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

FINANCIAL FACTORS IN SELECTING PLAN INVESTMENTS PROPOSED REGULATION (RIN 1210-AB95)

On behalf of the Australian Council of Superannuation Investors (ACSI), thank you for the opportunity to submit comments on the notice of proposed rulemaking titled '*Financial Factors in Selecting Plan Investments*' (Proposal).

Established in 2001, ACSI exists to provide a strong, collective voice on environmental, social and governance (ESG) investment issues on behalf of our members. Our members include 39 Australian and international asset owners and institutional investors. Collectively, ACSI members own on average 10% of every ASX200 company.

Our members recognise that ESG risks and opportunities have a material impact on investment outcomes.

As large institutional investors, ACSI's members hold widely diversified and long-term portfolios that span all sectors of the economy. These portfolios are inevitably exposed to material risks and opportunities. As fiduciary investors, they have a responsibility to act to enhance the long-term value of the savings entrusted to them. Our members work to positively influence the way business is conducted in order to protect and enhance investment value.

Our concern is that the Proposal mischaracterises ESG integration and could provide a poor precedent internationally.

The Proposal does not achieve its stated aim to '*separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return, increase costs, or assume additional investment risk to promote non-pecuniary benefits or objectives*'. This appears to be, in part, due to unclear wording in the Proposal, including a failure to distinguish between ESG integration and economically targeted investing (ETI). ESG integration is the consideration of ESG factors as part of prudent risk management and a strategy to take investment actions aimed at responding to those risks. ETIs are investments that aim to provide financial returns as well as collateral, non-financial benefits. For example, ETIs often advertise job creation or social impact as goals of the investment.

Our further comments are set out in this submission. I trust they are of assistance. Please contact me or Kate Griffiths, ACSI's Executive Manager - Public Policy and Advocacy, should you require any further information on ACSI's position.

Louise Davidson AM
Chief Executive Officer
Australian Council of Superannuation Investors

ESG Integration

The Proposal states that an ERISA fiduciary has fulfilled its obligations if they have '*selected investments and/or investment courses of action based solely on pecuniary factors*'. It goes on to state that '*ESG factors and other similar factors may be economic considerations*'. There is now an extensive body of research that makes clear that ESG factors are material investment considerations.

A policy by the DOL that clarifies that fiduciaries must integrate material factors into their investment actions and that ESG factors can be material would be appropriate. However, the remaining components of the Proposal create confusion and could guide fiduciaries to believe they are not permitted to consider material ESG factors in their investment analysis.

The "all else being equal test"

We are concerned that the Proposal creates new burdens for fiduciaries using the "all else being equal test" that would lead to unnecessary costs for plan participants. It also creates confusion about what activities the DOL is attempting to regulate.

Under the '*all else being equal test*,' which has been in place since 1994, 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. The Proposal sets out a documentation requirement 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. There appears to be no corresponding safeguard for a failure to take material ESG factors into account.

The Proposal's discussion of the '*all things being equal* test' is cause for confusion because it does not distinguish the application of this test from the broader discussion of ESG integration.

Defined contribution plan investment options

The Proposal clarifies 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 appears to be informed by confusion between ESG integration and ETIs. All investment options should be required to integrate material ESG factors, as part of prudent investment decision-making. In addition, it may be appropriate for ERISA fiduciaries to offer ETIs as options that participants may select in participant-directed plans.

The Department's stated rationale for prohibiting an '*ESG-themed fund*' from being selected as the default investment option is that it is not appropriate to select '*investment funds whose objectives include non-pecuniary goals*.' This statement shows either a misunderstanding of the purpose of ESG integration, (which is to integrate all material factors into investment decision-making) or a failure to distinguish between the terms such as 'ESG themed funds' and ETI. This is likely to cause confusion for fiduciaries as they attempt to reconcile the Department's statements earlier in the Proposal that ESG factors are likely to have a material economic impact. If the Proposal is to proceed, it should adopt a clear and consistent distinction between ESG integration and ETIs.

Conclusion

The Proposal mischaracterises ESG integration and fails to distinguish between ESG integration and economically targeted investing. This is likely to lead to confusion for ERISA fiduciaries and cost to plan savers. If the Proposal is finalized in its current form, we are concerned that fiduciaries will struggle to fulfil their obligations to integrate financially material risk factors while also trying to respond to the language in the Proposal that appears aimed at preventing fiduciaries from taking account of these same risks.

As institutional investors, our members have a duty to act in the best long-term interests of their beneficiaries. As ESG factors can be financially material, ESG integration is core to investment decision-making. If the Proposal goes into effect, it will undermine fiduciaries' ability to act in the long-term best interest of their beneficiaries. As such, we recommend you allow the existing guidance to remain in effect and not move forward with a final rule.