



MICHAEL D. SCOTT
EXECUTIVE DIRECTOR
E-MAIL: MSCOTT@NCCMP.ORG

July 30, 2020

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

Submitted Electronically Through www.regulations.gov

**Re: Notice of Proposed Rulemaking: Financial Factors in Selecting Plan Investments
Proposed Regulation
RIN 1210-AB95**

Dear Mr. Canary:

The National Coordinating Committee for Multiemployer Plans (“NCCMP”) appreciates this opportunity to comment on the Employee Benefits Security Administration (“EBSA”), U.S. Department of Labor’s (“the Department” or “DOL”) Notice of Proposed Rulemaking: Financial Factors in Selecting Plan Investments Proposed Regulation, published at 85 Fed. Reg. 39113 (June 30, 2020). The Proposal proposes “amendments to the “Investment duties” regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to confirm that ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action.”

The NCCMP is the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans. The NCCMP’s purpose is to assure an environment in which multiemployer plans can continue their vital role in providing retirement, health, training, and other benefits to America’s working men and women.

The NCCMP is a non-partisan, nonprofit, tax-exempt social welfare organization established under Internal Revenue Code Section 501(c)(4), with members, plans and contributing employers in every major segment of the multiemployer universe. Those segments include the airline, agriculture, building and construction, bakery and confectionery, entertainment, health care, hospitality, longshore, manufacturing, mining, office employee, retail food, service, steel, and trucking industries. Multiemployer plans are jointly trusted by employer and employee trustees.

Summary of Comments

As discussed below, the NCCMP agrees with certain aspects of the proposal, makes specific recommendations to clarify and strengthen the proposal, disagrees with aspects of the Department's positions, and raises concerns about the proposal as a significant and costly deviation from the de-regulatory agenda of the President while presenting the plaintiffs' bar with a significant new class action litigation bonanza.

Multiemployer pension funds have a multi-decades track record of successfully investing in what is often referred to as "Economically Targeted Investments" that provide competitive risk adjusted returns through investments that contribute to a well-diversified portfolio. As noted in footnote 6, prior to the issuance of IB-94-1, the Department issued a number of letters that granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investment that produce pecuniary and non-pecuniary benefits. We also document the pecuniary nature of plan contributions and the unique ability for multiemployer pension plans to make investments that generate plan contributions that are pecuniary, for the exclusive purpose of providing benefits and solely in the interest of the plan, participants and beneficiaries.

We support the Department's decision to "retain the all things being equal test" under the Department's previous guidance, but we view the Proposed Regulation as rejecting that test in favor of a more narrow, restrictive and ultimately unworkable standard that does not reflect a prudent approach to considering investment alternatives. We also provide a more complete understanding of the financial markets and explain that "ties" between investment alternatives occur more often than understood by the Department.

Finally, we provide a reasoned discussion of the Department's position on socially responsible investing, sustainable and responsible investing, environmental, social, and corporate governance (ESG) investing, and impact investing, and why the Department's views are not generally reflective of today's financial markets, its participants, or generally accepted investment or portfolio theory.

DOL's Sub-Regulatory Guidance

The U.S. Department of Labor (the Department or DOL) cited that "[v]arious 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."

We agree that there has not been uniform meaning to these terms and that the terminology is evolving, although we do not see this as a problem per se, and certainly not as it relates to multiemployer pensions. Consistent with the Department's longstanding guidance whether in letters, Interpretative Bulletins, or Field Assistance Bulletins, asset managers have developed investment vehicles that funded "Economically Targeted Investments". Today, some investments

that may have previously been considered as part of “Economically Targeted Investments” have become asset classes in their own right, for example some infrastructure and real estate strategies.

Investable asset sectors and classes evolve over time, and the asset sectors and classes implicated by the Department’s sub-regulatory guidance are certainly the latest examples of this evolution.

For example, infrastructure was not an asset class in 1994 when DOL issued Interpretative Bulletin 94-1. For almost 20-years, infrastructure has been an investable asset class, and today it is one which has great market depth, diversification benefits, and depending on the investment structure, varying degrees of liquidity. In just the period between January 2010 and September 2016, market participants invested \$1.7 trillion¹ in infrastructure assets globally. Since 2011, new fundraising for alternative investments (private equity, private credit, real estate, and infrastructure) exceeded \$6.8 trillion, of which \$2.1 trillion was for the asset classes of infrastructure and real estate.²

What constitutes an “Economically Targeted Investment” has also evolved for the multiemployer community. For the past decade, North America’s Building Trades Unions have partnered with a number of the largest asset owners, asset managers, public pension funds and insurance companies to work together on individual projects or their entire portfolio in a wide variety of sectors such as energy, infrastructure, manufacturing, and real estate. These partnerships are focused on ensuring the best project economics and business certainty possible through different types of agreements such as Responsible Contractor Policies and Project Labor Agreements. The purposes of these agreements include (1) to provide the highly skilled labor required to successfully complete projects, (2) to develop and implement the localized apprenticeship training needed to support projects and to develop skilled workforces, and (3) solving the federal, state, and local issues that can otherwise impede, delay, or derail projects. All of this has been a significant value add for the asset owner and the investor.

In the past, some of the concerns that the Department appears to have about ESG investments may have reflected prior skepticism about ESG investing. However, the history of the financial markets demonstrates that market participants act on their concerns about investment strategies in due course and force necessary corrections. As discussed later, we believe that many of today’s market participants are, and have been, addressing the Department’s stated concerns.

Pecuniary Factors

We believe that DOL’s extensive focus on pecuniary factors in this Notice of Proposed Rulemaking is appropriate. The Department highlights the required focus on the pecuniary (or financial) factors and the interests of the plan, its participants, and beneficiaries throughout this Notice of Proposed Rulemaking. For example:

¹ PwC and GIAA, Global Infrastructure Investment, 2017, InfraDeals analysis of global transaction activity from January 2010 to September 2016.

² Source: Preqin, HFRI, J.P. Morgan Asset Management

Citing decision in *Fifth Third Bancorp v Dudenhoeffler*, “*that the interests of participants and beneficiaries refer to “financial” rather than “nonpecuniary” benefits.*” 85 Fed. Reg. 39114.

“Rather, *ERISA fiduciaries must always put first the economic interests of the plan in providing retirement benefits* and “[a] fiduciary's evaluation of the economics of an investment should be focused on financial factors that have a material effect on the return and risk of an investment based on appropriate investment horizons consistent with the plan's articulated funding and investment objectives.” 85 Fed. Reg. 39115.

“Pension plans covered by ERISA are statutorily-bound to a narrower objective: *management with an “eye single” to maximizing the funds available to pay retirement benefits.*” 85 Fed. Reg. 39115.

“The Department is concerned, however, that the growing emphasis on ESG investing may be prompting ERISA plan fiduciaries to make investment decisions for purposes *distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan.*” 85 Fed. Reg. 39116.

“This proposed regulation is designed in part to make clear that ERISA plan *fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-pecuniary objectives.*” 85 Fed. Reg. 39116.

“*The duty of loyalty—a bedrock principle of ERISA, with deep roots in the common law of trusts—requires those serving as fiduciaries to act with a single-minded focus on the interests of beneficiaries.*” 85 Fed. Reg. 39116.

“*And the duty of prudence prevents a fiduciary from choosing an investment alternative that is financially less beneficial than an available alternative.* These fiduciary standards are the same no matter the investment vehicle or category.” 85 Fed. Reg. 39116.

“The Department's longstanding and consistent position,is that *plan fiduciaries when making decisions on investments and investment courses of action must be focused solely on the plan's financial risks and returns, and the interests of plan participants and beneficiaries in their plan benefits must be paramount.*” 85 Fed. Reg. 39116.

“*The fundamental principle is that an ERISA fiduciary's evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the plan's funding policy and investment policy objectives.*” 85 Fed. Reg. 39116.

“The corollary principle is that *ERISA fiduciaries must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals.*” 85 Fed. Reg. 39116.

“Rather, the proposed rule elaborates upon the core principles provided in the “Investment duties” regulation *by making clear that fiduciaries may never subordinate the interests of plan participants and beneficiaries in their retirement income to non-pecuniary goals.*” 85 Fed. Reg. 39117.

“Paragraph (b)(1) provides that the loyalty and prudence requirements of ERISA section 404(a)(1)(A) and 404(a)(1)(B) are satisfied in connection with an investment decision if, in addition to the requirements in the existing paragraph (b)(1), *the fiduciary has selected investments and/or investment courses of action based solely on their pecuniary factors and not on the basis of any non-pecuniary factor.*” 85 Fed. Reg. 39117.

Paragraph (b)(2) of the proposal adds to the original regulation a requirement that appropriate consideration of an investment or investment course of action includes a *requirement to compare investments or investment courses of action to other available investments or investment courses of action with regard to the factors listed in paragraphs (b)(2)(ii)(A) through (C).* 85 Fed. Reg. 39117.

“*Clarifying that an investment or investment course of action must be compared to available alternatives is an important reminder that fiduciaries must not let non-pecuniary considerations draw them away from an alternative option that would provide better financial results.*” 85 Fed. Reg. 39117.

“Paragraph (c) is entirely new and *is intended to expound upon the consideration of pecuniary versus non-pecuniary factors in practice* in both defined benefit and defined contribution plans.” 85 Fed. Reg. 39117.

“Paragraph (c)(1) directly provides that *a fiduciary's evaluation of an investment must be focused only on pecuniary factors.* The paragraph explains that it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political, or any other non-pecuniary goal.” 85 Fed. Reg. 39117.

The Department’s focus on the pecuniary factors and the interests of the plan, its participants, and beneficiaries is appropriate. However, as currently constructed, the Department fails to distinguish between the different types of defined benefit pension plans and how pecuniary factors might differ between different types of ERISA plans. Specifically, multiemployer defined benefit pension plans are considerably different from single employer defined benefit pension plans.

These differences include the source and nature of the plan contributions, the pecuniary impact of contributions on the plan, its participants, and beneficiaries, as well as the ability of the plan to

make investments that advance, promote and support the pecuniary interests of the plan, its participants, and beneficiaries through contributions.

Unlike single employer plans, multiemployer plans have a significant track record in being able to make investments that earn competitive risk adjusted returns, and directly put plan participants to work that, in turn, generates new contributions to the plan. All of which is consistent with (1) trustees acting “solely in the interests of the participants and beneficiaries” and the “exclusive purpose” requirement of “providing benefits”, and (2) the prohibited transaction provision of 29 USC §1106.

Multiemployer pension plans receive plan contributions principally based on the hours worked of an individual worker and participant. Therefore, if an investment puts a participant to work, the plan receives contributions that it would not have otherwise had, the participant earns a pension benefit, and the plan receives contributions that, as discussed below, are either first used to pay the benefits of current retirees, or being used to reduce the unfunded accrued liabilities of the plan.

Analysis of DOL Form 5500 data demonstrates the pecuniary importance of contributions to multiemployer pensions. The chart below demonstrates that over the past four years for which multiemployer pension Form 5500 data is available, contributions provided multiemployer plans with materially significant income (pecuniary support) relative to both benefits paid and the net investment income of plans. Contributions are the most liquid asset that plans have, and given that the benefits paid in each of the plan years exceed the contributions, it is obvious that contributions are the first source of funding for current benefits. This is a rational choice so that the portfolio is not unnecessarily divested. It is also the clearest demonstration of the vital pecuniary impact that contributions have on multiemployer pension plans and the economic interests of the plan, its participants and beneficiaries.

Multiemployer Pension Data (Source: U.S. Department of Labor, Form 5500)

Plan Year Ending	2015	2016	2017	2018
Number of Multiemployer Plans	1,296	1,242	1,231	1,220
Assets (\$ Billions)	\$474.5	\$480.9	\$527.6	\$523.3
Benefits Paid (\$ Billions)	\$41.0	\$42.0	\$45.5	\$43.9
Plan Contributions (\$ Billions)	\$27.9	\$28.3	\$30.0	\$32.3
Contributions as a Percent of Assets	5.9%	5.9%	5.7%	6.2%
Net Investment Income (\$ Billions)	\$2.0	\$20.5	\$70.0	\$9.0
Contributions as a Percent of Net Investment Income	1,393.0%	138.0%	42.9%	358.9%

However, as we all know, the multiemployer pension system suffers from significant unfunded liabilities for benefits that are owed to current retirees and active and inactive vested participants. While we have demonstrated that the current benefit payments exceed contributions, the Department may not consider contributions to be allocated to benefit payments. In that case, it is equally obvious that contributions are a pecuniary factor as a vital source of funding to reduce the unfunded liabilities that are owed to plan participants and beneficiaries.

In either case, the DOL Form 5500 data supports the fact that the majority of contributions are used for these purposes which further demonstrates the pecuniary impact of contributions that are (1) solely in the interest of the participants and beneficiaries³ and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan⁴ and (2) consistent with “an “eye single” to maximizing the funds available to pay retirement benefits.”⁵

Recommended Changes to Proposed Regulations

This leads to our recommendation that DOL amend proposed sections 2550.404a-1(b)(1)(ii) and 2550.404a-1(f)(3) to include, where relevant, contributions to the plan as recognized pecuniary factors.

For example, 2550.404a-1(b)(1)(ii) would now read:

“(ii) Has evaluated investments and investment courses of action based solely on pecuniary factors that have a material effect on (A) 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, and where relevant (B) contributions to the plan;”

For example, 2550.404a-1(f)(3) would now read:

“(3) The term “*pecuniary factor*” means a factor that has a material effect on (i) 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(a)(1) of ERISA, and where relevant (ii) contributions to the plan.”

Additionally, for the reasons discussed below, we also believe that 2550.404a-1(b)(iii) and 2550.404a-1(b)(ii)(D) should be deleted, and 2550.404a-1(c)(2) should be either deleted or conformed to the Department’s prior guidance. Ultimately, these new provisions (1) are counterproductive to managing assets for the benefit of others, (2) will create significant regulatory compliance issues and costs for fiduciaries and plans, (3) will expose plans, participants and beneficiaries to enormous litigation costs from the plaintiffs’ bar, and (4) are inconsistent with the President’s deregulatory agenda.

Tie-Breaker Considerations and Comment

We support the DOL’s decision to “retain the ‘all things being equal test’ from the Department’s previous guidance.” We also support its continued retention. We note, however, that it is far from clear that DOL has actually retained the standard. Instead, it appears that the applicable standard,

³ 29 USC § 1104(a)(1)

⁴ 29 USC § 1104(a)(1)(i) and (ii)

⁵ *Donovan v. Bierwirth*, supra. 680 F.2d at 271.

first formally recognized by the DOL in 1994 and retained by each subsequent administration,⁶ has been replaced with an “economically indistinguishable” standard. *See, e.g.*, 29 C.F.R. § 2550.404a-1(c)(2) (proposed). Indeed, we point out that neither the phrase “all things being equal” nor “tiebreaker” actually appear in the Proposed Regulations themselves.

The Department does correctly state in its preamble that “alternatives would remain two different investments that may function differently in the overall context of the fund portfolio, and which going forward may perform differently based on external economic trends and developments.” 85 Fed. Reg. 39117. From this, however, the Department reaches the erroneous conclusion that non-pecuniary factors may only be considered where the performance of the two investments could be expected to be identical in all circumstances.

This is a substantial departure from earlier guidance. Indeed, the extreme and inappropriately rigid narrowing of the standard in the proposed regulation is striking. Thus, although the phrase “economically indistinguishable” appears in the Department’s 2008 guidance, it does so in a much broader context:

Situations may arise, however, in which two or more investment alternatives are of equal economic value to a plan. The Department has recognized in past guidance that under these limited circumstances, fiduciaries can choose between the investment alternatives on the basis of a factor other than the economic interest of the plan. The Department has interpreted the statute to permit this selection because (1) ERISA requires fiduciaries to invest plan assets and to make choices between investment alternatives, (2) ERISA does not itself specifically provide a basis for making the investment choice in this circumstance, and (3) the economic interests of the plan are fully protected by the fact that the available investment alternatives are, from the plan's perspective, economically indistinguishable.

Given the significance of ERISA's requirement that fiduciaries act "solely in the interest of participants and beneficiaries," the Department believes that, before selecting an economically targeted investment, fiduciaries must have first concluded that the alternative options are truly equal, taking into account a quantitative and qualitative analysis of the economic impact on the plan. ERISA's fiduciary standards expressed in sections 403 and 404 do not permit fiduciaries to select investments based on factors outside the economic interests of the plan until they have concluded, based on economic factors, that alternative investments are equal. 73 Fed. Reg. 61735.

This formulation fundamentally differs from the current proposal. In the 2008 guidance, the review of the equivalence of the investments is in the context of “from the plan’s perspective”. In other words, the individual investment must be viewed from the perspective of the plan’s investments

⁶ The “all things being equal” or “tiebreaker” standard was initially set out as official guidance by the Department in IB 94-1 (Fed. Reg. Vol 59, No. 120, p. 32606, June 23, 1994), and, up to now, had been maintained through each subsequent administration, including this one. *See*, IB 2008-1 (Fed. Reg. Vol. 73, No. 202, p. 61734, October 17, 2008); IB 2015-1 (Fed. Reg. Vol 80, No. 206, p. 65135, October 26, 2015); FAB 2018-01 (April 23, 2018).

as a whole, and the intended role of those alternatives within the overall investment portfolio. Indeed, the review of the alternative investments must “tak[e] into account a quantitative and qualitative analysis of the economic impact on the plan”. This is a far cry from what the Proposal appears to require, which is that the alternatives under consideration have:

“the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, [and that it not] function differently in the overall context of the fund portfolio, and [not] perform differently based on external economic trends and developments.” 85 Fed. Reg. 39117.

In short, the prior standard, which is best characterized as functional equivalence, is replaced with a brand-new mathematically identical standard.

DOL states that “The Department expects that true ties rarely, if ever, occur.” That may be true under the new standard. DOL goes on to say “To be sure, there are highly correlated investments and otherwise very similar ones. Seldom, however, will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition.”

This statement suggests that fiduciaries have perfect and real-time information about all of the investable assets in the global markets and that each fiduciary will analyze each investment in identical ways. Neither of these assumptions is actually correct. Further, in any analysis of an investment, there are a number of subjective factors unique to each investment that need to be considered. This is consistent with any interpretation of modern investment and portfolio theory, which the Department inexplicably fails to recognize in its analysis.

There are more than 165,000 people who hold the Chartered Financial Analyst (CFA®) designation from the CFA Institute and countless more people who are not CFA’s but who are involved professionally as securities analysts. There are nine Nationally Recognized Statistical Ratings Organization (NRSRO’s) registered with the SEC. There are hundreds of firms nationally and globally that analyze all manner of investments either as direct investors or as providers of analyses. In an industry largely based on human judgment (although increasingly incorporating Artificial Intelligence), the notion that ties will be rare defies logic and experience.

Participants in the financial markets produce both “ties” and widely differing views on the exact same securities all the time. Given the number of analysts and firms that provide all manner of analysis, this should not be surprising. Further, there is also an entire industry within the investment community that is built around mispriced market ties, known as arbitrage.

In a global market with so many participants, imperfect information, competing investment theories and methodologies, differing human experiences, biases, judgments, and levels of education, ties are actually not uncommon between any particular investor. Additionally, where

the global equity market capitalization was \$74.7 trillion⁷, global bond market outstanding was \$102.8 trillion⁸, private equity investments were nearly \$4.5 trillion⁹, and \$29.9 trillion in U.S. private businesses¹⁰, the size of the investable universe alone suggests that the concept of ties would not be as remote as the Department believes.

The real world of investing is far from the Department’s utopian universe where information is perfect, in real-time and without subjective considerations. The timeline for an investment decision for a plan varies greatly for any particular investment or investments, and can range from mere milliseconds to years. There are great time lags in any required reporting but particularly for funds, which often means that the underlying asset composition is not known with the precision that the Department believes. There are a large number of investments where the underlying asset composition is not known with certainty and never could be, and numerous other factors that will only be known to varying degrees of accuracy and certainty. This can result from many factors including time-lags, the lack of detailed reporting requirements, the private nature of a many businesses, and the proprietary nature of the underlying business operations of even the most public of companies. The investment profession has always required the use of judgment based on imperfect information. It is equally true that investment strategies are known to drift for a variety of reasons including the level of asset prices, rebalancing timeframes, and personnel.

All of this suggests that in the evaluation of two or more investment options, the types, accuracy and completeness of information and data varies. This leads to a more subjective analysis than the Department outlined, which further supports the idea that ties are not an inconceivable outcome, and are unlikely to be “rare”. As a result, we support the Department’s decision to retain the “all things being equal” test under the Department’s previously articulated standards, and encourage the Department to revisit the misguided assumption that these occurrences are rare.

Additionally, the new standard proposed by DOL – the requirement of being mathematically identical – ignores modern “generally accepted investment theories” by apparently requiring individual investments to be viewed in isolation *See, e.g., Ibid.* Indeed, the Proposal includes language that flatly contradicts its own conclusion:

“[I]t remains the Department’s view that (1) generally the relative riskiness of a specific investment or investment course of action does not render such investment or investment course of action either per se prudent or per se imprudent, and (2) the prudence of an investment decision should not be judged without regard to the role that the proposed

⁷ SIFMA, Capital Markets Fact Book 2019, page 40. See <https://www.sifma.org/wp-content/uploads/2019/09/2019-Capital-Markets-Fact-Book-SIFMA.pdf>.

⁸ *Ibid.*, 37.

⁹ Institutional Investor, Schelling, Christopher, *The Truth About Private Equity Fund Size*, December 9, 2019. See <https://www.institutionalinvestor.com/article/b1jd43sxczt8jn/The-Truth-About-Private-Equity-Fund-Size>.

¹⁰ Board of Governors of the Federal Reserve System, Federal Reserve Statistical Release, “*Z.1 Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts*”, *First Quarter 2020*, June 11, 2020. B.103 Balance Sheet of Nonfinancial Corporate Business, page 139 and B.104 Balance Sheet of Nonfinancial Noncorporate Business, page 140.

investment or investment course of action plays within the overall plan portfolio. It also remains the Department's view that an investment reasonably designed—as part of the portfolio—to further the purposes of the plan, and that is made with appropriate consideration of the relevant facts and circumstances, should not be deemed to be imprudent merely because the investment, standing alone, would have a relatively high degree of risk. The Department also believes that appropriate consideration of an investment to further the purposes of the plan must include consideration of the characteristics of the investment itself and how it relates to the plan portfolio.” 85 Fed. Reg. 39116.

Thus, as explicitly noted in the above language, even an investment that, standing alone, may fail the proposed standard, should prudently and lawfully be part of the investment portfolio of an ERISA-covered plan. Far from requiring that investments be “economically indistinguishable”, this language militates for the conclusion that each investment must be considered in the context of the entire investment portfolio.

Furthermore, applying generally accepted investment theories, multiemployer plan portfolios are constructed based upon the characteristics of the entire portfolio – a theory known as the “efficient frontier”. As explained in one scholarly article:

Efficient Frontier . . . is a key concept of [Modern Portfolio Theory]. It represents the best combination of securities (those producing the maximum expected return for a given risk level) within an investment portfolio. It describes the relationship between expected portfolio returns and the riskiness or volatility of the portfolio. It is usually depicted in graphic form as a curve on a graph comparing risk against the expected return of a portfolio. The optimal portfolios plotted along this curve represent the highest expected return on investment possible, for the given amount of risk. Portfolios lying on the ‘Efficient Frontier’ represent the best possible combination of expected return and investment risk.

The relationship between securities within a portfolio is an important part of the Efficient Frontier. . . . One of the major implications of . . . Efficient Frontier theory is its inferences of the benefits of diversification. Diversification, as discussed above, can increase expected portfolio returns without increasing risk. [R]ational investors seek out portfolios that generate the largest possible returns with the least amount of risk—portfolios on the Efficient Frontier.

A Simplified Perspective of the Morkowitz Portfolio Theory, Myles E. Mangram, Global Journal of Business Research, Volume 7, November 1, 2013, p. 60. Thus, the appropriate question is not whether an individual investment is “economically indistinguishable” from an alternative. More properly, it is whether the alternatives, in the context of the plan's portfolio as a whole, place the portfolio on an equally appropriate part of the “efficient frontier.” Manifestly, that does not require that the investments be economically indistinguishable.

Environment, Social, and Governance (“ESG”) Observations and Comments

While multiemployer pension investments have not shown any significant interest in non-pecuniary investing that the Department seems to be focused on in this proposal, the evolution in the financial markets regarding ESG and the Department’s position on investing in ESG raise a number of concerns.

Based on the information cited by the Department, it seems that the Department’s view has been shaped by the Socially Responsible Investing movement that began in the 1980’s and presumes that non-pecuniary motivations are the driving force in ESG themed investments.

This fails to acknowledge the significant changes and advancements over the intervening years in (1) U.S. and global financial markets, (2) generally accepted investment and portfolio theory, (3) the development of ESG, and its potential contributions to a well-diversified portfolio (4) the actions and views of investors, other market participants, and corporate managements for what constitutes investment risks and opportunities, (5) the views of plan fiduciaries as to risk tolerance and capacity, and (6) federal regulatory requirements.

The Department seems to have relied on the writings¹¹ of individuals that similarly seem to be unaware of these changes and for whom investment management is not their primary professional occupation.

Contrary to the Department’s apparent presumption that ESG factors are non-pecuniary in nature, the management of public companies in the United States have clearly and unambiguously articulated a very different view. Since 2005, registrants of the U.S. Securities and Exchange Commission (“SEC”) have been required to include “Risk Factors” in 10-K and 10-Q filings through Item 503(c) of Regulation S-K. The SEC notes that these “Risk Factors” are a “discussion of the most significant factors that make the offering speculative or risky¹²” and “is intended to provide investors with a clear and concise summary of the material risk to an investment in the issuer’s securities.”¹³ The material risks described by the SEC are in fact financial, or pecuniary, in nature. Today, it would be grossly inaccurate to consider the “Risk Factors” identified by registrants and required by the SEC, whether related to ESG or not, as non-pecuniary, “a scarlet letter phenomenon¹⁴”, or “trendy”¹⁵.

¹¹ Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72. *Stanford Law Review*, February 2020. We disagree with their view that ties are “unicorns” (page 410) as well as their belief that if a tie did exist that a fiduciary would need to equally split the investment (page 409) because “textbook financial economics teaches that”.

¹² U.S. Securities and Exchange Commission, *Securities Offering Reform*, See page 257, <https://www.sec.gov/rules/final/33-8591.pdf>.

¹³ *Ibid.*

¹⁴ *Scarlet Letters: Remarks of SEC Commissioner Hester M. Peirce before the American Enterprise Institute (June 18, 2019)*, www.sec.gov/news/speech/speech-peirce-061819.

¹⁵ *Ibid.*

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A review of the 2019 10-K's of more than one hundred¹⁶ of the largest SEC registrants by market capitalization show that ESG related factors were identified as "Risk Factors" by every single one of the registrants reviewed.

The simple fact is that these companies have routinely identified a number of ESG related topics such as climate change, sustainability, labor, diversity, compensation, internal controls, bribery and corruption, as "Risk Factors." Interestingly, ESG related "Risk Factors" are identified by firms representing every segment of the economy.

Given that the management of any SEC registrant is highly unlikely to willfully misrepresent their filings (and expose themselves to civil or criminal litigation), it is prudent and reasonable for investors to consider all of the "Risk Factors" identified in an SEC filing in their analysis of a potential or continuing investment in the company's securities.

According to the Forum for Sustainable and Responsible Investment ("US SIF"), the U.S. assets in "Sustainable Investing" (which is principally ESG) has grown from \$570 billion (\$170 billion in ESG) in 1995 to \$11.7 trillion (\$10.0 trillion in ESG) in 2018.¹⁷ According to PRI (Principles for Responsible Investment) the assets under management that were "responsibly invested" exceed \$65 trillion globally. This level of market depth shows that ESG has become an important market sector in its own right.

The concern raised by the Department about the "lack of precision and rigor in the ESG investment marketplace" has certainly been an issue that fiduciaries have seen in the past. However, the market is maturing rapidly and there has been significant progress among asset managers, the analytical community, and corporate management teams. Many are better than others, but the marketplace is working and this concern seems to be more valid as identifying a past problem.

¹⁶ See 10-K's at <https://www.sec.gov/edgar/searchedgar/companysearch.html> of Apple, Microsoft, Amazon, Alphabet, Facebook, Berkshire Hathaway, Visa, Johnson & Johnson, Walmart, Mastercard, Procter & Gamble, UnitedHealth Group, JPMorgan Chase, Home Depot, Intel, NVIDIA, Verizon, Tesla, AT&T, Adobe, Netflix, Paypal, Bank of America, Merck, Walt Disney, Coca-Cola, Cisco, Pfizer, ExxonMobil, Pepsico, Comcast, Salesforce.com, Oracle, Chevron, Abbott Laboratories, Eli Lilly, Nike, Amgen, Abbvie, Thermo Fisher Scientific, McDonald's, Costco, Bristol-Myers Squibb, Broadcom, Danaher, NextEra Energy, American Tower, Texas Instruments, Union Pacific, Philip Morris, Charter Communications, International Business Machines (IBM), Citigroup, Wells Fargo, Qualcomm, Lowe's, Boeing, Honeywell, Lockheed Martin, Gilead Sciences, Raytheon, United Parcel Service (UPS), 3M, CVS Health, Starbucks, Fidelity National, Altria, Mondelez, General Electric, American Express, BlackRock, CIGNA, Fiserv, Caterpillar, Stryker, Becton Dickinson, CME Group, Vertex Pharmaceuticals, Dominion Energy, Crown Castle, Intuit, Prologis, Duke Energy, S&P Global, Automatic Data Processing, Intuitive Surgical, Estee Lauder, TJJ, Anthem, Southern Company, Colgate-Palmolive, Zoetis, Goldman Sachs, Booking Holdings, Biogen, ServiceNow, Regeneron Pharmaceuticals, Equinix, Advanced Micro Devices, U.S. Bancorp, Cummings, Samson Resources, Excel Energy, and the 20-F of ArcelorMittal. Accessed between July 8, 2020 and July 17, 2020.

¹⁷ US|SIF, The Forum for Sustainable and Responsible Investment, Fast Facts, *Overview, Size of Sustainable, Responsible and Impact (SRI) Investing 2018*, See [https://www.ussif.org/files/2018%20Infographic%20overview%20\(1\).pdf](https://www.ussif.org/files/2018%20Infographic%20overview%20(1).pdf).

From a U.S. investor's perspective, it is simply not credible that a particular sector obtains \$12 trillion in investments without an "eye single" on the financial interests of the investor (also participants and beneficiaries), whether an ERISA plan or not.

In 2018, Harvard Business School professors conducted a survey of asset managers that showed that "more than 80% now consider ESG criteria when making investment decisions and do so not only because of growing client demand but also because they believe ESG information is material to investment performance."¹⁸ A 2018 global survey concluded "the vast majority of surveyed investors are motivated by financial reasons rather than ethical reasons in using ESG data, which is not surprising given that our respondents consist mainly mainstream institutional investors"¹⁹ and that the "majority of respondents suggested that ESG information is material to investment performance"²⁰.

The U.S. Government Accountability Office issued a report in May 2018²¹ that, among other things, reviewed the academic research into the relationship between ESG factors and financial performance. GAO concluded that 1). "[a]cademic research on the performance of investments incorporating ESG factors suggests such factors can be a valid financial consideration, both in the aggregate and as individual factors", 2). "[t]he vast majority (88 percent) of the scenarios in studies we reviewed that were published in peer reviewed academic journals between 2012 to 2017 reported finding a neutral or positive relationship between the use of ESG information in investment management and financial returns in comparison to otherwise similar investments", 3). "[w]hen considered independently, environmental, social, and governance factors were each found to have either a neutral or positive relationship with financial performance in over 90 percent of the scenarios", 4). "a 2015 meta-analysis, which reported aggregate evidence from more than 2,000 empirical studies, similarly found that 90 percent of the studies reported finding a neutral, positive or mixed (i.e., non-negative) relationship between incorporating ESG factors and financial performance", and 5). "a 2017 study commissioned by DOL also reported that while some investors may continue to perceive that incorporating ESG factors entails accepting lower investment performance, its review of academic literature suggests that incorporating ESG factors generally produced investment performances comparable to or better than non-ESG investments."²²

¹⁸ Jon Hale, *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Performance in 2019*, February 14, 2020. See

https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_US_Landscape_021920.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=20871.

¹⁹ Amir Amel-Zadeh & George Serafeim (2018) *Why and How Investors Use ESG Information: Evidence from a Global Survey*, *Financial Analysts Journal*, 74:3, 87-103, 101. See <https://www.tandfonline.com/doi/full/10.2469/faj.v74.n3.2>

²⁰ Ibid.

²¹ U.S. Government Accountability Office, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful*, May 2018. See <https://www.gao.gov/assets/700/691930.pdf>.

²² Ibid, 7-8.

In a study by the McKinsey & Company examining one particular ESG factor – diversity – the results were striking:

“We first established a positive, statistically significant correlation between executive team diversity and financial performance in our 2015 Why Diversity Matters report (using 2014 diversity data). We find this relationship persists in our expanded, updated, and global 2017 data set. In Why Diversity Matters we found that companies in the top quartile for gender diversity on their executive teams were 15% more likely to experience above-average profitability than companies in the fourth quartile. Almost exactly three years later, this number rose to 21% and continued to be statistically significant. For ethnic/cultural diversity, the 2014 finding was a 35% likelihood of outperformance, comparable to the 2017 finding of a 33% likelihood of outperformance on EBIT margin, both statistically significant.”²³

“The penalty for not being diverse on both measures persists. Now, as previously, companies in the fourth quartile on both gender and ethnic diversity are more likely to underperform their industry peers financially. Specifically, they are 29% more likely than the other three quartiles to underperform on profitability.”²⁴

More generally, a February 2020 report from McKinsey & Company noted that in their July 2019 Global Survey that “83 percent of C-suite leaders and investment professionals say they expect that ESG programs will contribute more shareholder value in five years than today” and that they “would be willing to pay about a 10 percent median premium to acquire a company with a positive record for ESG issues over one with a negative record.”²⁵ In our work with asset managers and market participants, we simply see no credible information that suggests that the market in ESG investments is focused on anything other than the pecuniary aspects of the investment.

One obvious conclusion to draw from these studies is that they belie one of the underlying premises of the Proposed Regulation, as exemplified in the following statement:

“When fiduciaries weigh non-pecuniary considerations as required by this rule to select investments, some fiduciaries will select investments that are different from those they would have selected pre-rule. These selected investments’ returns will generally tend to be higher over the long run.” 85 Fed. Reg. 39121.

²³ *Delivering through Diversity*, Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle, Lareina Yee, McKinsey & Company, January 2018, page 8. Accessed July 28, 2020 at <https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity#>

²⁴ *Ibid*, 14.

²⁵ McKinsey & Company, *The ESG premium: New perspectives on value and performance*, February 2020, page 2. Accessed on July 21, 2020 at <https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/The%20ESG%20premium%20New%20perspectives%20on%20value%20and%20performance/The-ESG-premium-New-perspectives-on-value-and-performance.pdf>.

“To the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participant and beneficiaries’ retirement investment returns, thereby compromising a central purpose of ERISA. Given the increase in ESG investing, the Department is concerned that, without rulemaking, ESG investing will present a growing threat to ERISA fiduciary standards and, ultimately, to investment returns for plan participants and beneficiaries. For the plans and participants that would be affected by a reduced use of non-pecuniary factors, the benefits they would experience from higher investment returns, compounded over many years, could be considerable. The Department seeks information that could be used to quantify the increase in investment returns.” 85 Fed. Reg. 39121.

In fact, the evidence demonstrates that the opposite is true — to the extent ESG factors have an effect on return, it is a positive one. Therefore, rather than providing a benefit to plans by reducing ESG investing, the Proposed Regulations will impose an additional cost on plans – the opportunity cost – from reducing their consideration of ESG factors as well as new compliance and litigation costs.

Indeed, the additional documentation burden imposed on plans under the Proposed Regulations is both understated and unwarranted. Under current law, prudent plan fiduciaries already document their decision-making process. The Proposed Regulations, however, explicitly require *additional* documentation when ESG factors are considered. The Proposal is, however, vague and non-specific as to what form this additional documentation should take. As noted in the Department’s 2015 guidance, this lack of clarity is likely to have a chilling effect. In criticizing the earlier guidance issued in 2008, the Department stated:

“The Department believes that in the seven years since its publication, IB 2008-01 has unduly discouraged fiduciaries from considering ETIs and ESG factors. In particular, the Department is concerned that the 2008 guidance may be dissuading fiduciaries from (1) pursuing investment strategies that consider environmental, social, and governance factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior investments, and (2) investing in ETIs even where economically equivalent. Some fiduciaries believe the 2008 guidance sets a higher but unclear standard of compliance for fiduciaries when they are considering ESG factors or ETI investments.” 80 Fed. Reg. 65136.

Furthermore, the Proposal offers no particular reason why consideration of ESG factors should be subject to greater scrutiny or required documentation than any other investment factor. Indeed, the only plausible conclusion to draw is that the Department, through this rulemaking, is seeking to discourage consideration of ESG factors, notwithstanding the demonstrated cost to plans of eliminating consideration of such factors and the material nature of ESG factors as identified by SEC registrants in their regulatory filings.

The Department’s position also fails to recognize the significant implications on the numerous mainstream strategy funds that incorporate ESG factor analysis in their investment decisions. In

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fact, Morningstar noted that “564 ESG Consideration funds has \$933 billion in assets under management at the end of 2019”²⁶. This proposal would impose significant costs on these funds, as they would need to go back and document their investment decisions, as well as expose them to new litigation.

All of this is ironic in view of the Administration’s outspoken statements in support of ESG investing, albeit in limited contexts. For example, in his speech to the National Governors’ Association, Secretary of State Mike Pompeo spoke in favor of disinvestment from China, as follows²⁷:

“I know you all have power over pension funds or the people that run them. As of its latest public filing, the Florida Retirement System is invested in a company that in turn is invested in surveillance gear that the Chinese Communist Party uses to track more than 1 million Muslim minorities. California’s pension fund, the largest public pension fund in the country, is invested in companies that supply the People’s Liberation Army that puts our soldiers, sailors, airmen, and Marines at risk.”

Similarly:²⁸

“Why are we sending American capital to a country and supporting a defense industry that’s popping out a couple destroyers and frigates a month and threatening to have total overmatch against us in the Pacific?” White House national security adviser Robert O’Brien said Wednesday at an event in Washington. “I don’t see why we should be underwriting the Chinese defense industry.”

O’Brien singled out the California Public Employees’ Retirement System, the largest retirement fund in the country, for a special warning that its investment decisions could harm both retirees in particular and U.S. national security in general.

Most striking, Secretary Scalia recently raised the same concerns when he highlighted certain types of subjective factors that he wanted the fiduciaries of the Federal Retirement Thrift Investment Board to consider in their analysis of the appropriate index to use as a benchmark for the “I Fund”,

²⁶ Jon Hale, *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Performance in 2019*, February 14, 2020. See page 6 at

https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_US_Landscape_021920.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=20871.

²⁷ Speech, [Michael R. Pompeo, Secretary of State](#), Walter E. Washington Convention Center, Washington, DC, National Governors Association Winter Meeting, February 8, 2020, <https://www.state.gov/u-s-states-and-the-china-competition/>.

²⁸ *White House: California pension fund subsidizing Chinese plans to 'overmatch' US military*, Joel Gehrke, Foreign Affairs Reporter, Washington Examiner, March 11, 2020, <https://www.washingtonexaminer.com/policy/defense-national-security/white-house-california-pension-fund-subsidizing-chinese-plans-to-overmatch-us-military>.

an international stock index fund²⁹. Specifically, the Secretary endorsed the subjective ESG factors of national security and humanitarian concerns³⁰ as reasons to exclude an international stock index that include investments in Chinese companies. The Secretary noted that these companies “could be subject to sanctions, public protests, trade restrictions, boycotts and other punitive measures that jeopardize their business and profitability.”³¹ What makes this most noteworthy and pertinent is that both the Members of the Board and the plan’s other fiduciaries are subject to the same, indistinguishable, standards of loyalty and prudence as those established under ERISA, including being subject to personal liability for violating those standards.³²

While no action has been taken at this point, it is interesting to note the October 2019 “I Fund Benchmark Study” for the Federal Retirement Thrift Investment Board (“Board”) by Aon, which evaluated the benchmark alternatives available. Aon included two indices without exposure to Emerging Markets (and China) that represented 58% and 65% of non-U.S. equity markets³³, and two indices with Emerging Market exposure (China being 7.5% of one fund and 8.3% of the second³⁴) that represented 85% and 99% of non-U.S. equity markets.³⁵ Aon’s recommendation based on legislative, return, liquidity and diversification reasons was for the Board to select the index with the maximum exposure to non-U.S. equities, including Chinese equities.

The Proposal also seems to rely on a presumption that active management is inferior to passive management as the result of increased fees:

“Also, as plans invest less in actively managed ESG mutual funds, they may instead select mutual funds with lower fees or passive index funds.” 85 Fed. Reg. 39121.

“In this case, the societal resources freed for other uses due to lessened active management (minus potential upfront transition costs) would represent benefits of the rule.” 85 Fed. Reg. 39121.

In the context of the Proposed Rule, this is a non-sequitur for at least two reasons. First, sacrificing the financial goals of a plan for non-pecuniary objectives is already prohibited by ERISA, a fact that has been clearly stated in every piece of guidance ever issued by DOL on the issue. Consequently, attributing the gains from following settled law to the Proposed Regulation is unwarranted and unsubstantiated.

²⁹ Letter from Secretary Eugene Scalia to Michael D. Kennedy, Chairman, Federal Retirement Thrift Investment Board, May 11, 2020. Accessed July 21, 2020 at https://federalnewsnetwork.com/wp-content/uploads/2020/05/051220_scalia_frtib_letter_FNN.pdf.

³⁰ Ibid, 2.

³¹ Ibid.

³² 5 U.S.C. § 8477.

³³ Aon, I Fund Benchmark Study, Federal Retirement Thrift Investment Board, Thrift Savings Plan, October 2019. Page 9. Accessed on July 21, 2020 at https://www.frtib.gov/ReadingRoom/InvBMarks/2019_Oct_Benchmark_Evaluation_Report.pdf.

³⁴ Ibid, 11.

³⁵ Ibid, 9.

Second, if the Department’s goal is to reduce or eliminate active investment management by replacing it with passive management, that is beyond the scope of the Proposed Regulations. Indeed, that would be a matter of such significance that it would need to be the subject of a separate rulemaking, preceded by extensive fact-finding, something that has not occurred. It is also the case that the asset-weighted expense ratio charged by ETF funds that have an ESG focus are lower than five of ten ETF strategies and within 7 basis points of the strategy with the lowest fee.³⁶

Interestingly, the Department’s view on ESG investments for 401(k) plans provides fiduciary’s greater caution than the Department’s view on private equity investments provided in the June 3, 2020 letter to Mr. Jon W. Breyfogle, Esq., of Groom Law Group (“Breyfogle letter”)³⁷. While the Department qualified the approval based on private equity being incorporated into a broader asset allocation, the June 3rd letter seems at odds with the Department’s views expressed toward ESG investments and raises other questions.

For example, footnote 3 suggests that the petitioner provided the Department with a study that showed “defined benefit plans frequently invest a portion of their assets in private market assets, such as private equity investments, private company debt, and real estate to diversify investment risk and to enhance investment returns.” The Department further noted that the petitioner’s study indicated, “defined benefit plans that invest in private equity investments hold, on average, 19% of their assets in private market investments.” The identified source showed the actual private equity allocation to be 9.0 percent³⁸, and given that the petitioner was not seeking approval for the other private market asset classes, it is unclear the relevance for their inclusion.

What the Department does not address in the June 3rd letter or the accompanying release is that the defined benefit plans that invest in private equity and private market assets are sophisticated institutional investors that have massive dollars in assets under management as compared to the typical 401(k) participant. Additionally, the private equity asset allocation percentage tends to drop significantly for defined benefit pension plans below \$500 million in assets. Defined benefit pensions typically have investment horizons that are multigenerational whereas a 401(k) investor’s timeframe is not. There is no comparison between the investment sophistication of a defined benefit pension plan and that of a 401(k) participant.

In the Breyfogle letter, DOL appropriately notes that as “compared to typical public market investments available in individual account plans, private equity investments tend to involve more

³⁶ FactSet.com, Elisabeth Kashner, CFA, *ETF Fee Ware Hits ESG and Active Management*, January 22, 2020. Accessed July 21, 2020 at <https://insight.factset.com/etf-fee-war-hits-esg-and-active-management>.

³⁷ Letter from Louis J. Campagna, Chief, Division of Fiduciary Interpretations, to Jon W. Breyfogle, Esq., Groom Law Group, June 3, 2020. Accessed July 22, 2020 at <https://www.dol.gov/sites/dolgov/files/EBSA/about-cbsa/our-activities/resource-center/information-letters/06-03-2020.pdf>.

³⁸ See The Center for Retirement Research at Boston College (CRR) and the Center for State and Local Government Excellence (SLGE), *Public Plans Data (2019), Investments Asset Allocation, 2019* at <https://publicplansdata.org/quick-facts/national/>.

complex organizational structures and investment strategies, longer time horizons, and more complex, and typically, higher fees.”

In December 2019, the SEC proposed an update to its “Accredited Investor” definition “to update and improve the definition to more effectively identify institutional and individual investors that have the knowledge and expertise to participate in our private capital markets.”³⁹ SEC Chairman Jay Clayton explained “[T]he proposal would add additional means for individuals to qualify to participate in our private capital markets based on established, clear measures of financial sophistication. I also am pleased that the proposal specifically recognizes that certain organizations, such as tribal governments, should not be restricted from participating in our private capital markets.”⁴⁰ The characteristics of the SEC’s definition of an Accredited Investor do not have exceptions for the percent of a person’s assets invested, nor are they the characteristics of the average 401(k) participant.

In 2016, 55 million U.S. workers were active 401(k) participants with assets of \$4.76 trillion⁴¹. The EBRI/ICI Participant-Directed Retirement Plan Data Collection Project showed that the average account balance in 2016 was \$75,358, while the median account balance was \$16,836⁴². Neither amount represents enough assets to provide meaningful lifetime income nor does not suggest the ability to prudently invest in private equity. Finally, 60% “of non-retirees with self-directed retirement savings accounts, such as a 401(k) or IRA, have *little or no comfort* [emphasis added] in managing their investments.”⁴³ This last observation supports the importance of professional management of retirement assets, which is what occurs in defined benefit pension plans.

Selection of Diverse Investment Managers

In addition to forming part of the Social and Governance portions of the selection of investments, promoting the goal of diversity among investment managers has become a major issue of concern among investors for a variety of reasons, including its demonstrated benefits.⁴⁴ Although the Proposed Regulations do not explicitly govern the selection of investment managers (or other plan vendors), we are concerned that they will nevertheless have a chilling effect on such efforts. Indeed, we are concerned that any selection of investment managers and consultants that are diverse, including minority and women-owned and managed firms, will now be subject to additional, and unwarranted, scrutiny.

³⁹ U.S. Securities and Exchange Commission, *SEC Proposes to Update Accredited Investor Definition to Increase Access to Investments*, December 18, 2019. See <https://www.sec.gov/news/press-release/2019-265>.

⁴⁰ *Ibid.*

⁴¹ Investment Company Institute, ICI Research Perspective, September 2018, Vol. 24, No. 6, page 2, “401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2016”, <https://www.ici.org/pdf/per24-06.pdf>.

⁴² *Ibid.*, 5.

⁴³ *Ibid.*, 3.

⁴⁴ See page 15 above.

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Consequently, if the Department does not intend to impose additional burdens and scrutiny on the selection of diverse investment firms, the Proposed Regulations should be modified and clarified accordingly. If, on the other hand, the Department intends to place additional burdens on fiduciaries that select minority or women- owned and managed firms, the Proposed Regulation would likely be subject to successful legal challenge.

Plaintiffs Bar Bonanza

The Department's bias toward ESG investing as non-pecuniary and the vastly expanded record keeping requirements, whether in statute or simply to prepare for a new wave of litigation, will in fact be a silver platter invitation and roadmap for the plaintiffs bar to pursue frivolous, yet costly, litigation. This is contrary to nearly every public statement by this Administration on the intent of the deregulatory agenda of President Trump. Further, this will predictably impact plan's administrative expenses for fiduciary insurance.

Conclusion

As outlined above, we have serious concerns about a number of issues and look forward to working with the Department to arrive at a reasoned and rational rule.

Regards,

A handwritten signature in black ink, appearing to read "M. Scott", is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael D. Scott

Executive Director