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Mr. Ali Khawar
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)

Dear Acting Assistant Secretary Khawar:

On behalf of Ullico Inc. ("Ullico"), I am providing the comments described in this letter with respect to the above-referenced proposed regulation ("Proposed Rule")[1] issued by the Department of Labor (the "Department" or "DOL"). Ullico is a privately held investments and insurance holding company serving the union workplace. The activities of the company's subsidiaries cover a broad range of financial products and services provided principally to employee benefit plans and trustees of benefit plans, labor unions and their members, and employers of union members, including investment advisory services, asset management, commercial mortgage lending and servicing activities, life and health insurance, and property and casualty insurance.

We appreciate that the Department announced on March 10, 2021 that it would not enforce the "Financial Factors in Selecting Plan Investments" regulations ("2020 Final Rule")[2] published by the prior administration on November 13, 2020, which contained guidance inconsistent with the policies of the Biden administration related to climate change and environmental, social, and governance ("ESG") factors. The Proposed Rule re-examines the 2020 Final Rule and would amend the Department's investment duties regulation in 29 CFR 2550.404a-1 under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Although we offer some of our thoughts and analysis in order to improve the Proposed Rule, it is abundantly clear that the Department has worked exceptionally hard in its preparation. We respect the Department in its mission to ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families. We submit this comment letter in the hope that the final rule, when issued, will take our comments into account.

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[1] DOL's Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (October 14, 2021).

[2] Financial Factors in Selecting Plan Investments, RIN 1210-AB95, 85 Fed. Reg. 72846 (November 13, 2020).

I. Prior DOL Guidance – Statement of Law

The history of the Department's guidance regarding an ERISA fiduciary's obligations with respect to the investment of plan assets begins with the statute's duties of prudence and loyalty. ERISA requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[3] ERISA also requires that plan fiduciaries must act "solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan."[4]

The DOL issued a regulation that clarifies the application of the prudence standard to the investment of plan assets in 1979.[5] That regulation's preamble makes it clear that, for purposes of ERISA's prudence standards, no specific investment or investment course of action can be considered "per se prudent or per se imprudent" based on one factor alone.[6] The prudence of any investment decision is to be determined on the basis of an analysis of all the pertinent facts and circumstances, including the requirements and characteristics of the plan and the role the investment strategy is to play in the plan's portfolio.[7]

Beginning in 1994, the DOL formally advised in sub-regulatory guidance that consideration of collateral benefits in investment decisions may be consistent with the duties of prudence and loyalty under certain circumstances.[8] The Department further stated in 2015 that ESG factors may be considered in an investment decision if the decision meets the so-called "all things being equal" test.[9] In effect, this test provided that such factors may only be considered in any investment decision when it has been determined that the investment has a risk and return profile that is commensurate with available investment alternatives.[10]

The 2020 Final Rule amended the DOL's long-standing "investment duties" 1979 Regulation, which had focused on how fiduciaries could satisfy their duty of prudence under ERISA without specific reference to ESG factors. Initially, on June 23, 2020, the Department proposed a rule ("2020 Proposed Rule") that defined plan fiduciaries' duties under ERISA when considering investments or those that incorporate ESG factors.[11] The 2020 Proposed Rule provided that fiduciaries must compare investments to other available investments based solely on pecuniary factors. The 2020 Proposed Rule further stated that fiduciaries should not let non-pecuniary considerations distract them from obtaining the best economic results for their respective plans. However, the 2020 Final Rule removed any reference to environmental, social and governance factors, and instead shifted its focus to the use of pecuniary and non-pecuniary factors.[12] The 2020 Final Rule required that "plan fiduciaries select investments and investment courses of

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[3] Employee Retirement Income Security Act of 1974 § 404(a)(1)(B) (the "Duty of Prudence").

[4] Employee Retirement Income Security Act of 1974 § 404(a)(1)(A).

[5] 29 C.F.R. § 2550.404a-1 ("1979 Regulation").

[6] 44 Fed. Reg. 37221, 37222 (June 26, 1979).

[7] *Id.* at 37225.

[8] DOL Interpretive Bulletin 1994-1, 59 Fed. Reg. 32606 (June 23, 1994).

[9] DOL Interpretive Bulletin 2015-01, 80 Fed. Reg. 65135 (Oct. 26, 2015).

[10] 80 Fed. Reg. at 65137.

[11] NPRM Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (June 30, 2020).

[12] 85 Fed. Reg. at 72846.

action based solely on financial considerations relevant to the risk adjusted economic value of a particular investment or investment course of action."[13]

On January 20, 2021, the current administration released the "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (E.O. 13990) which directed all agencies to review regulations promulgated, issued or adopted between January 20, 2017 and January 20, 2021 that may be inconsistent with the Administration's goals and objectives.[14] This led to the Department stating, in March 10, 2021, that it would not enforce the 2020 Final Rule "[n]or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with those final rules with respect to an investment."[15] The Biden administration, on May 20, 2021, through the Executive Order on Climate-Related Financial Risk (E.O. 14030), ordered the Secretary of Labor to "consider publishing . . . for notice and comment a proposed rule to suspend, revise, or rescind the [2020 Final Rule]."[16]

II. Ullico Generally Supports the Proposed Rule

We support many aspects of the Proposed Rule and view it as a constructive improvement over the 2020 Final Rule.[17] The Department acknowledges, and we agree, that "a significant benefit of the proposal is that it clearly permits plan fiduciaries to consider climate change and other ESG factors that are often material."[18]

A. Consideration of ESG Factors – Return to Longstanding Guidance

We support the Department's efforts to issue a final regulation that explicitly allows plan fiduciaries to consider ESG factors. The 2020 Final Rule superseded DOL's long-standing guidance and set new restrictive standards for the consideration of factors in investment decisions, including environmental, social, and governance factors. The DOL now endeavors to issue a final regulation that clearly permits a fiduciary to consider ESG factors when those factors are reasonably part of the financial analysis of the investment. Notably, section (b)(4) of the Proposed Rule provides that a fiduciary may consider *any* factor in the evaluation of an investment that is material to the risk and return analysis, which might include "climate change-related factors," "governance factors," and "workforce practices."[19] We agree that the Proposed Rule is more consistent with past advice and "counteract[s] negative perception of the use of climate change and other ESG factors in investment decisions."[20]

B. Removal of Heightened Documentation Requirements

We support the Department's elimination of the detailed documentation requirements associated with selecting an investment based on non-pecuniary factors that existed under the 2020 Final Rule. We also agree with the Department that assigning a specific documentation requirement to all investments made based on a consideration

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[13] *Id*. at 72880.

[14] 86 Fed. Reg. 7037.

[15] DOL non-enforcement policy statement regarding the 2020 Final Rule (March 10, 2021).

[16] 86 Fed. Reg. at 27968.

[17] 85 Fed. Reg. at 72846.

[18] 86 Fed. Reg. at 57287.

[19] *Id*. at 57302.

[20] *Id*. at 57276.

of non-financial factors or collateral benefits suggests that such investments are inherently suspect.[21] The Department expressed concern that the 2020 Final Rule "singling out this one category of investment actions for a special documentation requirement may, in practice, chill investments based on climate change or other ESG factors, even when those factors are directly relevant to the financial merits of the investment decision or they are legitimately applied as a tie-breaker."[22]

C. Restoration of "All Things Being Equal" Test

We support the Department shifting away from the 2020 Final Rule, which undermined the "all things being equal test" by narrowing its potential application. Under the 2020 Final Rule, a fiduciary could only utilize that test when a fiduciary determined that the alternative investments under consideration are "economically indistinguishable".[23] That type of analysis is flawed. Prior longstanding Department guidance spoke in terms of comparing the economic characteristics of two investments as *similar* and with *commensurate* risks and returns. Section (c)(3) of the Proposed Rule represents a proper and historically consistent broadening of the "tie breaker" or "all things being equal" test when compared to the 2020 Final Rule. We support the Department's approach to the "all things being equal" test, which allows a fiduciary to consider all of the economic factors presented by two competing investments in their *totality* in order to judge whether two investments will equally serve the plan's financial interests, rather than the 2020 Final Rule's narrower test that focuses solely on whether two investments are economically indistinguishable based on a consideration of multiple investment characteristics. Arguably, the 2020 Final Rule's standard was so restrictive that it effectively eliminated the "all things being equal" test.[24]

D. Cost Savings Associated with the Proposed Rule[25]

The 2020 Final Rule, if enforced, would have imposed unnecessary costs and regulatory burdens that exceeded its potential benefits. The Department understands, and we agree, that the primary benefit of the Proposed Rule is the "clarification of legal standards and the prevention of confusion to plan fiduciaries" as a result of the 2020 Final Rule.[26] The substantial cost savings associated with this prevention of confusion cannot be underestimated. The fiduciary investment guidance in the 2020 Final Rule, if enforced, would have increased decision-making costs as fiduciaries dealt with the application of needlessly confusing, potentially misunderstood, and potentially misapplied requirements.

Similarly, through the elimination of the documentation requirement set forth in the 2020 Final Rule, the Proposed Rule would reduce confusion and provide an immediate cost savings to employee benefit plans. The Department under the previous administration argued that the documentation requirement would serve as "a safeguard against the risk that fiduciaries will improperly find economic equivalence and make decisions based on non-pecuniary factors without a proper analysis and evaluation."[27] This attempt to expose a purportedly small number of breaches of fiduciary duty with respect to non-financially motivated ESG investments would freeze the Duty of Prudence's flexible

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[21] *Id*. at 57279.

[22] *Id*. at 57279.

[23] 85 Fed. Reg. at 72877.

[24] For example, the 2020 Final Rule characterizes the occasion of two "economically indistinguishable" investments as a mythical "unicorn". *Id*. at 72861 n.43.

[25] 86 Fed. Reg. at 57292-94.

[26] *Id*. at 57284.

[27] 85 Fed. Reg. at 72861.

reliance upon facts and circumstances. However, any potential benefit from such a requirement would be easily outweighed by the increased cost of decision making attributable to the new and vague standards.

Most importantly, enforcement of the 2020 Final Rule would lead to negative financial performance by plans that would be more likely to avoid ESG considerations in their investment analyses.[28] The 2020 Final Rule, if enforced, would have chilled or dissuaded fiduciaries from making appropriate, prudent, and loyal ESG investments that would give higher returns than other investments. Studies show, including many listed in the Proposed Rule, that ESG factors generally promote the long-term performance of investments.[29]

III. A Suggestion for Improving the Final Regulation: Administrative Versus Investment Fiduciaries

Employee benefit plans frequently utilize different fiduciaries for the plans' administrative functions versus its investment functions. Investment fiduciaries generally analyze, select, and oversee plan investments. With respect to plans that utilize fiduciaries with separate functions and responsibilities, the Proposed Rule would directly affect investment fiduciaries because the proposal regulates their investment decision-making abilities. Imposing a requirement that is binding on the plan's administrator based on the activities of the investment fiduciary is fraught with the potential for regulatory foot faults. For example, a disclosure requirement related to investment decision-making appears to be imposed on administrative fiduciaries in the Proposed Rule with respect to QDIAs.[30] While we support the ability of a plan fiduciary to select as a QDIA an investment alternative that considers ESG factors, we are concerned that the Proposed Rule does not clearly lay out the appropriate responsibilities of each type of fiduciary. Because many plans will utilize separate fiduciaries, the final rule should address the responsibilities and potential liabilities between the two types of fiduciaries under any requirements set forth by the Department. Simultaneously, the final rule should carefully avoid requiring a fiduciary to have responsibility for requirements outside of their discretion.

IV. Assessment of Alternatives

The Proposed Rule's approach towards plan fiduciary investing is superior to the alternatives listed in the preamble.[31] We agree that replacing the current 2020 Final Rule with the Proposed Rule is a superior alternative to merely rescinding the 2020 Final Rule or the 1979 Regulation because it would leave those actions would leave fiduciaries without needed guidance. Of the alternatives, the European Commission approach towards fiduciary responsibilities when analyzing investments appears to be the most thorough. However, this European Commission regulatory scheme, in comparison to the Proposed Rule, may increase costs without a commensurate benefit because it requires fiduciaries to always consider ESG factors and to "solicit client's sustainability preferences, in addition to existing requirements that a fiduciary obtain information about the client's investment knowledge and experience, ability to bear losses, and risk tolerance as part of the suitability assessment."[32] We agree that this approach could potentially

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[28] 86 Fed. Reg. at 57284.

[29] *Id*. at 57290; *See, e.g.*, United States Government Accountability Office, GAO-20-530, *Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* 9 (2020) ("GAO ESG Report"), available at https://www.gao.gov/assets/710/707949.pdf. (finding that institutional investors generally agree that ESG factors can significantly affect long-term returns); See also, United States Government Accountability Office, *Retirement Plan Investing*, available at https://www.gao.gov/assets/700/691930.pdf.

[30] 86 Fed. Reg. at 57280.

[31] *Id*. at 57295.

[32] *Id*. at 57296.

"harmoniz[e] taxonomy for asset and investment managers in across jurisdictions."[33] However, we believe that plan fiduciaries should not have to solicit participant preferences to this detail due to the associated costs. Additionally, ESG factors should be treated in the same way as other factors appropriately considered when fiduciaries make investments.

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Again, we very much appreciate the Department's hard work in preparing the Proposed Regulation and appreciate the opportunity to comment. If you think it helpful, we would welcome the opportunity to further discuss the issues.

Sincerely,

Patrick McGlone

[33] *Id.*