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December 13, 2021

SUBMITTED VIA REGULATIONS.GOV

The Honorable Martin J. Walsh
Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

RE: RIN 1210-AC03, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Dear Secretary Walsh:

We write in opposition to the Department of Labor's (DOL or Department) proposed rule on "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."¹ The proposed rule upends important protections for retirement plan participants and beneficiaries finalized by the Department in 2020.² The 2020 financial factors rule and proxy voting rule updated the investment duties regulation to clarify that the *Employee Retirement Income Security Act of 1974* (ERISA) prohibits fiduciaries from subordinating the financial interests of retirement plan participants to non-financial agendas, which threaten retirement savings. We are disappointed by the proposed rule, which abandons the purpose of ERISA's fiduciary duties of prudence and loyalty to plan participants and inappropriately injects political objectives into retirement savings decisions.

ERISA's fundamental purpose is to protect the benefits of America's workers and their beneficiaries. Central to this protection is DOL's enforcement of ERISA's fiduciary duties of loyalty and prudence. Republican Members of the Committee on Education and Labor are

¹ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57,272 (proposed Oct. 13, 2021) [hereinafter Proposed Rule].

² Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020) [hereinafter Financial Factors Rule]; Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81,658 (Dec. 16, 2020).

committed to ensuring that DOL properly interprets and enforces ERISA’s fiduciary standards, including the selection and monitoring of investments, as well as the exercise of shareholder rights. Prior to the release of the proposed rule, the Department long held that, when selecting investments, plan fiduciaries “must focus solely on the plan’s financial risks and returns and keep the interests of plan participants and beneficiaries in their plan benefits paramount.”³ The proposed rule improperly forces partisan political preferences and objectives into such decisions.

The two rules issued in 2020 correctly prioritize the financial interests of retirement savers and their families. The financial factors rule clarifies that “a fiduciary’s evaluation of an investment or investment course of action must be based only on pecuniary factors.”⁴ The rule’s focus on pecuniary factors is grounded in Supreme Court precedent. In 2014, the Supreme Court ruled unanimously in *Fifth Third Bancorp v. Dudenhoeffer* that under ERISA, “benefits” refers to “financial benefits” and “does not cover nonpecuniary benefits.”⁵ As former Secretary of Labor Eugene Scalia wrote, the financial factors rule correctly “reminds plan providers that it is unlawful to sacrifice returns, or accept additional risk, through investments intended to promote a social or political end.”⁶

The proxy voting rule, much like the financial factors rule, places the financial interests of plan participants first. The rule confirms that proxy voting decisions and the exercise of other shareholder rights must be solely in the interest of providing financial benefits to participants and beneficiaries. The rule further ensures that when voting proxies or exercising shareholder rights, ERISA fiduciaries must not subordinate the financial interests of plan participants and beneficiaries to non-pecuniary or collateral objectives.⁷

The proposed rule inappropriately directs fiduciaries to consider specific environmental, social, and governance (ESG) factors when selecting and monitoring investments. Unlike the financial factors rule, which states that investments must be selected and monitored based on pecuniary benefits, the proposed rule effectively requires fiduciaries to consider collateral ESG factors when selecting investments or an investment course of action—even when they may not be relevant to risk or return. The proposed rule states that an investment’s projected return “may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”⁸ In fact, ERISA consultants are already advising that the proposed rule “can be read not just to authorize consideration of ESG factors but to require it ‘often.’”⁹ By proposing this new rule, the

³ Financial Factors Rule, *supra* note 2, at 72,848.

⁴ *Id.* at 72,884.

⁵ 573 U.S. 409, 421 (2014) (emphasis in original).

⁶ Eugene Scalia, *Retirees’ Security Trumps Other Social Goals*, WALL ST. J., June 23, 2020.

⁷ News Release, DOL, U.S. Department of Labor Issues Final Rule on Proxy Voting and Shareholder Rights by Employee Benefit Plans (Dec. 11, 2020).

⁸ Proposed Rule, *supra* note 1, at 57,302.

⁹ OCT. THREE CONSULTING, DOL PROPOSES NEW ESG AND PROXY VOTING REGULATION – WOULD SIGNIFICANTLY CHANGE RULES ADOPTED BY THE TRUMP DOL AT THE END OF 2020, (Oct. 15, 2021),

<https://www.octoberthree.com/dol-proposes-new-esg-and-proxy-voting-regulation-would-significantly-change-rules-adopted-by-the-trump-dol-at-the-end-of-2020/>.

Department is clearly singling out specific factors to shape fiduciaries' investment decisions, which serve political priorities and objectives.

On January 20, 2021, President Biden signed Executive Order (EO) 13990 titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." The EO directs all federal agencies to review, revise, and rescind regulations issued by the Trump administration that were inconsistent with the administration's policy of prioritizing "environmental justice and the creation of the well-paying union jobs."¹⁰ The White House also released a list of regulations the administration had predetermined must be reviewed, which included the financial factors rule.¹¹ By issuing the proposed rule pursuant to EO 13990, the Department is inappropriately favoring the partisan policy objectives of the Biden administration over the financial interests of retirement savers. This scheme is in clear conflict with ERISA's duties of loyalty to plan participants and is counter to the mission of the Employee Benefits Security Administration to ensure the security of the retirement benefits of America's workers and their families.

The preamble to the proposed rule claims that the 2020 financial factors rule includes "multiple statements that have been interpreted as putting the thumb on the scale against their consideration."¹² By listing specific examples of climate change, governance, and workforce factors¹³, the proposed rule effectively requires that such factors be considered material to an investment's risk and return. As such, the proposed rule is guilty of putting the thumb on the scale in favor of such investments. If the Department was truly interested in protecting retirement savers from unscrupulous actions, it would withdraw this improper coercion on fiduciaries to consider collateral ESG factors.

Furthermore, the Department falsely claims that the ESG examples included in the proposed rule have been listed in previous guidance.¹⁴ Yet, the Department has never listed "labor relations" as a factor that may be material to an investment or investment course of action. The inclusion of "labor relations" in the proposed regulation is a special interest hand-out to President Biden's friends in Big Labor. It is well-documented that union pension funds direct investments to projects and companies that are unionized in order to boost union participation.¹⁵ The proposed rule would make this unseemly practice a requirement.

Finally, we are also concerned that the proposed rule allows fiduciaries to vote proxies and exercise other shareholder rights, regardless of such actions' financial benefit to the plan or plan participants. The proposed rule requires fiduciaries when exercising shareholder rights to consider ESG factors that the Department has arbitrarily deemed material, such as climate change and labor

¹⁰ Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

¹¹ News Release, The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>.

¹² Proposed Rule, *supra* note 1, at 57,294.

¹³ *Id.* at 57,302-57,303.

¹⁴ *Id.* at 57,278.

¹⁵ See, e.g., THOMAS CROFT & ANNIE MALHOTRA, THE RESPONSIBLE INVESTOR HANDBOOK: MOBILIZING WORKERS' CAPITAL FOR A SUSTAINABLE WORLD (2017).

relations. This is especially troubling given the reliance of plans on the recommendations of a select few proxy advisory firms.¹⁶

In conclusion, we are extremely concerned that the Biden administration is jeopardizing the retirement savings of Americans to “steer private capital to implement an agenda they can’t pass through Congress.”¹⁷ It is incumbent on DOL to ensure its policies and regulatory guidance are consistent with the fundamental tenets of ERISA and the mission of EBSA—to protect the retirement savings of America’s workers and their families. As former Labor Secretary Eugene Scalia aptly put it, “A fiduciary’s duty is to retirees alone, because under ERISA one ‘social’ goal trumps all others—retirement security for American workers.”¹⁸ We therefore request that the Department immediately rescind the proposed rule and begin enforcing the existing rules, which prioritize the financial interests of workers and retirees.

Thank you for your consideration of these comments.

Respectfully submitted,



Virginia Foxx
Ranking Member



Rick W. Allen
Ranking Member
Subcommittee on Health, Employment,
Labor, and Pensions

¹⁶ See Editorial, *Your New Woke 401(k): Biden Proposes to Rewrite ERISA to Steer Investment Choices*, WALL ST. J., Oct. 20, 2021.

¹⁷ *Id.*

¹⁸ Scalia, *supra* note 6.