

Inherent Group, LP  
510 LaGuardia Place, 5<sup>th</sup> Floor  
New York, NY 10012

July 22, 2020

**VIA ELECTRONIC FILING**

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: RIN 1210-AB95, *Financial Factors in Selecting Plan Investments* proposed rule

Dear Assistant Secretary Wilson,

I am writing regarding the Department of Labor Employee Benefits Security Administration's proposed rule, *Financial Factors in Selecting Plan Investments*, Regulatory Identifier Number (RIN) number 1210-AB95. My firm, Inherent Group, LP, is a Registered Investment Adviser with approximately \$616 million of assets under management as of our latest ADV filing as of December 31, 2019. We use financially material environmental, social, and governance (ESG) factors as tools to help us source, underwrite, and engage with our portfolio companies in the private and public markets.

I have reviewed the letter submitted by Ceres on this subject on June 30 and support their recommendations. I am concerned that the proposed rule would dissuade fiduciaries from assessing ESG risks and opportunities in their investments. I urge the Department to withdraw, or in the alternative, substantially modify the proposed rule. Specifically, I call on the Department to:

(1) Acknowledge that ESG issues may in fact pose material short, medium and long term financial impacts and risks; (2) Clarify that when ESG issues present material risks or opportunities, the fiduciary duties under the U.S. Employee Retirement Income Security Act of 1974, as amended (ERISA), would compel qualified investment professionals to treat such ESG issues as economic considerations; (3) Retain the existing interpretation of the "tie-breaker" test, which allows for ESG factors to be considered for *non-pecuniary* reasons; and (4) Rely upon its existing, protective framework in whether a ESG fund (pecuniary or non-pecuniary) may constitute a QDIA or component of a QDIA.

**(1) ESG issues pose material short, medium and long term financial impacts and risks.** A substantial body of evidence demonstrates that ESG issues pose short, medium and long term financial impacts and risks to companies and financial markets. Investors have identified material ESG issues for every industry sector. Some ESG issues pose systemic risks to financial markets.

**(2) The Department needs to clarify that, when ESG issues present material risks or opportunities, ERISA’s fiduciary duties would compel qualified investment professionals to consider them.** U.S. investors are already considering ESG in engagement and investment decisions. The financial effects of ESG issues could manifest in the short, medium and long term. Because of the financial impacts and risks of ESG issues, and because ESG investments, on average, provide comparable or superior returns to non-ESG investments, it is a violation of fiduciary duty to not consider ESG in investment decisions.

**(3) The Department should retain the existing interpretation of the tie-breaker test, which allows for ESG factors to be considered for non-pecuniary reasons.** The proposed rule in effect redefines the “tie-breaker” test (*i.e.*, the “all things being equal test”) that a fiduciary would have to meet when it is making an investment decision on behalf of an ERISA plan for *non-pecuniary* reasons (*i.e.*, “collateral benefits”). The traditional and long-standing tie-breaker test is a much more workable standard. The traditional tie-breaker test and incidental benefits doctrine provide fiduciaries necessary breathing room while simultaneously protecting the interests of plan participants and beneficiaries in their retirement security. The Department should also reinstate the traditional tie-breaker test for fiduciaries who are selecting investment options for inclusion in defined contribution plan lineups.

**4) The Department should rely upon its existing, protective framework in whether an ESG fund (pecuniary or non-pecuniary) may constitute a QDIA or component of a QDIA.** QDIAs possess a special character and importance for many participants and beneficiaries in their retirement security. But there is already a well-understood protective framework in place with respect to both the selection and monitoring of QDIAs. The selection and monitoring of a QDIA, whether ESG-related or not, “is a fiduciary act and, therefore, ERISA obligates fiduciaries to act prudently and solely in the interest of the plan’s participants and beneficiaries.”

If a fiduciary selects an ESG-related QDIA for *pecuniary* reasons, the analysis should begin and end with longstanding interpretations of ERISA’s fiduciary duties, as well as the QDIA regulation, 29 C.F.R. § 2250.404c-5 specifically with respect to the fiduciary protection conferred under that safe harbor. A fiduciary who wishes to select an ESG-related QDIA for *non-pecuniary* reasons (*i.e.*, in whole or part for collateral benefits) already remains bound to the QDIA regulation (again, for purposes of availing itself of the protection under that safe harbor), ERISA’s fiduciary duties, *as well as* the traditional tie-breaker test.

I urge the Department to withdraw, or in the alternative, substantially modify the proposed rule.

Sincerely,



Tony Davis  
CEO