

United States Senate
WASHINGTON, DC 20510-2310

July 15, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

RE: Financial Factors in Selecting Plan Investments (RIN 1210-AB95)

Dear Secretary Scalia,

We write to express our deep concern with the Department of Labor’s (the “Department”) recent proposal discouraging retirement plan fiduciaries from considering environmental, social or governance (ESG) criteria in their investment decisions relating to ERISA-governed retirement plans. The proposed rule not only would impose a burdensome process for including ESG investments in ERISA-governed retirement plans, but it also arbitrarily prohibits the use of ESG funds as a Qualified Default Investment Alternative (“QDIA”) in a defined contribution plan, either as the QDIA itself or as a component of one. Among other things, the proposed rule would undermine the ability to consider firms’ records on race and diversity when making investment decisions. The proposed rule is contrary to longstanding Department guidance, and should be withdrawn.

We are at pivotal moment in the fight against systemic racism in our country. Yet, while people across the country demand accountability and reach for available tools to fight for racial and economic equity—from advocating for sweeping federal reforms to address systemic racism to taking smaller personal steps like supporting Black-owned businesses—the Department is moving in the opposite direction. ESG investing allows retirement savers to support long-term change by building a system that rewards and values inclusion and diversity in corporate culture from the board to the workforce. By restricting ESG investing, the Department’s proposal would undermine a powerful tool that leverages trillions of dollars a year to drive positive social change. According to the Forum for Sustainable and Responsible Investment, in 2018, there were \$12 trillion invested in ESG funds – more than a quarter of total investments – and rapid growth is expected in the future.

According to a 2018 Fortune analysis, women of color held only 4.6 percent of board seats on Fortune 500 companies, and men of color held only 11.5 percent of board positions. There is a similar lack of racial and gender diversity at the executive level, with only four Black CEOs in the entire Fortune 500. Furthermore, while diversity at the senior leadership level of a firm is important, firms’ records also vary widely in community involvement, anti-discrimination law violations and other factors, each of which may be important to some investors.

When deciding whether to invest in companies, we believe plan sponsors and fiduciaries should be able to consider whether or not companies have established diverse leadership teams, whether

they foster inclusive or discriminatory workplaces, and whether they engage in a variety of other practices that may impact a company's performance. ESG-based investing is a key way to grow a plan's assets in a manner consistent with its corporate principles without sacrificing investment returns. Racial justice, corporate diversity and other ESG factors are increasingly a consideration in investment decisions. Further, contrary to the skepticism and assumptions underlying the Department's proposed rule, ESG investments often outperform traditional investments and the overall financial markets, including over the past several years, showing investors can both achieve strong returns while driving positive change.

Despite the Administration's claims to adhere to free market and deregulatory principles, this proposed rule would sharply limit the ability of private-sector plan fiduciaries to pursue an ESG investment strategy, even though it is a mainstream and popular strategy that can materially improve an investment's long-term financial performance. Finally, we must highlight this proposal follows the Department's recent Information Letter allowing 401(k) and other defined contribution plan sponsors to begin incorporating private equity as a component of diversified asset allocation funds, such as target-date funds, even when those investments may be riskier or have higher fees. The fact the Department wants to make it easier for private equity firms to attract workers' savings, while making it harder for workers to invest in ESG funds, raises serious questions regarding both the Department's commitment to protecting workers and retirees as well as its willingness to support efforts to addressing systemic racism, racial injustices and other critical issues.

We urge you to immediately withdraw this proposed rule and refocus the Department's efforts on the multitude of pressing matters facing U.S. workers in light of COVID-19, as well as the ways the Department can use its authorities and tools to drive positive change, especially as it relates to systemic racism.

Sincerely,

/s/ Tina Smith

Tina Smith
United States Senator

/s/ Patty Murray

Patty Murray
United States Senator

/s/ Sherrod Brown

Sherrod Brown
United States Senator

/s/ Kirsten Gillibrand

Kirsten Gillibrand
United States Senator

/s/ Tim Kaine

Tim Kaine
United States Senator

/s/ Elizabeth Warren

Elizabeth Warren
United States Senator

/s/ Bernard Sanders

Bernard Sanders
United States Senator

/s/ Tammy Baldwin

Tammy Baldwin
United States Senator

/s/ Robert P. Casey, Jr.

Robert P. Casey, Jr.
United States Senator

/s/ Dick Durbin

Richard J. Durbin
United States Senator

/s/ Amy Klobuchar

Amy Klobuchar
United States Senator

/s/ Cory A. Booker

Cory A. Booker
United States Senator

/s/ Dianne Feinstein

Dianne Feinstein
United States Senator

cc: Jeanne Klinefelter Wilson, Acting Assistant Secretary,
Employee Benefits Security Administration