



Submitted via www.regulations.gov

July 28, 2020

Jeanne Wilson
Acting Assistant Secretary
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor 200 Constitution Ave. N.W.
Washington, DC 20210

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

Dear Assistant Secretary Wilson,

CommonSpirit Health (CommonSpirit) is pleased to provide comments to the Department of Labor (DOL) on its proposed rule related to financial factors in selecting plan investments. CommonSpirit is one of the largest faith-based, non-profit health care system with more than 135 hospitals across 21 states. We also support numerous rural facilities, long-term care facilities, home health entities, academic medical centers, nursing schools, and other health care providers. As a faith-based system, we strongly believe that living our values takes place at all levels of our organization, from the care we provide individuals at the bedside to the investments we make with our portfolios.

We mirror the concerns of our partner the Interfaith Center on Corporate Responsibility (ICCR), which is a cross section of faith-based investors, asset managers, pension funds, foundations, and other long-term institutional investors, have nearly 50 years of experience engaging companies on environmental, social, and governance (ESG) issues that are critical to long-term value creation. Both ICCR and CommonSpirit are concerned that the proposed rule is overly burdensome and short-sighted, for reasons outlined below, and we strongly urge DOL to withdraw it in its entirety.

The proposed rule would impose significant analytical and documentation burdens on fiduciaries of benefit plans governed by the Employee Retirement Income Security Act (ERISA) wishing to select (or allow individual account holders to select) investments that use ESG factors in investment analysis or that provide ESG benefits. We are concerned that the proposal will deter consideration of ESG factors by ERISA fiduciaries, and perhaps others whose regulatory frameworks follow ERISA, despite ample evidence that integrating such factors can improve performance. We are further concerned that the proposal broadly calls into question, with no factual underpinning, not only "ESG-themed" investment products but also ESG ratings and the use of ESG factors in traditional investment analysis.

ESG investing strategies are entirely mainstream. In his 2020 letter to CEOs, Larry Fink, the Chairman and CEO of BlackRock, the world's largest asset manager, announced that BlackRock would "place sustainability at the center of [its] investment approach" and asserted that "[c]limate change has become a defining factor in companies' long-term prospects." Similarly, State Street Global Advisors President and CEO Cyrus Taraporevala recently noted: "Having already engaged with companies on a number of governance matters for many years, we see that shareholder value is increasingly being driven by issues such as climate change, labor practices, and consumer product safety. We believe that addressing material ESG issues is good business practice and essential to a company's long-term

financial performance...”. **Investors are using ESG issues to guide their portfolios precisely because these factors lead to a company’s economic growth, outlook, and performance.**

We also are concerned by the lack of reason given for such drastic policy change. Indeed, the justification for the proposed rule is speculative and poorly supported, suggesting that DOL may be motivated more by political hostility to ESG issues than by a well-founded concern for plan participants and beneficiaries. The NPRM expresses worry that “the growing emphasis on ESG investing, and other non-pecuniary factors, may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from their responsibility to provide benefits to participants and beneficiaries and defraying reasonable administrative expenses.” However, the statistics cited in the proposal do not track to the proposed solutions, as they conflate “ESG investing,” “consider[ing] ESG factors in investment decisions,” “ESG-themed” investment options, and “socially responsible” equity funds.

No effort is made to assess the extent to which any of these products or approaches explicitly aim to provide non-pecuniary benefits—choices to which the proposed rule’s “tie-breaker” provision applies—as opposed to considering ESG factors as part of traditional investment analysis. The proposed rule cites a law article that defines the former as “collateral benefits” ESG investing and the latter as “risk-return” ESG investing; but, DOL often refers to the two concepts interchangeably throughout the proposal. Without some idea of the prevalence of these two very different issues among ERISA-governed funds, it is not possible to analyze the benefits and costs of the proposed rule’s differing approaches to collateral benefits and risk-return investing.

Nor does the proposed rule evaluate the financial performance of various types of ESG investing compared to non-ESG counterparts. In our experience, ESG funds, indices and portfolios outperform market and other benchmark indices over at least some periods. But it isn’t only our experience: Reporting on the first quarter of 2020, BlackRock noted that it “observed better risk-adjusted performance across sustainable products globally, with 94% of a globally-representative selection of widely analyzed sustainable indices outperforming their parent benchmarks.” That performance, according to BlackRock, “aligns with the resilience we have seen in sustainable strategies during prior downturns” and is attributable to a “range of material sustainability characteristics, including job satisfaction of employees, the strength of customer relations, or the effectiveness of the company’s board.” ESG investing is financially responsible.

The proposal’s analytical fuzziness and lack of performance data limit DOL’s ability to quantify the benefits of the proposed rule. DOL asserts that “[t]o the extent that ESG investing sacrifices return to achieve non-pecuniary goals, it reduces participants’ and beneficiaries’ retirement investment returns,” but this is purely speculative. As well, the proposed rule makes contradictory claims about the extent to which plan fiduciaries are violating existing sub-regulatory guidance on the issues addressed by the proposed rule. On the one hand, the proposal asserts that its policies would provide the benefit of “eliminat[ing] confusion that plan fiduciaries may currently face.” In the next breath, however, the proposal states that DOL believes that the number of plan fiduciaries that are not following or misinterpreting the guidance is “small.” We are concerned that DOL is picking and choosing data to support its policies rather than taking the total reality into account before proposing burdensome and unnecessary regulations.

We think it is important to note that reducing ESG investing results not only in potential foregone benefits related to a specific investment decision. ESG-informed investing plays a role that can bring about changes in corporate behavior that protect the value of other securities across the portfolio, as well as investments in other asset classes. Larry Fink points out in his recent CEO letter that climate impacts span asset classes; thus, curbing greenhouse gas emissions by a company whose equity security a plan holds may protect value not only of the plan's investment in that company, by allowing it to avoid disruptions from impending regulations, but also for the plan's real estate investments, which face physical risk from climate change.

Corporate action to prevent catastrophic warming due to investor demand would also reduce risks to the global financial system and the broader economy. Corporate behavior change could be reduced by the proposed rule, and DOL has an obligation to identify and analyze the potential negative impacts to companies, sectors, the financial system and the economy. Indeed, where ESG factors are material, we believe that the Department should clarify for ERISA fiduciaries that the duty of care under section 404(a)(1)(B) of ERISA requires their consideration, rather than imposing additional analytic and documentation burdens as the Proposed Rule now does.

We are also concerned that the proposed rule's tie-breaker standard is at odds with its professed purpose. The long-standing purpose of the tie-breaker test, which has been in effect for years in DOL's sub-regulatory guidance, has been to ensure that a fiduciary does not accept lower expected returns or assume greater risks in order to obtain collateral benefits. However, the proposed rule makes numerous changes that either undermine this goal, reverse the purpose of the standard, or have no relationship to the standard. For example:

- The new test would require any investment option a fiduciary wants to choose based on non-pecuniary (or collateral benefit) reasons to be identical in every way, including fee structure, performance history, investment strategy, asset composition, etc. The impossibility of satisfying this standard suggests that the test is designed to deter fiduciaries from considering investments with collateral benefits.
- The proposed standard for defined-contribution plan investment options requires that a fiduciary use "only objective risk-return criteria" to choose investment alternatives, which seems to place even the tie-breaker test off-limits. The proposal for defined-contribution plans also defines ESG investing more broadly than elsewhere in the proposed rule: rather than an investment choice that provides collateral ESG benefits, the rule applies anytime a fiduciary wants to add "one or more prudently selected, well managed, and properly diversified investment alternatives that include one or more environmental, social, corporate governance, or similarly oriented assessments or judgments in their investment mandates, or that include these parameters in the fund name."
- The proposed rule treats decisions made by defined-benefit and defined-contributions fiduciaries differently, yet does not explain a reason for this difference
- The standard for deeming an ESG factor to be pecuniary includes too many subjective terms and burdensome requirements. ESG "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.” Reasonable, informed people can disagree about these assessments. This proposed standard contains numerous potential pitfalls designed to make it difficult and risky for a fiduciary to select an investment that has taken the uncontroversial step of incorporating ESG factors into traditional investment analysis.

- None of these proposals includes any evidence that fiduciaries’ choices of ESG-informed investments have resulted in lower returns or higher risk.

DOL’s proposal does not establish that it would provide appreciable benefits to ERISA plans or beneficiaries nor does it analyze the true costs to plans and their participants and beneficiaries. These major shortcomings preclude an adequate cost-benefit analysis. We do not see how this proposed rule is filling a regulatory need, nor has DOL established the regulatory imperative for such policies. For all of the reasons above, **we strongly urge the Department of Labor to withdraw the proposed rule in its entirety.**

Thank you for the opportunity to provide comments on this proposal. If you have specific questions about our comments, please contact Laura Krausa, Director of Advocacy Programs, at 303-383-2748 or laurakrausa@catholichealth.net.

Thank you,



Rachel Tanner
Vice President, Regulatory Affairs