



December 13, 2021

Fred Wong
Acting Chief of the Division of Regulations
Office of Regulations and Interpretations,
Employee Benefits Security Administration,
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.

RE: Comments related to Department of Labor's (DOL or the Department) Proposed Rule, RIN 1210-AC03 - Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.

Dear Mr. Wong:

LTSE Services, Inc. offers its support for the proposed DOL rule, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*¹ and some alternatives to consider in formulating the final rule. LTSE Services, Inc. is a data and analytics driven capital markets platform specifically designed for public companies and private companies planning to enter the public markets. We strive to help create a more sustainable world by ensuring that public companies that join the LTSE ecosystem have a sustainable business model and are focused on long-term value creation for all of their respective stakeholders. In our view, the Environmental, Social and Governance (ESG) analysis is crucial for both companies and investors in understanding the risks and opportunities associated with the transition towards a more sustainable economy.

¹ See 86 FR 57272 (October 14, 2021).

We believe that ESG analysis starts with understanding the role of stakeholders in a corporation. In this regard, our affiliate, the Long-Term Stock Exchange, Inc.,² introduced principles-based listing standards that require listed companies to adopt five differentiated policies to address their long-term, multi-stakeholder strategy. One of the policies, the Long-Term Stakeholder Policy, which represents the strategic, long-term vision of a company, requires a company to explain in this policy how it operates its business to consider all of the stakeholders critical to its long-term success, including the company's impact on the environment and its community. This policy is guided by the principle that long-term focused companies should consider a broader group of stakeholders and the critical role they play in one another's success and addresses the interaction between the company and its stakeholders. Underlying this principles-based approach, is an understanding that companies consider those ESG issues that specifically pertain to their businesses. In doing so, companies are able to identify specific risks and opportunities, and in turn, enhance their operating model in order to develop a sustainable long-term business strategy. This approach also enables fiduciaries of retirement plans subject to ERISA (ERISA fiduciaries) to adopt a holistic view and to make fully-informed, suitable and appropriate investment decisions for the benefit of plan beneficiaries.

We believe that the DOL's proposed rule is a crucial step towards ensuring that plan beneficiaries are better served and protected. The requirement for plan sponsors to conduct the systematic analysis of the material ESG risks and issues, will help to ensure that due-care and full consideration has been given to the risks related to each underlying investment decision.

The Evolution of the Economy and Financial Markets

We believe that ERISA fiduciaries must be armed with the ability to address the rapidly evolving financial markets in order to provide appropriate returns to their retirement plan customers. The adoption of ERISA³ in 1974 was intended to protect the interests of workers by stipulating that qualified plans must follow certain rules to ensure that plan fiduciaries do not misuse plan assets and act in the best interests of plan participants or beneficiaries. At the heart of an ERISA fiduciary statutory duty is an obligation to put investment returns first. We support the fact that the DOL continues to acknowledge this as the primary object of the ERISA fiduciary. However, we also strive to bring attention to the evolution of the economy and financial returns.

The digitalization of the economy and pioneering research has helped generate awareness of critical issues that were previously not considered significant for investors, including, but not limited to, climate change, data privacy and social justice issues. These issues transcend the global economy and affect the financial markets, both over the short and long-term. Potential drawdowns and the risks associated with these ESG issues are factors that the financial

² The Long-Term Stock Exchange is a registered national securities exchange, which was approved by the Securities and Exchange Commission (SEC) in 2019, and commenced trading operations in 2020.

³ 29 U.S.C. 1104.

markets and ERISA fiduciaries must take into account in making business, investment and voting decisions. Additionally, we point to the growing body of academic literature that demonstrates a strong correlation between ESG factors and financial performance⁴. The academic world has experienced an explosion of papers investigating the relationship between ESG factors and corporate financial performance.⁵ These studies have demonstrated that funds incorporating ESG factors do not compromise or diminish financial returns of a fund on a risk-adjusted basis.⁶ However, when adding in the concept of ‘material’ ESG factors, there is now a growing body of literature that indicates that companies with strong ESG performance that explicitly consider material ESG issues significantly outperform companies with poor ESG performance on these issues.⁷ Therefore, in conducting an ESG analysis, fiduciaries are appropriately adopting a *value-driven approach* to investing by incorporating material ESG factors in seeking to maximize financial returns. This supports the underlying premise of ERISA that managers must not use pension plan assets to advance objectives that conflict with the financial imperative, but calls on ERISA fiduciaries to make the ESG analysis a mandatory form of due-diligence.

We also recommend that the DOL explore developing a long-term principles-based approach. While ESG analysis and the associated metrics help investors provide comparability across companies and industry sectors, we caution against the over-reliance on shorter-term ESG metrics. The majority of ESG risks manifest over the long-term so companies and ERISA fiduciaries are encouraged to focus on longer term ESG metrics and progress towards pre-defined targets. We recommend taking a principles-based approach, one in which companies clearly stipulate how their long-term ESG targets coincide with the transition to a more sustainable economy. This approach is complimentary with the investment time horizon of ERISA plans.

Current DOL Position and Proposed Changes

We believe that the proposed rule provides additional clarity with respect to ESG and other factors that ERISA fiduciaries may consider in making investment and proxy voting decisions and address issues raised by two prior rules addressing: (i) the Financial Factors in Selecting

⁴ See *generally*, Ben Maiden, Meta-study underlines ties between ESG and Corporate Success, Corporate Secretary (February 19,2021) *available at* <https://www.corporatesecretary.com/articles/esg/32465/meta-study-underlines-ties-between-esg-and-corporate-success>.

⁵ See Whelan, Ulrich, Van Holt and Clark, ESG and Financial Performance: Uncovering the Relationship by Aggregating Evidence from 1,000 Plus Studies Published between 2015 – 2020, Rockefeller Asset Management and NYU Stern Center for Sustainable Business (2021), *available at* https://www.stern.nyu.edu/sites/default/files/assets/documents/NYU-RAM_ESG-Paper_2021%20Rev_0.pdf

⁶ Friede, Busch & Bassen, ESG and Financial Performance: Aggregated evidence from more than 2000 empirical studies (2015).

⁷ Khan, Serafeim, and Yoon, Corporate Sustainability: First Evidence of Materiality (2016).

Plan Investments, and (ii) Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.⁸ We believe that the proposed rule changes also reflect a long-term view toward investment and voting decisions by ERISA fiduciaries that acknowledges the realities of the global economy today.

We acknowledge that the DOL's long standing guidance has recognized that, under the appropriate circumstances, ERISA fiduciaries can make investment decisions that reflect ESG considerations, including climate-related financial risk, and can select economically targeted investments or other investment vehicles for benefits apart from the investment return.⁹ The DOL has also provided guidance in its interpretive bulletins that "if a fiduciary prudently determines that an investment is appropriate based solely on economic considerations, including those that may derive from ESG factors, the fiduciary may make the investment without regard to any collateral benefits the investment may also promote."¹⁰

Elimination of the Use of Pecuniary Factors: Substitution of Materiality

We support the language change of the proposed rule which ceases using the term "pecuniary factors," and substitutes the concept of "materiality," which is a term that is used in the federal securities laws and related SEC regulations¹¹ and recognized by investors in the public markets. The concept of "pecuniary" under the current rule had the effect of excluding ESG funds, as well as ESG factors, from consideration in making investment decisions related to retirement plans. The term "materiality" is a widely accepted concept that investors and companies understand. This concept of materiality is well-documented in the securities laws and related case law and utilized by accountants and other financial professionals to make judgements in the preparation of financial statements and related notes, as well as other investment decisions.¹²

We note that the proposed rule includes several examples of ESG factors that are generally considered material to investment decisions. We believe that the list in the proposed rule should be viewed only as examples and not an exhaustive list of these factors. We believe that it would be inadvisable to provide an extensive list of ESG or other factors in the final rule as the concept of materiality provides for the determination of relevant factors on a case by case basis.

⁸ See 85 FR 72846 (November 13, 2020) and 85 FR 81658 (December 16, 2020).

⁹ See, e.g., Interpretive Bulletin 2015-01, 80 FR 65135 (Oct. 26, 2015).

¹⁰ See, e.g., Preamble to Interpretive Bulletin 2015-01, 80 FR 65135 (Oct. 26, 2015).

¹¹ See generally, 15 U.S.C.78j and 17 C.F.R. 240.10b-5 (2014).

¹² See generally, J. Anthony Terrell, Bracewell LLP, Materiality in Review - Probability, Magnitude and The Reasonable Investor, (February 12, 2021) available at https://bracewell.com/sites/default/files/knowledge-center/Materiality%20in%20Review_1_0_0.pdf.

We believe a principles based approach in this regard would better serve ERISA beneficiaries and provide greater flexibility for ERISA fiduciaries to consider unique factors relevant to a particular investment decision that may not be an appropriate consideration in every instance.

Changes in Guidance and Views on Fiduciary Duties

In the proposed rule, the Department has acknowledged that changes in interpretations of fiduciary duties with respect to ESG or sustainable investment funds has created a significant amount of confusion which has resulted in a negative impact on the selection of funds by ERISA plan fiduciaries. While the language of the proposed rule goes beyond the current rule in this regard, it may not fully eliminate the confusion. In this regard, we believe that it is important that the Department clarified in the proposed rule, and should include in the final rule, that including ESG factors that are material is consistent with the fiduciary duty of the plan's ERISA fiduciaries.

Tie Breakers

We appreciate that the tie-breaker provision, as revised, is intended to be broader in scope, however, in its current form, it is not clear how fiduciaries should interpret "equally serve the financial interests of the plan."¹³ This may not achieve the true purpose of ESG analysis, which is focused on obtaining superior risk-adjusted returns. As a result, we recommend removing reference to any "tie-breaker" provision.

Conclusion

As a result of the foregoing, we generally support adoption of the proposed rule, with the changes noted. We believe it goes beyond the existing rule language to address the realities of the current investment climate and the changing economy.

Thank you for your consideration.

Sincerely,

Martin Alvarez

Martin Alvarez
Chief Commercial Officer

Shahnawaz Malik

Shahnawaz Malik
Head of ESG Analytics

¹³ See *generally*, Preamble to Interpretive Bulletin 94 -1, 59 FR 32607 (June 23, 1994).

Jane K. Storero

Jane Storero

Senior Corporate Governance Counsel

cc: Maliz Beams, Interim President, LTSE Services, Inc.

Eric Ries, CEO and Chairman, LTSE Services, Inc.