ETHIICS.org
Tuesday, 28 July 2020

Secretary Scalia
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Secretary Scalia,

In response to 'Financial Factors in Selecting Plan Investments' - Rule RIN 1210-AB95

The proposed regulation would provide clarity on the investment duties of plan fiduciaries and should be enacted. The pervasiveness of ESG in the investment industry is rapidly limiting the options of plan fiduciaries in their choice of unambiguously economic-return focused products. Moreover, ESG's 'social' focus typically contravenes US labor law. Finally, ESG advocacy via corporate and investment mandates represents an inversion of democratic accountability and good governance.

Market structure

ESG has become an essential fashion item for investment product providers, contributing to diminishing investment options and a widely observed investment bubble[1]. Some products have ESG as central to their thesis and marketing. In this sense, ESG is advertised as an asset class. Such funds might invest in renewable energy, or have a social impact focus. Others argue that ESG is a risk management tool for mainstream investors, and is therefore a financial factor. However, investment products designed for financial return should not require a label in order to manage economic risks, so this rationale is circular. The reality is simpler. ESG is political activism presented as financial strategy. Its rapid adoption by investment fiduciaries and corporate executives around the world is due, not to a sober analysis of its economic merits, but from the 'carrot' of displaying virtue and the 'stick' of appearing unethical by not adopting this deceptively simplistic label. Such pseudo-moralism inevitably encroaches on genuine ethical judgements and decision-making. As such, ESG sounds unimpeachable, but it is, in fact, discreditable.

Political activism and discrimination

[1] "'Monstrous' run for responsible stocks stokes fears of a bubble" Financial Times, Feb 21 2020.

The proposed rule notes: "There is no consensus about what constitutes a genuine ESG investment". In fact, ESG philosophy verges on the dogmatic. Our analysis of public ESG-related formal private and public pronouncements may provide clarity:

'E': refers to demonstrating ever greater efforts to meet the concerns of the environmental lobby, irrespective of local regulations.

While there is no suggestion that investment managers should pursue Environmentalism at any cost, it is clear that the importance attached to the ESG label nevertheless imposes cost (in terms of a fundraising penalty) on any investment manager that chooses to 'merely' abide by the law.

'S': refers predominantly to social constructionism, wherein those organisations that have lower or higher proportions of members of specific identity groups are favoured.

While quotas are rarely advocated, the emphasis placed on such group-characteristics by ESG activists leads to effective contravention of Title VII of the Civil Rights Act of 1964. Only rarely is 'S' framed as furthering social goals outside of this narrow political agenda – such as encouraging the good, fair and unprejudiced treatment of individuals. Tackling instances of unfair disadvantage is a context-specific judgement-laden activity and cannot be captured in top-down ESG reporting. Even amid the current public health crisis, this focus on social engineering has not altered observably. Top-down social engineering is cheap, visible, and no doubt, well-intentioned. US legislators have debated its efficacy for generations, and have been broadly against. ESG has rendered that debate obsolete.

Further, ESG contributes to a corporate cancel culture, where junior employees are disciplined or fired as a consequence of expressing innocuous non-ESG compliant views[2].

We suggest that plan fiduciaries should be required to obtain from product providers a clear declaration and firm undertaking that their social 'risk management' processes do not in any way transgress, or encourage the transgression, of US labor laws relating to the protection of employees against unfair discrimination.

Governance and lobbying

'G': Ostensibly governance is the most innocuous component of ESG. However, in practice, ESG circumvents democracy in pursuit of political goals, and in so doing, subverts the legitimate governance and accountability that exists in a free society.

It would therefore be good practice if all ESG product providers were registered under the Honest Leadership and Open Government Act.

[2] See, for instance, "Stop Firing the Innocent", The Atlantic, June 27, 2020

"All things being equal test"

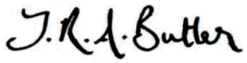
The Department's judgment that "true ties rarely, if ever, occur," is sound. It follows that persisting with an 'all things being equal test' continues an unwarranted complexity in the rulebook. The fact that a theoretical circumstance, never observed in history, may exist is not sufficient justification, and runs counter to the best tradition of experience-led common law.

Conclusion

ESG is a political campaign that uses financial risk-management and pseudo-morality as a Trojan Horse in order to arrogate the assets of America's retirees to advance its political agenda. The ESG sticker fastens the lips of American workers, unfairly discriminates against them in the workplace, and uses their savings to pursue political goals for which they did not vote. Such corporatism ultimately engenders mistrust, damages the reputation of the investment industry, and subordinates true ethical decision-making.

We believe the proposed regulation will help clarify the role of ESG in society, while protecting the assets and future income of America's retirement savers from political expropriation.

Yours sincerely,



Ross Butler

President

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