TAS STRATEGIES

Mr. Jason A. DeWitt
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, DC 20210
Attention: Financial Factors in Selecting Plan Investments Proposed Regulation

Rule Number: RIN 1210-AB95

Dear Mr. DeWitt:

Thank you for this opportunity to comment on the Department of Labor's proposed regulation on ESG (energy, social, and corporate governance) investing, which was placed in the Federal Register on June 30.

I am an attorney and consultant with a deep interest in public and social policy. I was elected last year to be chairman of the board of the California Black Chamber of Commerce and serve on the Board of Directors American Association of Blacks in Energy. I serve or have served on several non-profit boards, including the St. Ignatius College Preparatory Board of Regents (Emeritus), Catholic Charities/CYO of San Francisco, Marin and San Mateo Counties (Emeritus), the Mission Dolores Academy, and I currently serve as a Board of Trustee of the University of San Francisco. I was formerly a Commissioner of the California Public Utilities Commission and was appointed by two Secretaries of the U.S. Department of Energy as a member of the National Petroleum Council. Prior to my public service, I was a counsel and chief compliance officer, advising major financial institutions, these institutions included Vice President and Senior Counsel of Bank of America, Vice President and Chief Compliance Officer, Wells Fargo Savings and Investment Group, which included Wells Fargo Nikko Investment Advisors, Principal and Senior Counsel Robertson Stephens Investment Bankers and other broker-dealers and hedge funds. In this capacity a considerable amount of my legal advice involved matters surrounding retirement savings and investment vehicles. I was also an Adjunct Professor of Law at the University of California Hastings College of Law and the Golden Gate University School of Law, where for nineteen years, I taught Securities Regulations, which included coverage of the Employment Retirement Income Security Act (ERISA), Qualified Plans and fiduciary obligations associated with the management of its assets.

<u>Fiduciary Duties Are the 'Highest Known to Law'</u>

I offer this resume to emphasize my main interests as they relate to the proposed rule. It is also relevant to the extent that ESG has crossed into the nexus of capital markets and their influence on energy markets. I am a fervent believer in the solemn responsibility of fiduciaries. The proposed rule uses the word "fiduciary" 89 times. Citing the law governing private pension plans, it states that "federal appellate courts have described ERISA's fiduciary duties as 'the highest known to law."[1] I completely agree.

The proposed rule also notes: "[T]he Department has construed the requirements that a fiduciary act solely in the interest of, and for the exclusive purpose of providing benefits to, participants and benefits as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives."

[1] https://www.federalregister.gov/documents/2020/06/30/2020-13705/financial-factors-in-selecting-plan-investments

I Support ESG for Individual Investors But Not It's Current Application for Pension Plans

The "unrelated objective" that is the focus of the Department's attention in the proposed rule is ESG. As a Lifetime Member of the National Association for the Advancement of Colored People, "NAACP", the nation's oldest civil rights organization, and a participant for decades in advocacy of enlightened social justice policy, I understand the importance of ESG, particularly its alleged focus of diversity on corporate boards, C-Suites and company procurement practices. As an African American I find these objectives of ESG aspirations largely unfulfilled. These important moral imperatives are used as a camouflage to advance environmental agenda's that do not reach the underserved communities alleged to be the ultimate beneficiaries. I absolutely and unapologetically support the notion of individuals making investment decisions based on their personal beliefs. To be frank, ESG is a subjective term that means something different to each of us. For this reason, amongst others, its application diminishes the returns on the portfolios and consequently the beneficiaries that fiduciaries are obligated to serve. But, fiduciaries are, as the proposed rule states, "statutorily-bound to a narrower objective: management with an 'eye single' to maximizing the funds available to pay retirement benefits."

It stands to reason that when investment advisors use social criteria to eliminate categories of stocks and bonds based upon principals as fundamentally subjective as ESG, they will have a smaller universe for choosing the very best assets for plan members. Members that are hardworking plan contributors and with retirements whose balances and returns too often are underfunded. Understanding the subjectivity of what is ESG, utilizing it as a criterion for picking investments is not in line with fiduciary duties.

The Question of Comparative Performance: A Real-Life Example

Studies have looked at the question of comparative performance between ESG funds and traditional investments, and the proposed rule cites some of those, including research by Wayne Winegarden of the Pacific Research Institute, who notes especially the high fees charged by ESG fund managers.[2] This begs the question of what is the opportunity cost of following a subjective criteria?

Let me draw your attention, however, to some real-life results that are especially disturbing. My home state's California Public Employees Retirement System (CalPERS) is the largest public pension fund in the United States, with approximately 2 million members and $400 billion in assets. CalPERS is almost certainly the pension system most identified with ESG.[3] CalPERS, for example, has banned tobacco and coal stocks from its portfolio and has applied ESG standards, which can be opaque and vague, throughout.

CalPERS has enormous resources (its operating budget is $2 billion a year), and it has dozens of investment firms as advisors, as well as substantial in-house capabilities. But look at the disappointing results. CalPERS reported on July 15 that for the fiscal year 2020, ending June 30, its returns were just 4.7%, well below the 7% target it has set for annualized long-term returns.[4] By comparison, an investment in Vanguard Balanced Fund, a simple mix of stock and bond indices, returned 8.2%;[5] in Fidelity Balanced, 10.5%.[6] Over the past five years, the CalPERS pension fund has returned an annual average of just 6.3%, compared with 8% for Vanguard Balanced and 8.2% for Fidelity Balanced. In the world of pension investing, those are huge differences. This along with California's wealth disparity and growing poverty rate beg the question of the "social" benefits of ESG? Further, the companies should allow their shareholders to direct the governing boards of their criteria to meet standards of equity. ESG is not a regulatory body and its influences should not dominate this discussion of social responsibility

Treatment of the Energy Sector

While my initial professional training is in securities and banking regulations, much of my career has evolved into the energy and utilities sectors. Those sectors are undergoing enormous change, adapting to the realities of climate change, decarbonization and varying consumer, industry, and regulatory demands. No one knows what the future holds, but some of the best analytical minds have been applied to the question, and everyday millions of investors are making decisions about the prices of energy, utility firm shares and asset holdings. Utility stocks and bonds have historically been a reliable safe haven for investors, particularly retirees. As net borrowers to

---

[2] www.pacificresearch.org/wp-content/uploads/2019/05/ESG_Funds_F_web.pdf
[3] https://www.calpers.ca.gov/docs/total-fund-investment-policy.pdf
[4] https://www.calpers.ca.gov/page/newsroom/calpers-news/2020/calpers-preliminary-investment-return-2019-
[5] https://investor.vanguard.com/mutual-funds/profile/performance/vbiax
[6] https://fundresearch.fidelity.com/mutual-funds/summary/316345206

finance infrastructure, utilities rely heavily on market indicators and credit ratings for capital investments. Investments successfully used to deliver electricity and natural gas to residential, commercial, and industrial customers on demand. This is the backbone of the U.S. economy. This is a globally competitive market where capital can shift in a millisecond to other markets with more defined parameters of social responsibility. An investment policy that rules out whole sectors or that depreciates their value based on debated ideological considerations harms people who depend on unbiased options for their retirements.

ESG Has Good Intentions, But Its Practical Results Fall Short

As I said earlier, I have no problem with individuals making ESG investments for their own portfolios, but I want to close by pointing out that, while ESG has good intentions, it has fallen short of producing not only beneficial financial results but beneficial social results as well.

As an example, consider last year's merger of Catholic Health and Dignity Health to form Chicago-based CommonSpirit Health, with 142 hospitals and 150,000 employees. Both merging institutions had African American CEOs and diverse boards of directors, but not a single African American investment bank was involved in producing the second-largest integrated health delivery system by revenues in the United States.

ESG is not living up to its billing – in either way. I would rather see advocates of important social change focus not on activities that diminish pension fund returns but on activities that will make America a more inclusive and just nation.

Yours sincerely,

Timothy A. Simon

Timothy Alan Simon, Esq.
TAS STRATEGIES
San Francisco, California

TAS STRATEGIES
100 Pine Street, Suite 1250, San Francisco, CA 94111
Office: 415.800.1266 | Cell: 415.505.1723
Email: tas@tasstrategies.com