

December 13, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655

U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

*Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights;
RIN 1210-AC03*

Dear Sir or Madam:

The Vanguard Group, Inc. (“Vanguard”)¹ welcomes the Department of Labor’s (“Department”) proposal to amend the investment duties regulation under Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) to clarify the application of ERISA’s fiduciary duties of prudence and loyalty to selecting investments and exercising shareholder rights, such as proxy voting.² We believe the Proposal will benefit plan participants and beneficiaries by ensuring that ERISA fiduciaries continue to place paramount importance on a plan’s financial performance. We also appreciate that the Proposal provides fiduciaries greater certainty that their investment and proxy voting decisions may consider other factors that are material to the risk-return analysis, including factors related to environmental, social, or governance (“ESG”) considerations.

We write to support this framework, which appropriately prioritizes the long-term investment success of plan participants and beneficiaries and recognizes that careful investment selection and effective stewardship contribute to investment success. We also suggest a modest clarification to confirm how fiduciaries can display certain information required by the Proposal.

The Proposal will provide retirement investors with greater choice in investments and preserve their access to stewardship activities.

Vanguard’s core purpose is to take a stand for all investors, to treat them fairly, and to give them the best chance for investment success. Consistent with this purpose, we have long advocated

¹ Vanguard is one of the world’s leading asset managers and a leading provider of investment, advisory, and recordkeeping services for defined contribution retirement plans. As of October 31, 2021, Vanguard managed assets globally on behalf of more than 30 million investors. We provide direct recordkeeping and investment related services to nearly 5 million participants in nearly 1,700 defined contribution plans.

² Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (October 14, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf> (“Proposal”).

that retirement investors are best served by broadly diversified portfolios overseen by diligent management teams that engage with portfolio companies to promote sustainable, long-term value creation by helping companies understand and manage material risks. We also believe all investors, including retirement plan participants, should have the ability to make informed decisions to invest in a wide range of investment products, consistent with their personal preferences, investment objectives, and risk tolerance. We believe the Proposal promotes these objectives.

In 2020, Vanguard expressed concern that proposed changes to the Department's investment duties regulation could constrain retirement investors' access to certain classes of investment products and deprive them of the benefits of investment stewardship programs.³ For many years, the Department's non-regulatory guidance recognized that, in appropriate circumstances, an ERISA fiduciary could offer investment alternatives selected in part for benefits apart from investment return, including managing risks associated with ESG considerations (under the so-called "all things being equal" test). This framework also recognized that a fiduciary can and should vote proxies or exercise other shareholder rights in any manner consistent with the fiduciary's obligations under ERISA's prudence and loyalty requirements. The 2020 changes, however, altered this framework and introduced ambiguity about whether a fiduciary may take material ESG considerations into account when selecting investment alternatives or voting proxies on behalf of a plan.

The Proposal would remove these constraints by clarifying that when evaluating potential investments, a prudent fiduciary may consider any factor that is "material to the risk-return analysis"⁴ and that "proxies should be voted as part of the process of managing the plan's investment" unless the fiduciary "determines voting proxies may not be in the plan's best interest."⁵ In addition, when more than one investment alternative equally serves the financial interests of plan participants and beneficiaries, the fiduciary may take other, non-investment factors into account, provided they are "prominently displayed in disclosure materials provided to participants and beneficiaries." These proposed changes will reduce the uncertainty ERISA fiduciaries face when selecting plan investments, will promote, rather than discourage, diligent investment stewardship practices, and will provide investors with more choice in the allocation of their retirement assets.

We support these outcomes. The Proposal's approach to investment selection will encourage fiduciaries to offer plan participants and beneficiaries a broad range of investment options, including appropriate ESG alternatives, provided they are based on material risk-return factors. We believe the approach is sufficiently flexible to remain durable as investment strategies and

³ See Letter from Anne Robinson, Managing Director and General Counsel, The Vanguard Group, Inc., to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated October 5, 2020, *available at* <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00239.pdf>; Letter from John James, Managing Director, Institutional Investor Group, The Vanguard Group, Inc., to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated July 30, 2020, *available at* <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00648.pdf>.

⁴ See Proposed § 2550.404a-1(b)(4).

⁵ See Proposal at 57281. The Proposal also would remove certain burdens that may, over time, have discouraged voting by some fiduciaries.

markets evolve.⁶ Removing barriers to voting proxies will encourage fiduciaries to continue stewardship programs that protect shareholder value and promote long-term investor returns. Investment stewardship programs provide enduring benefits to investors, and the proposed amendments will help ensure ERISA fiduciaries can continue protecting shareholder value in this way.

The Department should clarify fiduciaries' requirements to display collateral benefits under the Proposal's "tie-breaker" scenario.

We appreciate that the Proposal recognizes the value fiduciaries add when choosing among competing investment alternatives that equally serve the financial interests of a plan.⁷ The Proposal appropriately recognizes the need for flexibility when fiduciaries "break a tie" and clarifies that a fiduciary may evaluate collateral benefits when doing so, provided the collateral benefit is prominently displayed in disclosure materials. This flexibility is appropriate when choosing among investment alternatives with equal investment merit, and we appreciate that the proposed standard applies equally to all types of investments and collateral benefits. We further appreciate that the Proposal's tie-breaker standard generally aligns with established Department guidance that effectively protected the interests of plan participants and beneficiaries for more than two decades.⁸

We respectfully suggest that the Department clarify one aspect of the proposed tie-breaker standard that diverges from prior guidance: the phrase "prominently displayed." Under proposed rule 404a-1(c)(3), if an ERISA fiduciary selects an investment based on collateral benefits, the fiduciary "must ensure that the collateral benefits of the investment product are prominently displayed in disclosure materials provided to participants and beneficiaries."⁹ The Proposal provides fiduciaries flexibility over how they satisfy this requirement and indicates that a plan fiduciary likely "could simply use the required disclosure under 29 CFR 2550.404a-5," potentially "with minor modifications or clarifications."¹⁰ We fully agree a fiduciary should display information about collateral benefits to plan participants and beneficiaries. This information will protect participants and beneficiaries by ensuring that plan sponsors fully considered collateral benefits alongside financial performance. We further believe that fiduciaries should provide this information at least as prominently as they disclose foundational information about the goals, strategies, costs, and principal risks of an investment alternative in 404(a)(5) disclosures. To avoid confusion and help participants leverage the Section 404(a)(5) disclosures as a consolidated source of important investment information, we encourage the Department to clarify in its rule text that disclosing collateral benefits in compliance with Section 404(a)(5) satisfies the display requirements of proposed rule 404a-1(c)(3).

⁶ Over the past several years, we have observed a meaningful increase in product availability, providing fiduciaries with the opportunity to reflect ESG considerations across asset classes. We also support that the Proposal removes restrictions on qualified default investment alternatives and agree with the Investment Company Institute that it is unclear how these restrictions would apply in practice, and they are not necessary. *See* Letter from Eric J. Pan, President and CEO, Investment Company Institute, to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated December 13, 2021.

⁷ *See* Proposal at 57278.

⁸ *See* Proposal at 57278.

⁹ *See* Proposal at 57303 (proposed § 2550.404a-1(c)(3)).

¹⁰ *See* Proposal at 57280.

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Vanguard appreciates the opportunity to comment on the Proposal and welcomes the opportunity to continue working with the Department on these important issues. If you have any questions or would like to discuss our views further, please contact Robert Stone, Assistant General Counsel, at (610) 503-5188 or robert_stone@vanguard.com; or George Gilbert, Senior Policy Advisor, at (202) 824-1293 or george_gilbert@vanguard.com.

Sincerely,

/s/ John James

John James
Managing Director, Institutional Investor Group
The Vanguard Group, Inc.