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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, D.C. 20210  
Attn: Financial Factors in Selecting Plan Investments

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

Dear Madam or Sir:

Institutional Shareholder Services Inc. (ISS) is pleased to submit these comments regarding the above-referenced proposal to amend the “Investment duties” rule under Title I of the Employee Retirement Income Security Act of 1974 (ERISA) [29 CFR §2550.404a-1].<sup>1</sup> Given the increasing importance of integrating environmental, social and corporate governance (“ESG”) factors into a prudent investment management strategy, ISS applauds the Department’s intent to clarify the sub-regulatory guidance in this area. Unfortunately, the proposed rule amendment adds more confusion than clarity, and would, we fear, work to the detriment of ERISA plan participants and their beneficiaries.

While the Department seems to recognize the economic relevance of ESG factors in theory, the Proposing Release nonetheless perpetuates outdated assumptions about ESG investing. As a result, the proposed amendment of Rule 404a-1 imposes unnecessary burdens on the selection of ESG investments, even where the fiduciary has found such investments to be prudent after evaluating them solely on pecuniary grounds. The permissible consideration of non-pecuniary factors under the proposed amendment is confusing as well. The Department characterizes this rulemaking as a confirmation of

<sup>1</sup> Financial Factors in Selecting Plan Investments, 29 CFR Parts 2509 and 2550, RIN 1210-AB95 (June 22, 2020), 85 Fed. Reg. 39113 (June 30, 2020) (“Proposing Release”).

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existing sub-regulatory guidance, but that is not the case. Whereas existing guidance employs an economic equivalence test for assessing alternative investments, the proposed rule requires that such alternatives be economically “indistinguishable.” In so doing, the proposal creates a new—and, ISS fears, unworkable—standard for ERISA fiduciaries.

ISS urges the Department to revise the proposal to address each of these issues. In so doing, we respectfully ask the Department to confirm that where ESG investments present material economic considerations under generally accepted investment theories, they are to be treated *pari passu* with other types of investments for purposes of the ERISA duties of prudence and loyalty. We further ask that the “economically indistinguishable” concept be modified to bring it more in line with the Department’s existing sub-regulatory guidance.

Finally, in light of the importance of fiduciary investment standards to the retirement security of plan participants and beneficiaries, we ask the Department to schedule a public hearing on this matter. As is customary, the record should be held open for a reasonable period after the hearing to permit interested parties to submit additional comments.

### **Background**

ISS is a federally registered investment adviser with over 30 years of experience in helping institutional investors meet their fiduciary responsibilities to clients. Through its governance research and proxy voting recommendations, ISS today helps more than 1,600 clients—including employee benefit plans, investment managers and mutual funds—make and execute informed proxy voting decisions for approximately 44,000 shareholder meetings a year in over 110 developed and emerging markets worldwide. In so doing, ISS applies specific policy frameworks created or selected by institutional investors. ISS currently implements more than 400 custom voting policies on behalf of its clients. Investors who choose not to create their own proxy voting policies may select among a range of policy options offered by ISS. These include benchmark policies focused on promoting long-term shareholder value creation, good governance and risk mitigation at public companies and thematic policies that evaluate governance and voting issues from the perspective of sustainability and public funds, among others.

In addition to assisting investors and their fiduciaries with their proxy voting responsibilities, ISS’ responsible investment arm, ISS ESG, also facilitates its clients’ integration of environmental, social and corporate governance factors into their investment decision-making process. For example, ISS ESG’s Screening & Controversies solutions identify corporate involvement in a range of controversial products, business practices and high-risk sectors, allowing clients to screen, monitor and analyze responsible investment performance.

ISS ESG also provides a comprehensive suite of climate solutions to provide investors with a better understanding of their portfolios’ exposure to climate-related risks. ISS ESG offers

a range of data and intelligence on climate change performance and risk and its impact on investments. Finally, ISS ESG Ratings & Rankings solutions provide comparable analyses on companies, countries and green bonds, providing investors with the insight to incorporate sustainability into their investment processes however they see fit. ISS ESG's ratings help investors minimize environmental, social and governance risks, comply with evolving regulatory and stakeholder requirements and identify potential investment opportunities.

### ***Legal Discussion***

Adopted in 1979, Rule 404a-1 addresses an ERISA fiduciary's investment duties under the prudence standard established in Section 404(a)(1)(B) of the statute. This provision obliges the fiduciary to discharge his duties with respect to the plan with the care, skill, prudence and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims. Briefly stated, Rule 404a-1 provides that a fiduciary responsible for investing employee benefit plan assets satisfies the prudence standard if he gives appropriate consideration to those facts and circumstances he knows or should know are relevant to the particular investment or investment course of action involved.<sup>2</sup> "Appropriate consideration" includes, but is not limited to, a determination that the particular investment is reasonably designed to further the purposes of the plan, taking into account the risk of loss or opportunity for gain associated with the investment. It also includes consideration of the following factors as they relate to the portion of the plan portfolio with respect to which the fiduciary has investment duties: (a) portfolio diversification, (b) liquidity and current return relative to the plan's anticipated cash flow requirements, and (c) projected return of the portfolio relative to the plan's funding objectives.

In the instant rulemaking, the Department proposes to restate this interpretation of the prudence standard with a slight modification<sup>3</sup> and to augment Rule 404a-1 to address ERISA's loyalty or "exclusive purpose" fiduciary duty as well. Section 404(a)(1)(A) and 403(c) of the statute oblige a plan fiduciary to discharge his duties solely in the interests of the plan's participants and their beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of plan administration. While the statute does not specify what types of benefits are covered by the

<sup>2</sup> Rule 404a-1(b)(1)(i). An "investment course of action" is defined to mean a series or program of investments or actions related to the fiduciary's performance of his investment duties. Rule 404a-1(c)(2). As used in this letter, the term "investment" also refers to an investment course of action.

<sup>3</sup> In addition to considering diversification, liquidity and projected return, the fiduciary now would also be obliged to consider how the investment compares to available alternatives with regard to these factors. Proposed Rule 404a-1(b)(2)(ii)(D).

“exclusive purpose” standard, the courts and the Department have confirmed that the benefits must be financial, rather than non-pecuniary.<sup>4</sup>

Over the years, the Department has addressed the circumstances in which an ERISA fiduciary may consider non-pecuniary factors in selecting plan investments and still satisfy his duty of loyalty. In a series of interpretive bulletins and other sub-regulatory guidance, the Department has emphasized that the fiduciary’s overarching duty is to focus on the plan’s financial returns and the risks to plan participants and beneficiaries. This duty prohibits the fiduciary from subordinating participants’ and beneficiaries’ interests in their retirement income to unrelated objectives, including collateral social policy goals.<sup>5</sup> However, the duty to assess potential investments solely on economic considerations does not always preclude the selection of an investment that confers collateral benefits. Where alternative investments serve a plan’s economic interests equally well, the Department has confirmed that the fiduciary can use collateral considerations as a “tie-breaker” in selecting a plan investment.<sup>6</sup>

Of particular relevance to the instant rulemaking, the Department has also confirmed that environmental, social and corporate governance factors are not always “collateral” to an investment’s economic benefits. In some circumstances, qualified investment professionals may determine that ESG factors entail material business risks or opportunities that should be part of a prudent investment analysis.<sup>7</sup> Today, qualified investment professionals are making such determinations with increasing frequency.

In a recent report on public companies’ disclosure of ESG factors, the U.S. Government Accountability Office (“GAO”) found that the institutional investors they interviewed generally agreed that ESG considerations can substantially influence a company’s long-term financial

<sup>4</sup> See Proposing Release, *supra* note 1, at 3-4, 85 Fed. Reg. at 39114.

<sup>5</sup> Interpretive Bulletin 94-1, Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32606 (June 23, 1994) (“IB 94-1”); Interpretive Bulletin 2008-01, Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734 (Oct. 17, 2008) (“IB 08-1”); Interpretive Bulletin 2015-01, Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135 (Oct. 26, 2015) codified at 29 CFR § 2509.2015-01 (“IB 2015-01”); and Field Assistance Bulletin 2018-01 (Apr. 23, 2018) (“FAB 2018-01”).

<sup>6</sup> IB 2015-01, 80 Fed. Reg. at 65136.

<sup>7</sup> *Id.* (“Environmental, social, and governance issues may have a direct relationship to the economic value of the plan’s investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary’s primary analysis of the economic merits of competing investment choices”). See also FAB 2018-01, *supra* note 5, at 2.

performance.<sup>8</sup> Among other things, “factors like climate change impacts and workplace safety may affect a company’s expected financial performance and thereby its value to shareholders.”<sup>9</sup> Likewise, in a recent recommendation to the Securities and Exchange Commission (“SEC”) regarding ESG disclosure, the SEC’s Investor Advisory Committee observed that “ESG is no longer a fringe concept. It is an integral part of the larger investment ecosystem of our modern, global, interconnected world. Many investors view material ESG factors as critical drivers of risk and returns in their investment making decisions, both in the short and long term.”<sup>10</sup> The SEC itself has recognized that ESG factors may be material to investors.<sup>11</sup> For example, in 2019, the SEC proposed to modernize its public company disclosure requirements to include information about human capital management, which the agency observed “may represent an important resource and driver of performance for certain companies.”<sup>12</sup> And SEC Chairman Jay Clayton has noted that climate change disclosures give investors a mix of information that “facilitates well-informed capital allocation decisions.”<sup>13</sup>

Against this backdrop, the Department seeks to clarify and codify its interpretation of ERISA’s prudence and exclusive purpose standards as they relate to ESG and economically

<sup>8</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM 9 (2020) (“GAO ESG Report”), available at <https://www.gao.gov/assets/710/707949.pdf>.

<sup>9</sup> *Id.* at 5.

<sup>10</sup> INVESTOR-AS-OWNER SUBCOMM., INVESTOR ADVISORY COMM., RECOMMENDATION FROM THE INVESTOR-AS-OWNER SUBCOMMITTEE OF THE SEC INVESTOR ADVISORY COMMITTEE RELATING TO ESG DISCLOSURE 7-8, 9 (as of May 14, 2020), available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf>. See also INT’L MONETARY FUND, *Sustainable Finance: Looking Farther*, in GLOBAL FINANCIAL STABILITY REPORT: LOWER FOR LONGER 83 (2019) (“IMF Sustainability Report”) (“ESG issues can have a material impact on firms’ corporate performance and risk profile, and on the stability of the financial system”).

<sup>11</sup> Under the federal securities laws, information is “material” if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision in the context of the total mix of available information. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

<sup>12</sup> Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Rel. No. 10668, Exchange Act Rel. No. 86614 (Aug. 8, 2019), 84 Fed. Reg. 44358, 44370 (Aug. 23, 2019).

<sup>13</sup> Jay Clayton, Chairman, Sec. & Exch. Comm’n, Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures; Other Ongoing Disclosure Modernization Initiatives; Impact of the Coronavirus; Environmental and Climate-Related Disclosure (Jan. 30, 2020) (transcript available at <https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30>).

targeted investing (“ETI”). The Department notes the imprecise and evolving nature of these terms, and suggests they both signify the selection of investments because of the non-pecuniary benefits they confer apart from investment return.<sup>14</sup> Regardless of the terminology used, ISS urges the Department not to lose sight of the fact that while some investors may select ESG investments to promote social goals apart from investment return, the primary purpose of ESG integration at this point in time is to reduce investment risk and maximize shareholder value.

The Department recognizes that ESG considerations may present economic business risks or opportunities that qualified investment professionals would consider material economic considerations under generally accepted investment theories, and the Department confirms that ERISA’s fiduciary standards are the same regardless of the investment vehicle or category.<sup>15</sup> Nevertheless, the Proposing Release is infused with outmoded and controversial characterizations of ESG investing. The Department opines that such investing raises “heightened concerns” under ERISA,<sup>16</sup> and repeatedly suggests that ESG investments produce lower returns,<sup>17</sup> without acknowledging a growing body of evidence to the contrary.<sup>18</sup> Furthermore, while the Department expresses concern about ESG investment funds that entail risks different from those presented by other types of investments,<sup>19</sup> the Department fails to acknowledge the heightened risk that ignoring ESG

<sup>14</sup> Proposing Release, *supra* note 1, at 4, 85 Fed. Reg. at 39114.

<sup>15</sup> *Id.* at 11-12, 85 Fed. Reg. at 39116.

<sup>16</sup> *Id.* at 9, 85 Fed. Reg. at 39115.

<sup>17</sup> *Id.* at 30, 32, 33, 37 and 51, 85 Fed. Reg. at 39120, 39121, 39122 and 39125.

<sup>18</sup> See, e.g., IMF Sustainability Report, *supra* note 10 at 87-89 (finding that there is no consistent evidence that sustainable funds regularly underperform traditional funds); MORGAN STANLEY, SUSTAINABLE REALITY: ANALYZING RISK AND RETURNS OF SUSTAINABLE FUNDS 4 (2019), available at [https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable Reality Analyzing Risk and Returns of Sustainable Funds.pdf](https://www.morganstanley.com/pub/content/dam/msdotcom/ideas/sustainable-investing-offers-financial-performance-lowered-risk/Sustainable%20Reality%20Analyzing%20Risk%20and%20Returns%20of%20Sustainable%20Funds.pdf) (“There is no trade-off in the financial performance of sustainable funds compared with their traditional peers. Analyzing the total returns between 2004 and 2018, we find only sporadic and inconsistent differences in performance. Therefore, the returns of sustainable funds were in line with those of traditional funds”); GORDON L. CLARK, ANDREAS FEINER & MICHAEL VIEHS, FROM THE STOCKHOLDER TO THE STAKEHOLDER: HOW SUSTAINABILITY CAN DRIVE FINANCIAL OUTPERFORMANCE 40 (2015) (“[E]vidence shows that stocks of firms with a superior sustainability profile deliver higher returns than those of their conventional peers, and that sustainability quality provides insurance-like effects when negative events occur, helping to support the stock price upon the announcement of the negative event.” (footnotes omitted)).

<sup>19</sup> Proposing Release, *supra* note 1 at 10, 85 Fed. Reg. at 39116.

factors may entail. As the COVID-19 pandemic continues to wreak havoc on the economy, ISS finds this omission to be glaring indeed.<sup>20</sup>

A fundamental skepticism regarding ESG investing is reflected in both the structure and content of the proposed amendments to Rule 404a-1. In subsection (b) of the revised rule, the Department proposes to largely restate the existing interpretation of the ERISA prudence standard<sup>21</sup> and to address the loyalty standard by requiring fiduciaries to evaluate investments solely on the basis of pecuniary factors, and not to subordinate participants' and beneficiaries' financial interests to unrelated objectives.<sup>22</sup> ISS supports this part of the proposal and believes that it clearly restates existing fiduciary standards. We are not so sanguine, however, about what comes next.

Under a revised subsection (c)(1), captioned "Consideration of Pecuniary vs. Non-Pecuniary Factors," the proposed amendment repeats the investment duties described in subsection (b), but this time in the context of ESG investing. The provision explains that ESG considerations are 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. The weight given to such factors should appropriately reflect a prudent assessment of their impact on risk and return. While ISS has no qualms about the theory of this proposed content, we believe that structure of the provision could cause confusion. Banishing all ESG considerations to a separate subsection of Rule 404a-1 suggests that this type of investing is somehow outside the

<sup>20</sup> Reports by RBC Capital Markets, LLC and BofA Global Research have found that companies with higher ESG risk profiles have outperformed companies with lower ESG risk profiles in the US and Europe on a market-neutral basis since February of this year and two-thirds of actively managed sustainable equity funds outperformed their benchmark in the initial days of market turmoil caused by the pandemic. See Leslie P. Norton, Barrons, *Sustainable Companies Are Beating the Market During the Crisis. Will It Last?* (March 26, 2020), available at <https://bit.ly/3fSseZu>; Sara Mahaffy, RBC Capital Markets, LLC, *ESG Strategies Show Their Resolve During the COVID-19 Downturn* (May 11, 2020), available at <https://bit.ly/2ZNljKI> ("For years, many questioned whether ESG funds could withstand periods of market and economic upheaval. Our latest report not only proves that they can deliver, but that they can also weather these storms better than many of their traditional counterparts.").

<sup>21</sup> See note 3, *supra*.

<sup>22</sup> In particular, the fiduciary must evaluate investments solely on the basis of pecuniary factors that have a material effect on the investments' return and risk, based on the appropriate horizons and the plan's articulated funding and investment objections. Moreover, the fiduciary cannot subordinate the interests of the plan participants and beneficiaries in their retirement income or financial benefits to unrelated objectives, and cannot sacrifice investment return or assume additional investment risk to promote goals unrelated to such financial interests or the purposes of the plan. Finally, the fiduciary cannot otherwise subordinate the plan participants' and beneficiaries' interests to its own interests or those of another party and the fiduciary must otherwise comply with the duty of loyalty. Proposed Rule 404a-1(b)(ii), (iii) and (iv).

bounds of ordinary portfolio management. Such an outmoded view ignores the whole purpose of ESG integration and is contrary to the Department's instruction that ERISA's fiduciary standards are the same regardless of the investment vehicle or category.<sup>23</sup>

In order to rectify this problem, ISS respectfully suggests that proposed subsection (c)(1) be folded into subsection (b). The provisions specifying when ESG considerations constitute pecuniary factors are helpful and can easily be added as new subparagraphs to paragraph (b)(1)(ii).<sup>24</sup>

Proposed subsection (c)(2) is more problematic. This provision employs the concept of "economically indistinguishable alternative investments" to erect a new barrier to ESG investing. As proposed, subsection (c)(2) would require a plan fiduciary who selects an ESG investment after conducting the evaluation described in subsection (b) (*i.e.*, considering solely pecuniary factors having a material effect on the investment's risk and return profile over the appropriate time horizon) to justify that selection by documenting, among other things, how the ESG investment is "economically indistinguishable" from other available investment alternatives. This burdensome obligation presumably would apply regardless of whether the fiduciary selects the ESG investment for its economic or collateral benefits.<sup>25</sup>

Requiring an ERISA fiduciary to demonstrate why "a distinguishing factor could not be found"<sup>26</sup> between an ESG investment selected for economic reasons and another available alternative negates the whole purpose of integrating environmental, social and corporate governance factors into prudent portfolio management. A skilled fiduciary finds prudent

<sup>23</sup> Proposing Release, *supra* note 1 at 11, 85 Fed. Reg. at 39116.

<sup>24</sup> As so reconfigured, subsection (b)(1)(ii) would read as follows: "Has evaluated investments and investment courses of action based solely on pecuniary factors that have a material effect on the return and risk of an investment based on appropriate investment horizons and the plan's articulated funding and investment objectives insofar as such objectives are consistent with the provisions of Title I of ERISA.

(A) Environmental, social, corporate governance, or other similarly oriented considerations are 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.

(B) The weight given to environmental, social, corporate governance or similarly oriented considerations should appropriately reflect a prudent assessment of their impact on risk and return."

<sup>25</sup> The requirement applies any time an investment is selected on the basis of either a non-pecuniary factor "or factors such as" ESG considerations (emphasis supplied).

<sup>26</sup> Proposing Release, *supra* note 1 at 17, 85 Fed. Reg. at 39117.

ways to leverage the distinctions between ESG and other investment options and does so for the financial benefit of the plan's participants and beneficiaries. As drafted, Rule 404a-1(c)(2) would rob participants and beneficiaries of the benefits of ESG integration — precisely the harm that the Department's current sub-regulatory guidance was designed to prevent.<sup>27</sup>

ISS urges the Department to revise the proposal to eliminate the phrase “or factors such as environmental, social, or corporate governance considerations.” ESG considerations that do not qualify as pecuniary factors under subsection (b)(1)(ii) of the rule are already covered by the phrase “a non-pecuniary factor.”<sup>28</sup>

Even where non-pecuniary factors are concerned, subsection (c)(2) misses the mark. While the rule does not define “economically indistinguishable,” the Proposing Release suggests that this term means much more than “economically equivalent,” which is the current standard this rule amendment purports to codify.<sup>29</sup> Instead of merely possessing *comparable* or *commensurate* levels of diversification, degrees of liquidity and potential risks and rates of return over the appropriate time horizon as the equivalence test requires, indistinguishable investments must possess the *same* target risk-return profile or benchmark, the *same* fee structure, the *same* performance history and the *same* investment strategy, and they must function the *same* way in the overall context of the fund portfolio.<sup>30</sup>

Perhaps the most troubling aspect of proposed subsection (c)(2) is that it sets a standard the Department does not believe fiduciaries will be able to meet. The Proposing Release repeatedly warns that indistinguishable investment alternatives rarely, *if ever*, exist,<sup>31</sup> and the Department notes that a hypothetical pair of truly identical investments has been characterized as a “unicorn.”<sup>32</sup> Adopting an unattainable standard in this fashion neither clarifies nor codifies the Department's existing guidance. All it does is set tripwires for ERISA fiduciaries.

ISS respectfully suggests that subsection (c)(2) be modified to make clear that while plan fiduciaries are forbidden to sacrifice investment return or assume additional investment risk

<sup>27</sup> IB 2015-01, *supra* note 5, 80 Fed. Reg. at 65136.

<sup>28</sup> See note 24 *supra*.

<sup>29</sup> IB 2015-01, *supra* note 5, 80 Fed. Reg. at 65136.

<sup>30</sup> Proposing Release, *supra* note 1 at 16-17, 85 Fed. Reg. at 39117.

<sup>31</sup> *Id.* at 16, 35, 39, 41, 50, 85 Fed. Reg. at 39117, 39122, 39123, 39125.

<sup>32</sup> *Id.* at 17 n.22, 35 n.45, 85 Fed. Reg. at 39117 n.22, 39122 n.45.

to promote non-pecuniary goals, they may consider such goals as “tie-breakers” in selecting among prudent, economically equivalent investment alternatives.<sup>33</sup>

### Other Matters

The Department asserts that the proposed revisions to Rule 404a-1 would not result in either substantial costs or benefits,<sup>34</sup> but it bases this assessment on a number of unsupported and contradictory assumptions. For example, the Department assumes that defined benefit plans that focus only on the financial aspects of ESG factors would be unaffected by the rule changes,<sup>35</sup> and claims that it “does not intend to increase fiduciaries’ burden of care attendant” to consideration of ESG factors material to a risk-return analysis.<sup>36</sup> However, as noted above, proposed subsection (c)(2) would impose the heightened economic indistinguishability test on the selection of all ESG investments, even those chosen for purely economic reasons. Likewise, the Department suggests that the effects of the amendment are likely to be minimal because most fiduciaries already comply with existing sub-regulatory guidance.<sup>37</sup> In addition to calling the need for this rulemaking into question, this suggestion ignores the fact that the proposed amendment alters, rather than codifies, existing guidance. The Department further estimates that the costs of complying with the documentation requirements under subsection (c)(2) will be negligible because economically indistinguishable investments are so rare, it is unlikely that fiduciaries will have much to document.<sup>38</sup>

At the same time, the Department anticipates that the benefits from the rule changes “will be appreciable,” because the economic indistinguishability test will result in less ESG

<sup>33</sup> Such a modification might read as follows: (c) *Consideration of non-pecuniary factors*. Plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or any other non-pecuniary goals. However, when a fiduciary determines, after conducting the evaluation described in paragraph (b) that alternative investments are substantially economically comparable, the fiduciary may select one of the investments on the basis of a non-pecuniary factor (notwithstanding the requirements of paragraph (b) and paragraph (c)(1)) if the fiduciary documents specifically why the investments were determined to be substantially economically comparable under generally accepted investment theories and why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries in receiving benefits from the plan.

<sup>34</sup> Proposing Release, *supra* note 1, at 41, 85 Fed. Reg. at 39123.

<sup>35</sup> *Id.* at 30, 85 Fed. Reg. at 39121.

<sup>36</sup> *Id.* at 33-34, 85 Fed. Reg. at 39121.

<sup>37</sup> *Id.* at 26, 50, 85 Fed. Reg. at 39120, 39125.

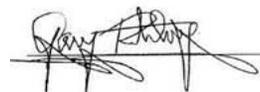
<sup>38</sup> *Id.* at 35, 50, 85 Fed. Reg. at 39122.

investing, thereby producing higher investment returns over the long run.<sup>39</sup> Where the amended rule results in a reduced use of non-pecuniary factors, the “higher investment returns, compounded over many years, could be considerable.”<sup>40</sup> The Department does not even acknowledge, let alone attempt to quantify, the reduced investment returns plan participants and beneficiaries may suffer if the amended rule dissuades fiduciaries from integrating economically material ESG factors into their portfolio strategy.

ISS respectfully submits that the Department’s economic analysis does not begin to support this rulemaking. We ask the Department to delay final action on this proposal pending the completion of a robust analysis of the costs and benefits of amending Rule 404a-1 (including evaluating the regulatory approach that maximizes net economic, environmental, public health and safety benefits, among others)<sup>41</sup> and until the other issues raised in this letter have been addressed. We also ask the Department to schedule a public hearing on this matter to ensure that the final product serves the participants and beneficiaries of ERISA plans for years to come.

We would be happy to supply the Department with additional information regarding any of the matters discussed herein. Please direct any questions about these comments to the undersigned, to our General Counsel, Steven Friedman, who can be reached at 301.556.0420, or to our outside counsel, Mari-Anne Pisarri, who can be reached at 202.223.4418.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary Retelny", written over a horizontal line.

Gary Retelny  
President and CEO

Cc: Jeanne Klinefelter Wilson, Acting Secretary  
Joe Canary, Office Director, Office of Regulations and Interpretations  
Jeffrey Turner, Deputy Director, Office of Regulations and Interpretations  
EBSA

<sup>39</sup> *Id.* at 32, 85 Fed. Reg. at 39121.

<sup>40</sup> *Id.* at 33, 85 Fed. Reg. at 39121.

<sup>41</sup> See Exec. Order No. 13,563, 3 C.F.R. 215 (2011).