process to address the fundamental question of the extent of an ERISA fiduciary's ability to consider all relevant factors and information.

III. Conclusion

For the reasons expressed herein, NASAA supports the Proposal and encourages its adoption. The Proposal would restore the Department's prior guidance on ESG factors and related considerations, and it would empower ERISA fiduciaries to analyze investments comprehensively. NASAA recommends a revision to the Proposed Rule and additional language for the preamble to the adopting release to fortify the principal that ERISA fiduciaries have broad discretion to consider any and all factors relevant to an investment risk-return analysis. If you have any questions or would like additional information, please do not hesitate to contact the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,



Melanie Senter Lubin
NASAA President
Maryland Securities Commissioner