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July 30, 2020

Joe Canary  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

**Re: Financial Factors in Selecting Plan Investments Proposed Regulation (RIN 1210-AB95)**

Dear Director Canary:

On behalf of the American Federation of State, County and Municipal Employees (“AFSCME”), I am writing in strong opposition to the U.S. Department of Labor’s (“DOL”) proposed rulemaking entitled “Financial Factors in Selecting Plan Investments” (RIN 1210-AB95) (the “Proposed Rule”).

AFSCME's 1.4 million members provide the vital services that make America happen. With members in communities across the nation, serving in hundreds of different occupations — from nurses to corrections officers, child care providers to sanitation workers — AFSCME advocates for fairness in the workplace, excellence in public services and freedom and opportunity for all working families. AFSCME members in the private sector participate in both single and multiemployer retirement plans. Further, while not directly covered by the Employee Retirement Income Security Act (“ERISA”), many of the more than 150 public pension funds in which AFSCME members participate look to ERISA for guidance on fiduciary standards.

**DOL Should Withdraw Current Proposed Rule**

The Proposed Rule was published in the Federal Register on June 30, 2020 and only permits a brief 30-day comment period. More than 30 days is needed for analysis to prevent unintended consequences that could include increased costs and additional burdens on fiduciaries, investment choice limitations for plans and increased litigation risk. Overturning decades of established policy should not be rushed through in a warp-speed rulemaking with a rushed comment period in the middle of the COVID-19 pandemic and economic crisis at the end of a Presidential term.

**American Federation of State, County and Municipal Employees, AFL-CIO**

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We urge DOL to withdraw the Proposed Rule and allow the current guidance to remain in place. Alternatively, the DOL should withdraw the Proposed Rule and issue a new proposed rule only after it has addressed the inadequate cost benefit analysis and other procedural deficiencies described here. DOL should then provide sufficient time for public comment, including through a public hearing and a post-hearing comment period.

### **The Proposed Rule Is Overly Vague and Could Create Additional Liabilities**

The Proposed Rule uses vague and inconsistent terminology that requires further clarification. This vagueness will create legal uncertainty for fiduciaries. The Proposed Rule's rationale notes that the concept of "environmental, social, and corporate governance" is "evolving"<sup>1</sup> and "vague."<sup>2</sup> If DOL is unable to define the environmental, social and governance ("ESG") investment strategies that it is attempting to regulate with the Proposed Rule, it will be very difficult for fiduciaries to determine how to comply with the Proposed Rule.

DOL's failure to provide specific definitions for ESG terms not only creates confusion, but also opens fiduciaries to potential liability based on arguments that investments were made based on "environmental," "social," "corporate governance" or "similarly oriented" factors. Without any guidance or consensus as to what these terms mean, the Proposed Rule will create potential liability for fiduciaries if they select investments where there could be an argument that the investments considered risks associated with ESG factors.

### **"ESG" is Widely Used by Investors to Measure Investment Risks**

The Proposed Rule is based on a faulty assumption that ESG factors are unconnected to shareholder value. A recent report by the Government Accountability Office found that "most institutional investors... seek information on environmental, social, and governance (ESG) issues to better understand risks that could affect company financial performance over time."<sup>3</sup> The world's largest asset managers like BlackRock and Vanguard recognize the importance of ESG factors in investments.<sup>4</sup>

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<sup>1</sup> "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." Financial Factors in Selecting Plan Investments (RIN 1210-AB95), 85 Fed. Reg. 39113 (June 30, 2020) ("Rule"), p. 39114.

<sup>2</sup> "There is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts." Rule, p. 39115.

<sup>3</sup> GAO-20-530, "Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them," at 9 (In an interview of 14 institutional investors, including 4 large private sector asset management firms, 3 mid-sized private sector asset management firms, 3 large public pension funds, and 4 mid-sized public pension funds, "[a]ll seven private asset managers and representatives at five of seven public pension funds said they seek ESG information to enhance their understanding of risks that could affect companies' value over time.")

<sup>4</sup> BlackRock, Inc., "Blackrock ESG Investment Statement," May 19, 2020, <https://www.blackrock.com/ch/individual/en/literature/publication/blk-esg-investment-statement-web.pdf>. The Vanguard Group, "ESG Investing at Vanguard," 2019, <https://institutional.vanguard.com/iam/pdf/INPESGOP.pdf> ("Systematic inclusion of financially material ESG information (risks and opportunities) to complement standard investment analysis [are] employed by Vanguard.").

DOL is taking a step backwards with this Proposed Rule by disregarding the growing investor consensus on the materiality of ESG factors. Before implementing drastic changes to rules governing ERISA, we urge DOL to undertake an in-depth analysis of the numerous studies showing that ESG investment strategies have performed as well as or better than comparable non-ESG investment strategies.

### **Economically Targeted Investments**

DOL has long recognized that fiduciaries can make economically targeted investments (“ETIs”) so long as the investments do not sacrifice investment returns or incur greater risk.<sup>5</sup> Pension plans have long relied on DOL’s interpretive guidance on ETIs to make job-creating investments and to provide other collateral benefits for communities, such as by supporting infrastructure projects, economic development, small businesses and affordable housing. The Proposed Rule would overturn decades of precedent that allows plans to invest responsibly under strict conditions.

### **DOL’s Economic Analysis Falls Far Short of What Is Needed to Justify the Proposed Rule**

DOL’s economic analysis lacks the evidence and rigor necessary to justify the Proposed Rule. Its shortcomings start with DOL’s failure to establish a real-world problem with the use of ESG factors. This is underscored by the fact that nowhere in the analysis or other elements of the published proposal does the Department describe any of its own enforcement actions that have identified and recovered losses caused by plan fiduciaries engaging in ESG investing that violates their duties under ERISA. Given this, the purported benefits of the Proposed Rule are speculative, at best. Further, the Department’s analysis of the Proposed Rule’s costs lacks the rigor necessary to support moving forward with rulemaking. DOL contends the Proposed Rule will not create significant additional costs without any evidence to support this. For example, while DOL finds “the rule may impose costs on fiduciaries whose current documentation and recordkeeping are insufficient to meet the new requirement,”<sup>6</sup> it also concludes — without any supporting data — that “truly ‘economically indistinguishable’ alternatives are rare” and therefore, the new documentation requirement “would not result in a substantial cost burden.”<sup>7</sup> This kind of assessment clearly does not meet a reasonable standard of rigorous analysis necessary to comply with the Administrative Procedure Act.

### **Conclusion**

The Proposed Rule is a solution in search of a problem. It is not based on any documented evidence of a problem that needs to be addressed. Instead of improving pension plan investing, the Proposed Rule is likely to do real harm by creating confusion among plan decisionmakers, who will be left to interpret and apply the rule’s vague terminology. Further, the rule is out of step with growing investor consensus on the materiality of ESG factors. Overturning decades of precedent should require thorough and rigorous cost benefit analysis,

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<sup>5</sup> Ian Lanoff, “The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully Under ERISA?” *Labor Law Journal*, Vol. 31, Iss. 7 (July 1, 1980), p. 387.

<sup>6</sup> Rule, p. 39122.

<sup>7</sup> *Id.*

which is clearly lacking here. We therefore urge DOL to withdraw the Proposed Rule. In the alternative, the DOL should revise the Proposed Rule, provide adequate economic analysis to justify it and invite additional comment.

We appreciate the opportunity to share our views. If you have any questions, or need additional information, please do not hesitate to contact John Keenan at [jkeen@afscme.org](mailto:jkeen@afscme.org).

Sincerely,

/s/ Dalia Thornton

Dalia Thornton  
Director  
Department of Research and  
Collective Bargaining Services