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July 30, 2020

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

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

Submitted electronically to www.regulations.gov

Dear Director Canary,

As an ERISA plan sponsor, Public Citizen submits these comments to the proposed rulemaking entitled "Financial Factors in Selecting Plan Investments" (RIN 1210-AB95) objecting to the length of the comment period as well as the direction of the proposed rule. Public Citizen objects to this proposed rule on that basis that it is predicated on a misunderstanding of the current state of environmental, social, and governance (ESG) investing and that the cost- benefit analysis is vague, conclusory and incomplete. We maintain that the 30- day comment period offered by the Department of Labor (DOL) is too short for plan sponsors to review and comment on this rulemaking, especially given that so many have had to make functional adjustments to adapt to the coronavirus pandemic. Executive Order 12866 clearly stipulates that comment periods should be no shorter than 60 days at a minimum, particularly for rules designated as "economically significant" such as this proposal. Further, we maintain that the EBSA should schedule a virtual public hearing to provide an opportunity to hear directly from impacted stakeholders.

I. **The proposed rule is based on a misunderstanding of the current state of ESG investing.**

The proposed rule fundamentally misunderstands the current state of ESG investing. It conflates this term with older social investing strategies such as impact investing and misconstrues economically targeted investments (ETIs) with ESG integration. As stated in the proposal, DOL has used "economically targeted investments to broadly refer to any investment or investment course of action that is selected, in part, for its expected non-pecuniary benefits, apart from the investment return to the employee benefit plan investor." This differs significantly from the widely accepted definition of ESG integration in investing, which refers to "the consideration of ESG factors as part of prudent risk management and a strategy to take investment actions aimed at responding to those risks." [1]

Besides misunderstanding the modern definition of ESG investing, the proposed rule disingenuously points to the rise of ESG investing as the basis for DOL's concern but fails to reveal that in addition to ESG investing being on the rise, ESG investments are outperforming the market, especially in 2020. Research from Morningstar shows that, "when markets were flat (2015) or down (2018), the returns of 57% and 63% of sustainable funds placed in the top half of their categories. When markets were up in 2016, 2017, and 2019, the returns of 55%, 54%, and 65% of sustainable funds placed in the top half of their categories." [2] More recently, additional Morningstar data shows that as market activity decreased due to global reactions to the coronavirus pandemic, 62% of ESG- focused large- cap equity funds performed better than the global tracker.[3] This is just a snapshot of the research that is consistent with academic studies that suggests that there is "no systematic performance penalty associated with sustainable investing and possible avenues for outperformance through reduced risk or added alpha." [4]

The case for investor interest in ESG risks is further bolstered by evidence from trends relating to shareholder proposals on ESG issues. Recent analysis from the Sustainable Investments Institute shows that investors have voted on 172 shareholder resolutions on ESG issues as of July 2020.[5] The number of these proposals filed has increased 12% since 2010, and the average support for the proposals "has steadily increased, from 18.3 percent in 2010 to 26.8 percent so far in 2020." [6] Additionally, "withdrawals have increased in number, up 35 percent since 2010, generally because of a growing likelihood companies will agree to investor requests for more disclosure." [7]

Large institutional investors are increasingly recognizing that ESG disclosures are a critical part of the mix of information they need in order to evaluate the performance of the companies in their portfolio. BlackRock, the world's largest asset manager, has acknowledged the growing trend towards ESG investing. On the company's recent second- quarter earnings call "BlackRock executives said they believe ESG would converge and align with retirement plans' financial plan objectives and that ESG helps identify unpriced risks and opportunities." [8] In fact, BlackRock's CEO, Larry Fink, said that DOL's proposed rule "'accelerates' interest in ESG, by forcing people to clarify that they're investing in ESG because they're worried about climate and specific risks." [9]

Moreover, DOL references a lack of a standard definition of ESG metrics as another reason for their lack of pecuniary value. This mirrors recent remarks from Commissioner Roisman of the Securities and Exchange Commission (SEC) who said, "in my experience, there is not consensus on what,

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[1] *Financial Factors in Selecting Plan Investments*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, https://bit.ly/2P9q4sq (viewed on July 29, 2020).
[2] *U.S. ESG Funds Outperformed Conventional Funds in 2019,* MORNINGSTAR (April 16, 2020), https://bit.ly/2Dht1EG.
[3] Lynn Strongin Dodds, *ESG equities outshine their conventional peers*, BEST EXECUTION (April 7, 2020), https://bit.ly/3geoaTx.
[4] *U.S. ESG Funds Outperformed Conventional Funds in 2019,* MORNINGSTAR (April 16, 2020), https://bit.ly/2Dht1EG.
[5] *Comparative Impact of Proposed Rule 14a-8: Social and Environmental Policy Shareholder Resolutions*, SUSTAINABLE INVESTMENTS INSTITUTE (July 28, 2020), https://bit.ly/2CUxxcE.
[6] *Id.*
[7] *Id.*
[8] Leslie P. Norton, *BlackRock's Fink Says U.S. Proposal to Limit ESG Investing Will Only Boost Interest*, BARRON'S (July 17, 2020), https://bit.ly/2CQNtfZ.
[9] *Id.*

exactly, 'ESG' means."[10] Both of these assertions ignore the role that the SEC has in creating a standard ESG disclosure regime. In fact, investors have been asking the SEC to do so. Investors representing $5 trillion in assets under management submitted a rulemaking petition to the SEC in 2018 calling on the agency to take up standardizing ESG disclosure across the market.[11] Instead of heeding investors' calls, this SEC, under Chairman Jay Clayton, has issued rules that will significantly silence investors looking for long- term material information from their companies. If DOL has a genuine concern for the impact a lack of standard ESG data has on ERISA plans it should support efforts to advance disclosure, not disincentivize plan fiduciaries from considering these critical long-term factors.

II. The cost-benefit analysis for the rule is vague, conclusory and incomplete.

The regulatory impact analysis accompanying the proposed rule is cursory, conclusory, and lacks analytical rigor. This is all the more conspicuous given DOL's designation of the proposal as an "economically significant" rule under EO 12866,[12] which signifies a determination by DOL that the proposal will result in an annual effect of $100 million or more. Yet, the proposal provides no documentation or analysis of how DOL reaches that conclusion and provides virtually no information on the economic effects of the proposal. This is highly irregular and at odds with the vast majority of rulemakings designated as "economically significant," which are accompanied by regulatory impacts analyses that often number in the hundreds of pages and include substantial amounts of data to inform the conclusions of the analysis.[13] As a global problem, these analyses too often ignore obvious lost benefits and seek to justify the proposal rather than provide an unbiased examination of the proposed rule's impacts.

Office of Management and Budget Circular A-4 advises agencies on the fundamental principles of how to conduct a cost-benefit analysis. DOL's analysis does not contain these basic elements. Even in cases where there is a great deal of uncertainty, agencies should report cost-benefit estimates "that reflect the full probability distribution of potential consequences." The department's analysis does not venture any monetary estimates, instead relying on evidence-free assertions and repeated excuses that such estimates would be "difficult." The analysis relies on "the number of plan fiduciaries that are currently not following or misinterpreting the Department's sub-regulatory guidance," and goes on to say that even though DOL doesn't have "sufficient data" to estimate that number, it "believes it is small, because most fiduciaries are operating in compliance with the Department's sub-regulatory guidance." The analysis does not include any deeper explanation or data to substantiate this belief.

While DOL concedes that "some fiduciaries will select investments that are different from what they would have selected pre-rule" DOL makes no attempt to determine how many fiduciaries will change their investment decisions, and to what extent, as a consequence of the proposal if finalized. DOL's inability to provide any indication of the consequences of its proposal, and most particularly, the decline in ESG investment as a result of proposal, as is clearly DOL's intent, prevents commenters and

[10] Commissioner Elad L. Roisman, *Keynote Speech at the Society for Corporate Governance National Conference,* U.S. SECURITIES AND EXCHANGE COMMISSION (July 7, 2020), https://bit.ly/31hehyb.
[11] *Request for rulemaking on environmental, social, and governance (ESG) disclosure*, SECURITIES AND EXCHANGE COMMISSION (October 1, 2018), https://bit.ly/30Sz0YA.
[12] Exec. Order No.12,866, 58 Fed. Reg.51,735 (Oct. 4, 1993), https://bit.ly/2PbHbKk.
[13] *See e.g.* Default Electronic Disclosure by Employee Pension Benefit Plans Under ERISA, 84 Fed. Reg. 56,894 (October 23, 2019) (to be codified a t 29 C.F.R.pt.2520), https://bit.ly/3fgs5xy.

the public from fully understanding the potential impact of the proposal and thus prevents informed comment on the proposal.

The analytical errors contained in the impact analysis are significant enough to warrant a delay or extension of the rulemaking process in order to allow DOL to re-propose the rule with a more thorough and informative analysis of the proposed rule's costs and benefits. DOL must not proceed to finalizing the rule without first providing the public with an opportunity to scrutinize and comment on the updated economic analysis.

Recent attempts by the SEC to curb investor access to ESG information through rules on the proxy voting and shareholder proposal process raise questions about this Administration's motivation to examine ESG. The proxy voting rulemaking process was undermined by the realization that a significant number of the public comments were fake and orchestrated by a secret money organization.[14] Analysis shows that the changes proposed by the SEC's rule focused on shareholder proposals would benefit roughly a dozen companies and that the two proposals that would be most significantly curbed by the rule ask for details of issuer political activity. [15] The federal rulemaking process should be reserved for serious analysis of issues affecting broad, public concerns. The dynamics raising questions about the SEC's motivations for curbing access to ESG information should prompt DOL to apply the most careful consideration of the impact this rule will have on ERISA plan fiduciaries.

Thank you for reviewing Public Citizen's comment. If you have any further questions, do not hesitate to contact Rachel Curley, Democracy Advocate at 202-454-5195 or rcurley@citizen.org.

Sincerely,

Rachel Curley
Democracy Advocate
Public Citizen's Congress Watch

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[14] Zachary Mider and Ben Elgin, *SEC Chairman Cites Fishy Letters in Support of Policy Change*, BLOOMBERG (November 19, 2019), https://bloom.bg/30Yv4ps.
[15] Christine MacDonald, *Trump Administration Seeks to Muzzle Activist Shareholders*, THE REVELATOR (April 27, 2020), https://bit.ly/3jV7r9K.