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October 1, 2020

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: Financial Factors in Selecting Plan Investments Proposed Regulation

By electronic transmission to Federal eRulemaking Portal: [www.regulations.gov](http://www.regulations.gov).

Re: RIN 1210-AB91 a proposed U.S. Department of Labor rule  
pertaining to Fiduciary Duties Regarding Proxy Voting and Shareholder Rights  
released in 85 Fed. Reg. 55,219 (September 4, 2020)

Dear Madam or Sir:

My firm, the Law Offices of Albert Feuer, with law offices in New York City focuses on employee benefits, executive compensation, estate planning and administration, and related tax issues. I have written and spoken extensively on employee benefits issues. I am submitting these comments in my private capacity, not on behalf of any client.

It is advisable for the U. S. Department of Labor (DOL) to revise the proposed ERISA duties regulation promulgated in 85 Fed. Reg. 55,219 (September 4, 2020), that would govern how an ERISA plan fiduciary may exercise the shareholder rights of companies in the plan's portfolio (the "DOL Shareholder Proposal") to

- Delete the requirement that plan fiduciaries subject to ERISA section 404 considering how to exercise their shareholder rights may take into account

“only factors that they prudently determine will affect the economic value of the plan’s investment.” The DOL Shareholder Proposal would replace 29 C.F.R § 2509.2016–01 that was promulgated by DOL Int. Bull. 2016-01, 81 Fed. Reg. 95,879 (Dec. 29, 2016). The existing regulation does not mention such an exercise requirement. Both the existing and the proposed regulation prohibit fiduciaries from exercises of shareholder rights that would be expected to diminish the economic value of the plan’s investments.

- Delete the requirement that an ERISA fiduciary may only exercise proxy rights in a portfolio company if the fiduciary finds that the matter voted upon would have an economic impact on the plan. The DOL Shareholder Proposal further provides, that if the fiduciary so finds, the proxy must be exercised. The proposal fails to state that in such case the proxy must be exercised to have a positive economic impact on the plan. The DOL Shareholder Proposal permits the fiduciary to avoid such individualized determinations if the fiduciary takes advantage of one of three safe harbors that discourage a fiduciary from voting against the position of the management of the portfolio company unless the fiduciary determines that such vote would likely have a significant or material impact on the plan’s investments. 85 Fed. Reg. 55,219, 242, Proposed 29 C.F.R. § 2550.404a–1 (e)(2)(iii). Thus, as a practical matter, management proposals could not be challenged unless the company constitutes a large portion of the plan’s portfolio although there seems to be an exception for non-advisory proposals substantially related to the corporation’s business activities, such as corporate buybacks. 85 Fed. Reg. 55,219, 242, Proposed 29 C.F.R. § 2550.404a–1 (e)(2)(iii)(B). It is not clear why the safe harbor does not also permit advisory proposals substantially related to the corporation’s business activities, such as the one described in the next paragraph.

There does not appear to be a good reason why an ERISA

fiduciary should not support an advisory proposal that a company in an ERISA plan's portfolio designate a board member or a committee of the board as accountable for the company's assessment and management of the financial risks from climate change. However, if the proposal would not have a significant positive economic impact on the plan's portfolio it would not qualify under the safe harbor proposals. The proposal would not appear to pose any risk of an adverse economic effect on the plan's investment portfolio, but it is unclear if the fiduciary could show the proposal would improve the economic performance of the plan's portfolio. In fact, the proposal may have significant support from other investors, and was recently described as an expectation for New York insurers by the New York Department of Financial Services. [Linda A Lacewell, Supt. Financial Services, \*Climate Change and Financial Risks, Insurance Circular Letter No. 15 \(2020\)\*, N. Y. S DEP'T OF FINANCIAL SERVICES, \(September 22, 2020\)](#) .

- Provide that it is advisable for an ERISA fiduciary subject to ERISA section 404, who is determining how to exercise shareholder rights in a portfolio company, to consider how other shareholders of the company would behave, and to disregard the fraction of the plan's portfolio that the company constitutes. For example, in determining whether to vote in favor of a proposed acquisition by a portfolio company, it would be relevant whether there is a shareholder campaign in opposition to the acquisition. However, it would be irrelevant whether the company is .5% or 5% of the plan's portfolio. The existing regulation takes this approach when describing the considerations that a prudent fiduciary would use to make its requisite pre-exercise analysis of the expected economic effects of the fiduciary's exercise options. In contrast, the DOL Shareholder Proposal, without any explanation, suggests that the fraction of the portfolio is relevant, but fails to mention the actions of other shareholder in analyzing the fiduciary's exercise options. 85 Fed. Reg. 55,219, 242, Proposed 29

C.F.R. § 2550.404a-1 (e)(2)(ii)(B).

The DOL describes the DOL Shareholder Proposal as intended to prevent ERISA fiduciaries from supporting or pursuing “proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments used for the payment of benefits or plan administrative expenses.” The DOL made similar statements in the ERISA duties regulation promulgated in 85 Fed. Reg. 39,113 (June 30, 2020). See generally [Albert Feuer, \*The Proposed DOL ESG ERISA Regulation and the Public Reaction\*, 48 COMP. PLAN. J. 201 \(Aug. 7, 2020\)](#).

Regardless of one’s view of environmental, socially responsible, sustainable, or ESG investing (including exercising shareholder rights with respect to any of the investor’s portfolio companies), the DOL Shareholder Proposal may only discourage such ethical-factor investments to the extent that ERISA prohibits those investments. Each of the Proposal’s three features discussed above would discourage an ERISA fiduciary from exercising shareholder rights based on any ethical factors. This is because the fiduciary could only do so if the fiduciary would meet the heavy burden of showing each such engagement activity would increase the expected economic value of the plan’s investments, or fitted within one of the three safe harbor provisions. As described in my attached article, [Albert Feuer, \*DOL Lacks a Convincing Legal Basis for Attempts to Discourage ESG/Sustainable Investing\*, DAILY TAX REP. \(Sept. 18, 2020\)](#) there is no legal basis for imposing any of these requirements. Moreover, that article explains why if the DOL Shareholder Proposal is finalized in its current form it could also discourage fiduciaries of state and local savings and retirement plans from exercising shareholder rights based on any ethical factors.

It is advisable for the DOL to revise the DOL Shareholder Proposal to be consistent with ERISA, the usual practice of ERISA plan fiduciaries in exercising shareholder rights, the prior DOL guidance, and the reasonable preferences of many ERISA plan fiduciaries, participants, and beneficiaries for investments that provide ethical benefits without reducing the economic value of plan investments. These exercises of shareholder rights may often, but not always, thereby improve the plan’s

Department of Labor

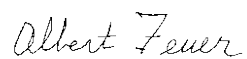
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economic returns.

I would be happy to meet with staff or provide any additional information that may be of use in developing a record or analysis of various ethical-factor investments.

Respectfully submitted,

A handwritten signature in cursive script that reads "Albert Feuer".

Albert Feuer

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## INSIGHT: DOL Lacks a Convincing Legal Basis for Attempts to Discourage ESG/Sustainable Investing



BY ALBERT FEUER

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On June 30, 2020, the U.S. Department of Labor (DOL) published in the Federal Register, 85 Fed. Reg. 39,113, proposed amendments to the regulations that set forth the duties of ERISA plan fiduciaries when selecting and monitoring plan investments and investment alternatives for plan participants and beneficiaries that would discourage what the DOL called “ESG” investments (DOL ESG/sustainable investment proposal). On Sept. 4, 2020, the DOL published, in the Federal Register, 85 Fed. Reg. 55,222, proposed amendments to the regulations that set forth the duties of ERISA plan fiduciaries when exercising proxy voting and other shareholder rights that would discourage the pursuit of what the DOL called “environmental, social or public policy agendas.” (DOL ESG/sustainable proxy proposal). The first proposal applies to all plan investments. The second proposal is limited to plan investments in corporate stock. Corporate stock includes investments in the many mutual funds organized as corporations that pursue stewardship policies that include ‘environmental, social or public policy’ agendas.”

Historically, the DOL has a long-standing prohibition on ERISA fiduciaries making investment decisions (including exercising shareholder rights) that would subordinate an investment’s expected economic return to any non-economic concern. In the new proposals, the DOL prohibits ERISA fiduciaries from consider any non-economic concerns when making any investment

decisions. The DOL failed to present a convincing legal basis for this dramatic change. In addition, these proposals may discourage not only ERISA plans, but also any non-ERISA trustee savings or retirement plan, such as a church plan, or a state or local public plan, from making ESG/sustainable investments.

### Many Savings and Retirement Plans and their Participants and Beneficiaries Wish to Make ESG/Sustainable Investments and Support ESG/Sustainable Corporate Resolutions

Savings and Retirement Plan participants and beneficiaries, like many other investors, often seek and make ESG/sustainable investments not only because such investments, like other investments, are perceived as good economic investments. They also do so because, unlike other investments, these investments are also perceived to be ethically beneficial without sacrificing any economic value. They support ESG/sustainable resolutions for the same reasons. In short, they not only want to do well by doing good, but they also want to know they have done good. See e.g., Jordyn Holman & Thomas Buckley, *How Ben & Jerry’s Perfected the Delicate Recipe for Corporate Activism*, *Bloomberg Bus. Wk.* (July 22, 2020). Thus, many plan fiduciaries seek to accommodate their plan participant and beneficiary desires by making such direct plan investments, or such investment alternatives available in self-directed plans, by distributing regular reports to those individuals about the extent of those ethical-factor benefits, and supporting such corporate resolutions.

ERISA already requires these fiduciaries to make and execute these decisions in a manner that complies with the prudent man requirements, the diversification requirements, and the plan document requirements of ERISA Sections 404(a)(1)(B), (C), and (D), respectively. Neither the DOL ESG/sustainable investment proposal, nor the DOL ESG/sustainable proxy proposal shows that a substantial number of ERISA fiduciaries are failing to comply with these rules or complying with these rules but diminishing economic performance. Other premises of the DOL ESG/sustainable investment proposal, and the public comments made with respect to that proposal are questioned in detail in Albert Feuer,

*The Proposed DOL ESG ERISA Regulation and the Public Reaction*, 48 COMP. PLAN. J. 201 (Aug. 7, 2020). Thus, it is unclear why the DOL wishes to impose these new and dramatic investment restrictions.

**The statute cited by the DOL as the basis for prohibiting fiduciaries from considering any non-economic concerns when making an investment decision does not support such a prohibition**

In both proposals, the DOL relies on the following initial words of ERISA Section 404(a)(1) (emphasis added):

(a) Prudent man standard of care.

(1) Subject to [ERISA] sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) *for the exclusive purpose of:*

- (i) *providing benefits to participants and their beneficiaries;* and
- (ii) *defraying reasonable expenses of administering the plan;*

The DOL historically interpreted this exclusive purpose mandate to prohibit ERISA plan fiduciaries from making investment decisions (including exercising shareholder rights) that would subordinate an investment's expected economic return to any non-economic concern. This is consistent with the lack of any mention of non-economic benefits in the statute.

The ERISA language is consistent with the DOL interpretation more than 40 years earlier in the DOL Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc., 1988 ERISA Lexis 19 (Feb. 23, 1988) (Avon opinion) that was discussed in the DOL ESG/sustainable proxy proposal. The DOL stated that "[i]n general, the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock. Avon opinion, at \*5-\*6. This opinion, like the exclusive purpose mandate, did not explicitly limit the role of, or even mention non-economic concerns. The DOL held that the managing of plan assets included voting proxies with respect "to a proposal to change the state of incorporation of a corporation in which a plan owned shares (thereby possibly affecting shareholders' rights to participate in the decision-making process of the corporation which, in turn, affects the value of their investment) and a proposal to rescind 'poison pill' arrangements with regard to various corporations in which a plan is invested." Avon opinion at \*6.

The ERISA language is also consistent with the DOL interpretation more than 30 years earlier in Advisory opinion 98-04A, U.S. Dep't Of Labor (May 28, 1998) (Calvert opinion) that, in 2018, the DOL apparently reaffirmed. DOL Field Ass't. Bull. 2018-01, at 6. n.6 (April 23, 2018) This opinion addressed and limited the investment role of non-economic concerns as follows, "A decision to make an investment, or to designate an investment alternative, may not be influenced by non-economic factors unless the investment ultimately chosen for the plan, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments." Calvert opinion, at 2.

This historical interpretation, but not the new interpretation, is also consistent with the interaction between the exclusive purpose mandate and the other sections of ERISA. ERISA Section 406 reinforces the mandate by explicitly prohibiting any transactions between ERISA plans and plan fiduciaries and other parties in interest. However, there are 20 explicit and specific statutory exemptions from these exclusive purpose rules. ERISA Sections 408(b)(1)-(20). Each exemption requires that there be no financial detriment to plan participants or beneficiaries from the exemption, and none mentions non-economic concerns. In addition, there is a statutory procedure for obtaining individual or class exemptions from these rules for transactions that are "protective of the rights of participants and beneficiaries of such plan." ERISA Section 408(a). [Almost 40 different DOL class exemptions are now in effect, and none mentions any non-economic concerns.](#) Thus, it is clear that the exclusive benefit mandate is designed to prevent reductions in the economic value of plan assets that could in turn reduce benefit payments. Thus, it has no relevance to conduct that would not so reduce benefit payments.

The historical interpretation, but not the new interpretation is also consistent with the dominating general purpose of ERISA, namely the protection of ERISA plan

benefit payments. There seems to be no rational basis for the new interpretation that ERISA implicitly prohibits the consideration of non-economic concerns in investment decisions that do not diminish the investment's economic return. Such consideration would not adversely affect the benefit payments available to plan participants and beneficiaries. Thus, the historical interpretation should continue.

**The Supreme Court decisions cited by the DOL as the basis for prohibiting fiduciaries from considering any non-economic concerns when making any investment decisions do not support such a prohibition**

The DOL claims in the DOL ESG/sustainable investment proposal that the U.S. Supreme Court unanimously held that the "benefits" to be pursued by ERISA fiduciaries as their "exclusive purpose" do not include a "nonpecuniary benefit." 85 Fed Reg. 39,113, at 114. In fact, the Supreme Court decision made the point that the fiduciary prudence duty does not permit non-pecuniary benefits to adversely affect the economic benefits of the plan participants and beneficiaries. [Fifth Third Bancorp v. Dudenhoeffer](#). This is the historical DOL position, not the new DOL position, as the proposal suggests.

The DOL observes in the DOL ESG/sustainable proxy proposal that the Supreme Court declared that ERISA Section 404(a)(1) requires that "fiduciaries act with an 'eye single' to the interests of participants and beneficiaries." 85 Fed Reg. 55,219, at 221. In fact, the Supreme Court decision did not address investment decisions. Instead, the court held that the decisions of an HMO's physician employees, about both how to diagnose or treat a patient's condition and whether the patient's ERISA medical plan covers the condition or its treatment procedure—are not fiduciary acts within meaning of ERISA. [Pegram v. Herdrich](#).

No court decision after the Calvert opinion, or any earlier court decision addresses whether ERISA plan fiduciaries may consider non-economic concerns in making investments, if the concerns do not affect the expected economic return of the investment.

**Fiduciaries of Tax-Qualified Trust Plans That are Not Subject to ERISA, such as State and Local Government Plans, May Need to Follow the DOL ESG/Sustainable Investment Proposal and the DOL ESG/Sustainable Proxy Proposal if the Plans wish to Retain their tax-qualification**

A tax-qualified trust plan is a pension, profit-sharing, or stock bonus plan that is funded with a trust, a custodial account, or a group annuity contract that meets the requirements of tax code Sections 401(a) and (f). Such plans are not subject to federal income tax, tax code Section 501(a), and their participants are not taxed on their benefits until those benefits are distributed. tax code Section 402(a). However, such a plan trust must be "created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries." tax code Section 401(a) (emphasis added). There does not seem to be a meaningful difference between that language and the ERISA exclusive benefit language. Thus, if ERISA plans may not generally make ESG/sustainable investments, including casting proxy votes, because of the ERISA exclusive benefit language, absent a showing that the plan that the ESG/sustainable concerns in the investment decision were only economic, tax-qualified trustee plans



are subject to same investment restraints. However, not all tax-qualified trustee plans are ERISA plans. Those sponsored by state or local governments, by churches, or whose participants are limited to owner-employees are not ERISA plans.

## CONCLUSIONS

The new prohibition of ERISA fiduciaries considering any non-economic concerns when making investment decisions lacks a convincing legal basis. If adopted, as proposed, those regulations are likely to discourage such investments and proxy votes not only by ERISA plans, but by non-ERISA trustee plans. Those plans include many major state and local public plans, such as those of New York State, <https://www.osc.state.ny.us/common-retirement-fund/pension-fund-overview>, New York City, <https://www.nycers.org/board-trustees>, Florida, <https://www.myfrs.com/sponsor.htm>, the Teachers Retirement System of Texas, <https://www.trs.texas.gov/Pages/board.aspx>, or of North Carolina, <https://www.myncretirement.com/governance/boards-and-committees>. Furthermore, even though the underlying corporate securities of a mutual fund or an exchange traded fund are not generally plan assets,

ERISA Section 3(21)(B), and thus plan fiduciaries are not generally responsible for the fund's interaction with such corporations, those proposed rules may prevent ERISA and non-ERISA trustee plans from investing in a fund of any investment advisor, such as the largest three, Blackrock, Vanguard or State Street Global Advisors, each of whose stewardship policies require that its proxy voting decisions take into account non-economic concerns. Bernard S. Sharfman, *The Conflict between Blackrock's Shareholder Activism and ERISA's Fiduciary Duties* (September 13, 2020), at 13-14 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3691957](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691957). Thus, the DOL needs to revise both of its proposals substantially before finalizing the regulation amendments.

*This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.*

## Author Information

*Albert Feuer is the principal attorney in the Law Offices of Albert Feuer, Forest Hills, N.Y. The firm focuses on employee benefits, executive compensation, estate planning and administration, and related tax issues. Anna Masilela deserves credit for substantially improving the focus and clarity of the article.*