

July 13, 2020

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: Notice of Proposed Rulemaking on Financial Factors in Selecting Plan Investments Amending “Investment duties” Regulation at 29 CFR 2550.404a-1 (RIN 1210-AB95)

Dear Assistant Secretary Klinefelter Wilson,

The Defined Contribution Alternatives Association (“DCALTA”) is pleased to have the opportunity to comment on the Department of Labor’s (“DOL” or “Department”) June 30th Notice of Proposed Rulemaking (the “NPRM”) entitled *Financial Factors in Selecting Plan Investments*. DCALTA welcomes DOL’s decision to provide clarification around the loyalty requirement found in Section 404 of the Employee Retirement Income Security Act of 1974 (“ERISA”). We encourage DOL to provide additional certainty regarding the duty of loyalty and to do so in a manner that is asset-class neutral. DCALTA applauds DOL’s recent efforts to enhance participant access to a wider range of asset classes and encourages DOL to use the NPRM as an opportunity to reinforce the message that ERISA fiduciaries should prudently use all of the investment tools available to them instead of simply relying on the tools that participants best understand. Retirement security is enhanced when savers have access to modern tools for saving inside their retirement plans.

DCALTA advocates on behalf of plan sponsors, plan fiduciaries, asset servicers, investment managers, and others within the retirement industry who believe that alternative investments provide benefits to retirement savers. DCALTA was created to raise awareness about the benefits of expanding the opportunity set of investments available to defined contribution plans to include alternative investments. Through its education, outreach, research, and advocacy efforts, DCALTA is committed to securing optimal retirement outcomes for plan participants. The continually evolving regulatory environment and innovations in investment products and methods have changed the operational landscape for plan fiduciaries and investors. Alternative investments, including hedge funds, real estate, and private equity, can be used in professionally managed multi-asset portfolios and other structures to minimize participant risk and maximize returns. DCALTA has a strong interest in the emergence of modernizing solutions that adequately respond to market developments and broaden the opportunity set of investments available to plan participants within the context of sound decision-making by investment fiduciaries.

While DCALTA is concerned that the NPRM may go too far in limiting a plan fiduciary's consideration of ESG factors when it is a close call if those factors are "material", our comments focus on ways that the NPRM could be modified to be asset class neutral:

- i. **In Section 404a-1(b), subsections (b)(iii) and (b)(v) should be stricken, and "otherwise" and "and has otherwise complied with the duty of loyalty" should be struck from (b)(iv).**

As currently drafted, Section 404a-1(b) is repetitive and circular. The section is circular because it includes compliance with the duty of loyalty as an element of complying with the duty of loyalty. While we believe the standard of loyalty to be clear, addition of this phrase creates an invitation for courts and plaintiffs to craft additional responsibilities not included within either the Department's rule or section 404(a)(1)(A) of ERISA. We ask that (b)(iii) be stricken because it is consumed by (b)(iv). It should not matter why a fiduciary subordinates the interest of a participant. Finally, we ask that (b)(v) be stricken because it is superfluous. We believe that no court would find a fiduciary to have acted prudently or loyally were they to simply follow a prudent process and then disregard the outcome without a procedurally prudent process underlying the decision to disregard the outcome. It is important that the Department fix these provisions. Courts interpret words as having meaning and even if the Department believes it has clearly articulated the fiduciary standard for loyalty in (b)(iv), it is likely that courts will be asked to hold that the remaining sections should be interpreted as having separate meaning. For these reasons, DCALTA asks the department to strike (b)(iii) and (b)(v) as well as the repetitive "and has otherwise complied with the duty of loyalty" phrase from (b)(iv).

- ii. **In Section 404a-1(b)(2)(ii)(D), "compares to available alternative investments or investment courses" should be changed to "compares to reasonably similar available alternative investments or investment courses that would play a similar role in the plan's portfolio".**

DCALTA asks the Department to clarify that investors are not required to compare each possible investment to every other possible investment in order to satisfy ERISA's fiduciary provisions. A fiduciary who is considering a specific target-date fund with a sleeve allocated to a diversifying asset class (such as private equity) should be required to compare that target-date fund to a prudent number of other similar, reasonably available target-date funds. In making the determination to add a target-date fund with a sleeve allocated to a diversifying asset class, a fiduciary should consider at a high level the advantages and disadvantages of different target-date fund structures. We think this clarification likely reflects the Department's intent. To require a fiduciary to compare each possible investment to every other possible available alternative investment would be impossible.

- iii. **In Section 404a-1(c)(3)(i), the list of asset types should be expanded to include "equity, fixed income, money market funds, real assets, derivatives, private assets, and other diversifying asset classes".**

When taken as a whole, alternative investments are growing more rapidly than any other asset class.¹ And defined benefit pension plans already allocate a significant portion of their assets to diversifying asset classes. Any rule that the Department issues should be designed to account for the institutionalization of the defined contribution marketplace. As the defined contribution marketplace becomes more mature, we expect that its investment profile will gradually merge with that of defined benefit plans and other long term investors. If the Department chooses to include examples of types of funds, the list should include all of the asset classes that plan fiduciaries have used, do use, and should use in the future.

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The DCALTA appreciates the opportunity to provide these comments. If you have any questions or would like more information regarding this letter, please contact me at (888) 322-5828 or je1@dcalta.com.

Thank you very much for your consideration.

Respectfully submitted,



Jonathan Epstein

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¹ See Institutional Investor, *Report: Alternative Investment Industry Will Hit \$14 Trillion by 2023*, <https://www.institutionalinvestor.com/article/b1bg5lknj62d71/Report-Alternative-Investment-Industry-Will-Hit-14-Trillion-By-2023> (Last Visited 7/2/2020).