



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

July 30, 2020

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

Dear Director Canary,

We thank you for the opportunity to submit comments on the notice of proposed rulemaking entitled “Financial Factors in Selecting Plan Investments.” We are co-founders of Tiemann Investment Advisors, an SEC registered investment advisory firm founded in 2002 and based in Menlo Park. Together, we bring four advanced degrees—Ph.D, MBA, MS, and JD—and more than 50 years of combined professional experience managing client portfolios, advising clients, which includes retirees, and thinking about what used to be called SRI factors and now is called ESG for environmental, social, and governance (ESG) factors. While we agree that there is still a wide range as to how well appropriate ESG factors are utilized and deployed by the many groups claiming to have an ESG product (in part because of lack of consistent reporting data from companies and other reasons), we believe that the broader use of ESG factors, when done well, is both intended to and can fundamentally reduce risk and increase returns for clients. Thus, the Proposed Rule misconstrues the importance of ESG integration in making pecuniary-focused risk and return evaluations and ignores its already well-established track record of reducing risk and increasing returns for many investors. We therefore believe that making the proposed rule change would not only lead to confusion and bad advice for retirement plan beneficiaries, it would actually do the opposite of what you intend and hurt investor returns by sending a clear signal for plan fiduciaries to ignore very important factors that are now broadly recognized as central metrics to good business performance. We, therefore, urge you to retain the existing guidance and not move forward with a final rule as proposed.

There is now an extensive body of research that makes clear that ESG factors are material investment considerations. As such there exists a sound basis for integrating ESG factors into investment actions. A policy by the DOL that simply clarifies that fiduciaries must integrate material factors into their investment actions, and that ESG factors may be material, would be appropriate. That then places the responsibility on the fiduciary to ensure that they take only material ESG factors into consideration. Any change that causes fiduciaries to believe they are not permitted to consider material ESG factors in their investment analysis would result in both market confusion and considerable economic impacts to plan beneficiaries.

While the Proposed Rule maintains the 1994 standard “all else being equal test” under the proposed rule, it inappropriately creates new reporting burdens for fiduciaries that will lead to unnecessary costs for plan participants. Currently, fiduciaries may select an investment that provides collateral benefits only after they have determined that the risk and return profile of that investment option is substantially similar to that of competing options that would meet the financial needs of the fund. The proposed new requirement that fiduciaries document their conclusion that multiple options are equal provides an overly burdensome cost that will hurt retirees, slow down the process and provide no clear benefit. Furthermore, the Proposal’s discussion of the “all things being equal test” will cause confusion because the discussion in the Proposal appears to envision the selection of an ETI investment, the language of the Proposal does not distinguish the application of this test from the broader discussion of ESG integration, inappropriately suggesting that the documentation requirement is necessary whenever ESG factors are considered.

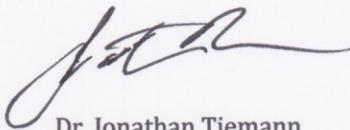
There are a few other ways that the Proposed Rule will be confusing. For example, it states that ERISA fiduciaries may select “ESG-themed funds” as an investment option for a participant-directed plan but that an “ESG-themed fund” cannot be selected as the default investment option. This determination is internally inconsistent and self-contradictory and appears to be based on confusion between ESG integration and ETIs. In fact, it would be more appropriate for the rulemaking to recognize the importance of fiduciaries taking all investment factors into consideration—rather than continuing to ignore what has been shown to be pecuniarily important ESG factors—such that fiduciaries should be required to integrate ESG factors as part of prudent investment decision-making. This would suggest that the ESG fund should be the default investment option, requiring fiduciaries to conduct the added assessments, unless specifically declined by the beneficiary.

ESG issues, when properly evaluated and vetted, can have a material impact on the financial performance of specific securities and the use of ESG metrics have a positive impact as well on the sustainability of the markets for future investors. In 2015 the Supreme Court confirmed that “a trustee has a continuing duty—separate and apart from the duty to exercise prudence in selecting investments at the outset—to monitor, and remove imprudent, trust investments.” Thus we believe that investors become vulnerable to market volatility and undermine their own goals of long-term wealth creation when they fail to evaluate material ESG factors, undermining the interests of future beneficiaries. Thus the Department’s stated rationale for prohibiting an “ESG-themed fund” from being selected as the default investment option shows a fundamental misunderstanding of the purpose of ESG integration, which is to integrate all material factors into investment decision-making.

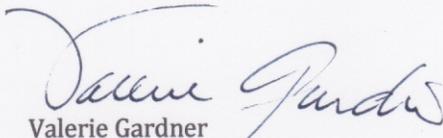
Conclusion

We believe the Department's apparent assertion that ESG factors are “non-pecuniary” is both wrong and misleading and reflect views that lack an understanding of how the broader universe of investors are thinking about environmental, social and governance factors and their importance to the long-term health of companies, the economy, and the environment. While we may be at a relatively early and imperfect stage in our collection and analysis of ESG data, trends show that overall it is definitely getting better and are clearly pointing to the fact that our use of these analyses impact both corporate and investment performance for the better. We strongly recommend, therefore, that you not move ahead to approve the proposed rulemaking when doing so reflects a backwards understanding of today's market awareness and the resulting confusion will negatively impact ERISA beneficiaries as opposed to the broader market.

Sincerely,



Dr. Jonathan Tiemann
President & CIO



Valerie Gardner
Co-Founder & Principal