
December 10, 2021

Mr. Fred Wong, Acting Chief
Division of Regulations
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**Via Federal eRulemaking Portal (www.regulations.gov)**

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

Mr. Wong:

We at the Free Enterprise Project[1] of the National Center for Public Policy Research[2] appreciate the opportunity to submit this comment on the above-styled proposed rule that would amend previous rules elaborating the application of the Employee Retirement Income Security Act's (ERISA) fiduciary duties of prudence and loyalty as they apply to the selection of investments

[1] Launched in 2007, the National Center for Public Policy Research's Free Enterprise Project (FEP) focuses on shareholder activism and the confluence of big government and big business. FEP is the conservative movement's leading shareholder activism and education program: It files shareholder resolutions, engages corporate CEOs and board members at shareholder meetings, petitions the U.S. Securities and Exchange Commission (SEC) for interpretative guidance, and sponsors effective media campaigns to create the incentives for corporations to stay focused on their missions. More information is available here.

[2] The National Center for Public Policy Research is a communications and research foundation dedicated to providing free market solutions to today's public policy problems. We believe that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. More information is available here.

and investment courses of action, including selecting qualified default investment alternatives, exercising shareholder rights, such as proxy voting, and the use of written proxy voting policies and guidelines by pension-fund managers.

We are troubled by the proposed rule. The rule would not only effectively coerce pension managers into investing in and voting for overtly political Environmental, Social, and Governance (ESG) shareholder resolutions, but would roll back critical protections and transparency measures for fund participants by encouraging reliance by fund managers on proxy-advisory firms without requiring that either the fund managers or the proxy-advisory firms demonstrate that they have issued their guidance on the sole basis of full and objective research demonstrating that the guidance is legitimately in the best interest of the funds and/or the underlying companies. While the Department claims that the proposed rule will decrease uncertainty and increase transparency, it will patently do neither. Instead, it will force fund managers to make vital decisions on unexamined and un-reported grounds, thus decreasing transparency, reliability and reliably responsible behavior.

This proposed rule should simply be withdrawn. The current rule is fully appropriate. Every change this rule makes is an error.

## I. **Background**

The Department's proposal effectively does away with two Labor rules that were properly designed to ensure that pension managers: (1) exercise their fiduciary duties to act in the best financial interest of pension holders; and (2) engage in appropriate oversight of those it may outsource responsibilities to, such as proxy-advisory firms. The first of these rules, *Financial Factors in Selecting Plan Investments*, amended the "investment duties" regulation under Title I of ERISA.[3] It required plan fiduciaries to select investments and investment courses of action based solely on financial considerations.[4]

This rule (which is currently in force but is not being enforced by the Biden Administration),[5] reiterated and functionalized the fiduciary duties held by pension fund managers. Managers of private pension funds governed by ERISA have a fiduciary duty to act "solely" in the interest of maximizing the value of the plan for purposes of meeting plan obligations, primarily payment obligations to beneficiaries. Part of this fiduciary duty is a duty of care not to waste the assets of the funds on irrelevant pursuits, including the advancement of fund-managers' (or their superiors') personal policy preferences.[6] Nevertheless, in recent years, ERISA-governed plan

[3] 85 Fed. Reg. 72,846 (Nov. 13, 2020).

[4] *Id.*

[5] U.S. Department of Labor Press Release, *U.S. Department of Labor Releases Statement on Enforcement of its Final Rules on ESG Investments, Proxy Voting by Employee Benefit Plans*, (Mar. 10, 2021), *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20210310 (last accessed Dec. 8, 2021).

[6] *See* 29 U.S.C. § 1103(c). *See also Fifth Third Bancorp. v. Dudenhoeffer,* 573, U.S. 409, 421 (2014) (holding that the "benefits" that it is the sole duty of ERISA plan managers to maximize are financial rather than non-pecuniary).

managers have followed the lead of a wide array of public pension fund managers[7] in making investments on the basis of policy rather than according to their clear fiduciary duty.[8]

Even before the COVID-19 crisis of 2020, a significant percentage of these pension plans were in such bad financial shape that they looked likely to be able to pay their pensioners only a fraction of the pensions they had been promised.[9] Multiemployer plans, which cover unionized workers and are run by joint committees of representatives of unions and employers, have been particularly susceptible to underperformance.[10] Some had even begun formally reducing payouts.[11] Meanwhile, these financially crippled funds were already bankrupting the Pension Benefit Guarantee Corporation (PBGC), the organization designed to insure undercapitalized pension funds from having to shortchange their beneficiaries.[12] The pandemic and its resulting economic dislocations have only made this situation worse.[13]

The parlous state of these pension funds means that violations of fiduciary duty by plan managers, in the form of indulging their personal policy preferences in selecting investments rather than following their duty of loyalty to plan beneficiaries to maximize their benefits, will (and indeed as discussed herein already has done) directly reduce the financial well-being of those beneficiaries. This is unconscionable. And even with plans to bail out these flailing funds, as we have seen via the American Rescue Plan's $86 billion federal taxpayer bailout of pension funds,[14] a bailout can do nothing to absolve plan managers of their sole duty to invest for

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[7] *See, e.g.*, Chris Taylor, *Sustainable investing's secret weapon: Public pensions,* REUTERS (Nov. 12, 2018), *available at* https://www.reuters.com/article/us-money-investment-esg-idUSKCN1NH24M (last accessed Dec. 8, 2021).

[8] *See, e.g.*, John Manganaro, *2019 Could Be Banner Year for ESG in ERISA Plan,* PLANSPONSOR (Jan. 16, 2019), available at *https://www.plansponsor.com/in-depth/2019-banner-year-esg-erisa-plans/* (last accessed Dec. 8, 2021); Judy Faust Hartnett & Rebecca Moore, *What would Encourage More ERISA Plans to use ESG Investments?,* PLANADVISOR (Nov. 14, 2018), *available at https://www.planadviser.com/encourage-erisa-plans-use-esg-investments/* (last accessed Dec. 8, 2021).

[9] *See, e.g.*, Stephen Miller, *144 Multiemployer Pension Plans Projected to Fail Within 20 Years,* SHRM (Aug. 20, 2017), *available at https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/multiemployer-pension-fail.aspx* (last accessed Dec. 8, 2021).

[10] *See id.;* Regina Kelley, *Multiemployer Pension Bailout a Wasteful Part of COVID Relief Bill*, NATIONAL TAXPAYERS UNION, (Apr. 23, 2021) *available at https://www.ntu.org/publications/detail/multiemployer-pension-bailout-a-wasteful-part-of-covid-relief-bill* (last accessed Dec. 8, 2021).

[11] *See, e.g.*, Stephen Miller, *144 Multiemployer Pension Plans Projected to Fail Within 20 Years,* SHRM (Aug. 20, 2017), *available at https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/multiemployer-pension-fail.aspx* (last accessed Dec. 8, 2021).

[12] Regina Kelley, *Multiemployer Pension Bailout a Wasteful Part of COVID Relief Bill*, NATIONAL TAXPAYERS UNION, (Apr. 23, 2021) *available at https://www.ntu.org/publications/detail/multiemployer-pension-bailout-a-wasteful-part-of-covid-relief-bill* (last accessed Dec. 8, 2021).

[13] *See, e.g.*, MP McQueen, *Multiemployer pension plans' troubles worsening due to COVID-19*, BENEFITSPRO, (May 4, 2020), *available at* https://www.benefitspro.com/2020/05/04/multiemployer-pension-plans-in-growing-trouble-due-to-covid-19-milliman/?slreturn=20211108153248 (last accessed Dec. 8, 2021).

[14] Charles Blahous, *The American Rescue Plan's Disastrous Pension Bailout*, MERCATUS CENTER, (Apr. 19, 2021), *available at* https://www.mercatus.org/bridge/commentary/american-rescue-plan%E2%80%99s-disastrous-pension-bailout (last accessed Dec. 8, 2021).

maximum returns, for then every indulgence of their personal policy preferences have resulted in this direct tax on American taxpayers. (And in any case, even these massive bailouts have proven entirely insufficient to the task. The very legislators who pushed the bailout plan are now reportedly admitting that the pension bailout was flawed, that even more – and much more – taxpayer money should be thrown at the problem.[15] This is an unconscionable time to inject politics into fund-manager decision making in ways that will lower fund returns and manager transparency. Yet this is exactly – and only – what this proposed rule does.)

The second of these two rules, the *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights* final rule issued on December 16, 2020, would effectively be dismantled by this proposed rule. (The rule remains a duly enacted regulation, but the new Department has improperly refused to enforce it while it carries out this rulemaking process.)[16] Also amending the "investment duties" regulations under ERISA, the current rule addresses the application of the prudence and exclusive-purpose duties under ERISA to the exercise of shareholder rights, including proxy voting, the use of written proxy-voting policies and guidelines, and the selection and monitoring of proxy-advisory firms.[17] Of particular importance to this comment is the provisions ensuring that fiduciaries monitor proxy-advisory firms.

The current rule was sorely needed, as for some years, some fund managers have worked under the misapprehension that they were obliged to vote the proxies for the stocks that their funds own in any matters that came before the shareholders of the companies in which their funds had invested. This misunderstanding has resulted either in the fund managers employing significant assets to explore the issues implicated in the matters or in their relying on proxy-advisory services to decide for them how to vote. Both of these approaches create conflicts with and potential breaches of their fiduciary duties.

The first route – researching all of the issues with due diligence themselves, or via their staff – raises the specter of the breach of the duty of care through the misapplication of fund resources. The second raises the specter of the breach of that duty through reliance on recommendations that have been inadequately researched in general, researched for the wrong purposes (*i.e.*, without sole reference to the single permissible purpose of maximizing shareholder value, but instead with the personal policy preferences of the researchers or the proxy-advisory firms illicitly in mind), or researched without any regard to the specific and unique issues and concerns that must necessarily animate the actions of individual pension funds and their managers.

These concerns about reliance on proxy-advisory firms are magnified by the manner in which those firms operate. The industry is a duopoly of the sort that often leads to inferior service to clients and the application of market power, with the two primary industry players sharing 97

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[15] *See, e.g.*, Aharon Friedman, *Democrats want to rescue union pensions from the party's failed bailout plan,* THE HILL, (Nov. 27, 2021), *available at* https://thehill.com/opinion/finance/583184-democrats-want-to-rescue-union-pensions-from-the-partys-failed-bailout-plan (last accessed Dec. 9, 2021).

[16] 85 Fed. Reg. 81,658 (Dec. 16, 2020).

[17] *Id.*

percent of the market.[18] This market power plays out in a variety of ways that render reliance on the firms dangerous both to the value of pension funds and to fund managers eager to fulfill their fiduciary duties.[19] The number of shareholder proposals has, as the Department has previously noted, risen dramatically in recent years, as have the voting recommendations offered by the proxy-advisory services. But these services are insufficiently staffed and otherwise ill-suited to conduct the sort of research required under fiduciary law. The result, when fund managers rely on the recommendations of these firms, is that no one has done the necessary and appropriately focused research.

## II. **The Proposal**

With that background in mind, the Free Enterprise Project of the National Center for Public Policy Research is dismayed that the Department has refused to enforce either of the two Labor rules – both of which the Free Enterprise Project strongly supported – and is concerned that the Department now seeks to dismantle them through this proposed rule. The following represents only our most pressing concerns about the proposed rule.

### A. *The Proposal Effectively Compels Pension Managers to Review ESG Investments and Vote on Politicized ESG Shareholder Resolutions*

Rather than merely "counteract[ing] [the] negative perception" of the consideration of ESG factors that the Department contends resulted from the previous regulations, the proposed rule effectively compels pension managers to consider ESG investments and vote on politicized ESG shareholder resolutions.[20] While the proposed rule purportedly counteracts this alleged perception, in reality it simply adds confusing and ill-defined obligations on pension managers that politicize their function and leave them unable to fulfill their fiduciary duties to pension beneficiaries.

Under the proposal, for a fiduciary to satisfy its investment duties, the fiduciary must, among other things, have "given *appropriate consideration* to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action . . . ."[21] The proposed regulatory text goes on to state that:

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[18] *See, e.g.*,*Your New Woke 401(k)*, WALL ST. J. (Oct. 20, 2021) ("DOL says small plans can reduce their costs by relying on the recommendations of proxy advisers that happen to be the left-leaning proxy duopolists Glass Lewis and Institutional Shareholder Services.) (emp. added), *available at* https://www.wsj.com/articles/your-new-woke-401-k-retirement-savings-esg-erisa-biden-administration-department-of-labor-proposal-11634753095; *Meet the Biggest "Stakeholders,"* WALL ST. J. (Aug. 27, 2019), *available at* https://www.wsj.com/articles/meet-the-biggest-stakeholders-11566948582.

[19] *Id.*

[20] 86 Fed. Reg. 57,276 (Oct. 14, 2021).

[21] *Id.* at 57,302 (emphasis added).

> [A]ppropriate consideration ***shall include***, but is not necessarily limited to . . . consideration of . . . [t]the projected return of the portfolio relative to the funding objectives of the plan, *which 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.[22]

Here the Department all but admits that it is not just permitting the consideration of ESG factors such as climate change, but "require[ing]" it —and "often" at that. Given this instruction, when faced with whether or not to consider ESG shareholder proposals, a pension manager would under the proposed rule be left with little choice but to spend time and resources on such considerations.

There are two key problems with the Department's effective coercion of fund managers to undertake ESG investments and support assertedly ESG-supporting shareholder resolutions. First, ESG investments come at a high cost with demonstrably low returns. Second, in yielding these low returns, ESG investments and shareholder support – especially as delineated in this proposed rule – advance the political and social interests of the left at the expense of pecuniary objectives. Both problems result in a potential – in fact, a highly likely – violation of a pension manager's fiduciary duties.

### i. High Costs, Low Returns

Evidence shows that ESG funds have higher investment fees than traditional non-ESG funds. According to its "2020 U.S. Fund Fee Study", the financial services firm Morningstar asserts that, "Investors in sustainable funds are paying a 'greenium' relative to investors in conventional funds."[23] Although the study makes the point that sustainable-fund fees (*i.e.*, ESG fund fees), have been falling over the last decade, Morningstar nonetheless concludes that these funds have a "higher asset-weighted average expense ratio, which stood at 0.61% at the end of 2020 versus 0.41% for their traditional peers."[24] Additional sources demonstrate that ESG fund fees are more expensive than passive indexes or benchmarks[25] and can even carry fees that are as much as 40 percent higher than similar non-ESG investments.[26] As the *Wall Street Journal* has

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[22] *Id.* (emphasis added).

[23] Morningstar, *U.S. Fund Fee Study*, at 14 (Aug. 2021), *available at* annual-us-fund-fee-study-updated.pdf (morningstar.com) (last accessed Dec. 7, 2021).

[24] *Id.*

[25] Kate Ashford, *Pros and Cons of ESG Funds*, FORBES (Apr. 10, 2019), *available at* *https://www.forbes.com/advisor/investing/pros-and-cons-of-esg-funds/* (last accessed Dec. 7, 2021).

[26] Charles Gasparino, *Larry Fink shakes big bucks from lefty Joe's Environmental Social Governance,* THE NEW YORK POST (Oct. 30, 2021), *available at* https://nypost.com/2021/10/30/larry-fink-shakes-big-bucks-from-lefty-joe-bidens-esg/ (last accessed Dec. 7, 2021).

noted, "[e]xchange-traded funds that explicitly focus on socially responsible investments have 43% higher fees than widely popular standard ETFs."[27]

Fund managers bound by fiduciary duty to maximize fund returns can only justify investment in funds that charge higher fees if those funds produce concomitantly higher returns. ESG funds do not provide such a premium. To the contrary, research demonstrates that despite the higher fees associated with ESG investments, the returns are *lower* than with traditional non-ESG investments. Although state and local government plans are not subject to ERISA, the increase in ESG investing by state and local government pension-plan investors in recent years makes the returns for these plans instructive in evaluating the potential returns for private-pension plans as the Department pushes for increased ESG investing.

Recognizing the importance of evaluating public pension-plan performance, researchers at the Boston College Center for Retirement Research studied state and local pension plans for the years 2001 to 2018.[28] Of the 176 plans it reviewed, roughly two-thirds currently have either a social-investing state mandate or an ESG policy in place.[29] The study "show[ed] a negative relationship between the rate of return and both state mandates and ESG policies" and asserts that "the average annualized return for those with a state mandate would be 20 basis points lower than for those without a mandate."[30] The study goes on to conclude that "[t]he fact that having an ESG policy is also negatively related to returns (with 10-percent significance) appears to contradict the assertion that focusing on social factors produces market or better returns."[31]

The Boston College study is consistent with other reports on the topic of ESG returns. According to a 2018 report by the American Council for Capital Formation, three of the 10 worst performing New York City Employees' Retirement System (NYCERS)[32] private-equity funds that year were focused on ESG ventures; none of NYCERS' top 10 performing ones were in the ESG category.[33] The American Council for Capital Formation found a similarly alarming trend when it came to ESG investments by California Public Employees' Retirement System

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[27] Michael Wursthorn, *Tidal Wave of ESG Funds Brings Profit to Wall Street*, WALL STREET JOURNAL (Mar. 16, 2021), *available at* https://www.wsj.com/articles/tidal-wave-of-esg-funds-brings-profit-to-wall-street-11615887004 (last accessed Dec. 7, 2021).

[28] Jean-Pierre Aubry, Anqi Chen, Patrick M. Hubbard, and Alicia H. Munnell, *ESG Investing and Public Pensions: An Update*, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE (Oct. 2020), *available at* https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf (last accessed Dec. 7, 2021).

[29] *Id.* at 5.

[30] *Id.*

[31] *Id. at 6.*

[32] NYCERS is the largest municipal public employee retirement system in the United States. See the NYCERS website, *available at https://www.nycers.org/about* (last accessed Dec. 7, 2021).

[33] Timothy M. Doyle, *Politics Over Performance: New York City Pension Funds*, AMERICAN COUNCIL FOR CAPITAL FORMATION (Jan. 11, 2018), *available at https://accf.org/2018/01/11/politics-over-performance-new-york-city-pension-funds/* (last accessed Dec. 7, 2021).

(CalPERS) pension managers.[34] According to a separate 2017 report, the Council found that four of the nine worst performing funds in the CalPERS portfolio at the time focused on supporting ESG ventures; similarly, none of CalPERS' 25 top-performing funds were ESG-focused.[35] The report further found that CalPERS went from a $3 billion pension surplus in 2007 to a $138 billion deficit in just 10 years, all while increasing its ESG investing.[36] And during that same time span, the report found that "CalPERS returned 4.4 percent – which is not only well under its expected rate of 7.5 percent . . . but also below [what was] the public pension average over that time of 5.7 percent."[37]

Perhaps summing it up best, the Institute for Pension Fund Integrity warns, "Certain ESG policies, exclusions, and divestments are almost certain routes to lower returns for pension funds. Policymakers should take the steps necessary to ensure that ESG considerations, whether pushed by proxy firms or others, don't unfairly threaten the retirement funds of American workers."[38] The current Labor Department proposal, however, appears to do the exact opposite.

ii. Puts Leftwing Activism Above Pecuniary Interest

Despite the high costs and low returns of ESG investing, the Department is, with this proposed rule, forcing an ESG agenda on fund managers. Despite its claim to be responding to unidentified correspondents who claimed to have been confused by the current rule, the proposal's obvious focus is instead on fulfilling a Biden Administration mandate established in a series of climate-change related executive orders, and in pushing other portions of the Administration's partisan agenda (The Department fails anywhere to acknowledge that nothing in an executive order can change any duties established by ERISA or other statute, and in fact proceeds as though the executive orders provide overriding authority.).

On January 20, 2021, his first day in office, President Biden signed Executive Order (E.O.) 13990, titled "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."[39] Taking his climate change and ESG agenda a step further (and likely realizing his Administration lacked the underlying authority to issue the proposal at hand) on May 20,

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[34] CalPERS serves employees in California state, regional, and local government. It is the United States' largest public pension fund. *See* the CalPERS website, *available at* https://www.calpers.ca.gov/page/about/organization/calpers-story (last accessed Dec. 7, 2021).

[35] Timothy M. Doyle, CalPERS and the Point of No Returns, AMERICAN COUNCIL FOR CAPITAL FORMATION (Dec. 5, 2017), *available at* https://accf.org/2017/12/05/calpers-and-the-point-of-no-returns/ (last accessed Dec. 7, 2021).

[36] *Id.*

[37] *Id.*

[38] The Institute for Pension Fund Integrity, *ESG and the Proxy Process: What Does the Research Say* at 3, (Apr. 2019), *available at* https://ipfiusa.org/wp-content/uploads/2019/04/ESG-and-the-Proxy-Process-What-Does-The-Research-Say.pdf (last accessed Dec. 8, 2021).

[39] E.O. 13990 *available at* https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis (last accessed Dec. 8, 2021).

2021, President Biden issued a second relevant directive, E.O. 14030, titled "Climate Related Financial Risk." This second E.O. gave rise to the current proposal, which states, "Section 4 of E.O. 14030 directed the Department to consider publishing, by September 2021, for notice and comment a proposed rule to suspend, revise, or rescind 'Financial Factors in Selecting Plan Investments,' 85 FR 72846 (Nov. 13, 2020), and 'Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,' 85 FR 81658 (Dec. 16, 2020)."[40]

The proposal suggests that more leftwing environmental regulations are forthcoming, effectively necessitating the proposal's push for ESG investing. It reads, "imminent or proposed regulations, for example, to reduce greenhouse gas emissions in the power sector, and other policies incentivizing a shift from carbon-intensive investments to low-carbon investments, could significantly lower the value of carbon-intensive investments while raising the value of other investments. This could create a potentially serious risk for plan participants and beneficiaries."[41]

The Administration's bootstrapping is incoherently narrow and convoluted. It effectively represents a claim that since the Administration intends to pass regulations making carbon-based energy extraction and use unaffordable or impossible in the future, fund managers must invest as though those regulations will be passed, will prove successful, and will never be repealed. But those are not only facts not in evidence, but are demonstrably counterfactual. The regulations alluded to have not been promulgated. Even if they are promulgated, there is no reason to believe – and fund managers acting with fiduciary competence may not presume – that those regulations will stay in place over decades, or even long enough to make any material difference to investment determinations. First, there is significant evidence that politicized and agenda-driven, rather than technology- and affordability-driven, carbon-reduction schedules cannot be adhered to, as the current world-wide energy crisis and its consequences illustrate.[42] Second, administrations revoke or amend the rules of previous administrations constantly, as this very proceeding illustrates. It is entirely to be expected that when an administration with differing commitments assumes office, it will revoke the as-yet-unenacted regulations to which the executive order alludes.

As a result of all this, fund managers may not, *contra* the implications of the executive order and this proposed rule, act on the presumption that these prospective regulations will not only come into force but will remain in force into the foreseeable future. Instead, if fund managers are to

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[40] 86 Fed. Reg. 57,273 (Oct. 14, 2021).

[41] *Id.* at 57,277.

[42] *See, e.g.*, Matt McGrath, *Climate Change: Fossil Fuel Production Set to Soar over Next Decade,* BBC NEWS, (Oct. 20, 2021), *available at* https://www.bbc.com/news/science-environment-58971131 (last accessed Dec. 9, 2021); Christopher M. Matthews, Collin Eaton, and Benoit Faucon, *Behind the Energy Crisis: Fossil Fuel Investment Drops, and Renewables Aren't Ready,* THE WALL STREET JOURNAL, (Oct. 17, 2021), *available at* https://www.wsj.com/articles/energy-crisis-fossil-fuel-investment-renewables-gas-oil-prices-coal-wind-solar-hydro-power-grid-11634497531 (last accessed Dec. 9, 2021); Jude Clemente, *Climate Change and the Energy Transition Demand a U.S. Mining Revolution*, REAL CLEAR ENERGY, (May 21, 2021), *available at* https://www.realclearenergy.org/articles/2021/05/21/climate_change_and_the_energy_transition_demand_a_us_mining_revolution_778126.html (last accessed Dec. 9, 2021).

undertake calculations about how regulations will effect long-term investments, they will have to gauge – and do so competently, not merely on the basis of personal policy preferences or the advice of black-box proxy-advisors with known political agendas[43] – the likelihood that these regulations will come into effect; that they will have the intended effect and not other effects; that they might be repealed, and when; that they might be amended, and how; and a whole host of other considerations. The dreams of regulatory permanence indulged by the current Administration cannot provide a sound basis for proper fiduciary analysis.

This impermissible bootstrapping by both the Administration and the Department is exacerbated by the astonishing fact that while the proposed rule recognizes the authors of the previous rule for following commenter concern and removing any direct references to ESG investing,[44] the proposed rule then itself makes explicit reference to ESG investing constantly, and doubles down by describing ESG investments in explicitly and exclusively leftwing policy terms.[45] As only one small example: there is no recognition that one of the vital factors to be considered in analyzing the value of ESG investments or ESG shareholder proposals is whether the whole world is zeroing out emissions, or whether the developing world is – whatever it may say publicly – increasing carbon emissions such that emission-reduction by American companies will be effectively meaningless to climate change. At the very least, the proposed rule should be revised to remove not only the leftwing characterizations of ESG investing, but – as the proposed rule itself agrees was appropriate in the previous rule – any reference to ESG at all.

Despite quoting the various responsibilities of fiduciaries over and over again, the proposal nonetheless ignores these fiduciary duties, including the prohibition against subordinating the interests of the participants and beneficiaries in their retirement income to other objectives – in this case, ESG policy preferences. Indeed, ERISA fund managers owe a clear duty to maximize the value of the funds they manage, and violate their fiduciary duties if they act otherwise. Given the mountain of evidence regarding the high costs and low returns of ESG, it seems clear that the proposed rule puts a leftwing agenda ahead of the pecuniary interest of fund participants.

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[43] *See, e.g.*, *Your New Woke 401(k)*, WALL ST. J. (Oct. 20, 2021) ("DOL says small plans can reduce their costs by relying on the recommendations of proxy advisers that happen to be the left-leaning proxy duopolists Glass Lewis and Institutional Shareholder Services.) (emp. added), *available at* https://www.wsj.com/articles/your-new-woke-401-k-retirement-savings-esg-erisa-biden-administration-department-of-labor-proposal-11634753095; *Meet the Biggest "Stakeholders,"* WALL ST. J. (Aug. 27, 2019), *available at* https://www.wsj.com/articles/meet-the-biggest-stakeholders-11566948582.

[44] 86 Fed. Reg. 57,275 (Oct. 14, 2021).

[45] *See, e.g., id.* at 57,302.

### B. *Money Management and Proxy-Advisory Firms, Not Pension Holders, Stand to Benefit from the Department's Proposal*

BlackRock, the world's largest money-management company, is perhaps also the world's largest investor of ESG funds. BlackRock's CEO, Larry Fink, has made ESG investing a hallmark of his company's investment strategy and has encouraged companies to invest in ESG if they want to be the most profitable in their industry.[46] It has been reported that in total, BlackRock offers more than 150 ESG investment fund opportunities, more than any other Wall Street firm, and currently manages more than $400 billion in ESG client money.[47] As previously discussed, because ESG funds carry fees that are as much as 40 percent higher than other similar investments, if anyone stands to gain from the inducement to invest in ESG by the Department's proposed rule, it's BlackRock and Larry Fink.[48] This potential bonanza certainly explains BlackRock's support for the proposed rule[49] – but it makes the Department's citation of BlackRock's support incomprehensible.[50] It is not the duty of the Department of Labor – it is a dereliction of duty by the Department of Labor – to enrich the world's richest investment house at the expense of hard-working pension-fund beneficiaries. BlackRock will get a windfall from the proposed rule, at the direct expense of pension-fund beneficiaries. BlackRock's endorsement of the proposal is all by itself sufficient grounds for the Department to withdraw it.

Not only do large money-management firms such as BlackRock stand to profit from an increase in ESG investments, but so do proxy-advisory firms from the inevitable increase in ESG shareholder resolutions that will be fostered by this rule and the effective mandate to vote on ESG resolutions that the rule inappropriately establishes. Indeed, the Department's proposal all but ensures reliance on the ESG recommendations of proxy-advisory firms because of the volume of resolutions and the limited investigatory assets of fund managers. The proxy-advisory market is controlled by two firms: Institutional Shareholder Services (ISS) and Glass Lewis.[51] Combined, these two firms control 97 percent of the market, effectively forming a

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[46] Rohit Samandur, *BlackRock CEO Larry Fink on ESG Investing,* MSN MONEY (Jan. 26, 2021), *available at* https://www.msn.com/en-us/money/news/blackrock-ceo-larry-fink-on-esg-investing/ar-BB1d7i4F?pfr=1 (last accessed Dec. 7, 2021).

[47] Charles Gasparino, *Larry Fink shakes big bucks from lefty Joe's Environmental Social Governance,* THE NEW YORK POST (Oct. 30, 2021), *available at* https://nypost.com/2021/10/30/larry-fink-shakes-big-bucks-from-lefty-joe-bidens-esg/ (last accessed Dec. 7, 2021).

[48] *Id.; see also* Eleanor Terrett, Charlie Gasparino, *Larry Fink's BlackRock to benefit from government ESG push*, FOX BUSINESS (Oct. 28, 2021), *available at* https://www.foxbusiness.com/financials/larry-finks-blackrock-benefit-esg (last accessed Dec. 7, 2021).

[49] *The DOL's proposed rule on ESG investments and proxy voting,* BLACKROCK (Oct. 26, 2021), *available at* https://www.blackrock.com/us/financial-professionals/your-practice/defined-contribution/news-insight-analysis/dol-esg-proposal (last accessed Dec. 7, 2021).

[50] 86 Fed. Reg. 57,289 (Oct. 14, 2021).

[51] Free Enterprise Project, INVESTOR VALUE VOTER GUIDE 2020 at 5 (April 2020), *available at* https://nationalcenter.org/wp-content/uploads/2020/04/Investor_Value_Voter_Guide_2020_web.pdf (last accessed Dec. 7, 2021).

duopoly.[52] Having moved increasingly to the left over the last several years, they regularly recommend votes for all manner of far-left ESG resolutions.[53]

According to the Institute for Pension Fund Integrity, proxy-advisory firms "advise fund managers to take pro-ESG votes on proxy questions, and those votes – or even the threat of such votes – push U.S. corporations to adopt ESG policies."[54] The Institute goes on to conclude that proxy-advisory firms such as ISS and Glass Lewis have "adopted the strategy of environmental activists in an attempt to shape the policies of global businesses."[55] But proxy-advisory firms have effectively no obligation to explain the rationales for their proxy advice, much less to provide the research and evidence upon which they rely to conclude – as fund managers must conclude, if they are to act within their fiduciary duty – that a vote in favor of any given shareholder proposal advances the pecuniary interest of the fund. In fact, one of the first moves of the new chairman of the Securities and Exchange Commission, appointed by the Biden Administration, was to announce his intention not to enforce a duly enacted regulation that requires even minimal disclosure by the proxy-advisory duopoly.[56]

Proxy companies are also inherently conflicted when it comes to ESG issues. Not only do they make vote recommendations on ESG issues that push companies in an ESG direction, but in the case of ISS, it also rates companies on how ESG compliant they are. (Referred to as the E&S QualityScore, ISS' ESG rating scheme focuses on a company's disclosure rather than its ESG risk management and are blatantly viewpoint biased).[57] And then it offers companies consulting services to help them increase their ESG ratings. The conflict renders every ESG recommendation fundamentally untrustworthy unless objectively, fully and independently demonstrated to genuinely add company and fund value.

Adding to the conflict of interest of proxy-advisory firms is that they are foreign owned. ISS, the largest of the proxy-advisory firm duopoly, is majority owned by Deutsche Bourse Group.[58]

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[52] *Id.; see also* The Institute for Pension Fund Integrity, *ESG and the Proxy Process: What Does the Research Say,* (Apr. 2019), *available at* https://ipfiusa.org/wp-content/uploads/2019/04/ESG-and-the-Proxy-Process-What-Does-The-Research-Say.pdf (last accessed Dec. 8, 2021).

[53] Timothy M. Doyle, *The Conflicted Role of Proxy Advisors* at 19-20, AMERICAN COUNCIL FOR CAPITAL FORMATION (May, 2018), *available at* https://accf.org/wp-content/uploads/2018/05/ACCF-The-Conflicted-Role-of-Proxy-Advisor-FINAL.pdf (last accessed Dec. 8, 2021).

[54] The Institute for Pension Fund Integrity, *ESG and the Proxy Process: What Does the Research Say* at 6, (Apr. 2019), *available at* https://ipfiusa.org/wp-content/uploads/2019/04/ESG-and-the-Proxy-Process-What-Does-The-Research-Say.pdf (last accessed Dec. 8, 2021).

[55] *Id.* at 8.

[56] *See, e.g., SEC avoids enforcement of Trump-era proxy advisor rules*, NEWSNOW (June 2, 2021), *available at* https://quebecnewstribune.com/news/business/sec-avoids-enforcement-of-trump-era-proxy-advisor-rules-12684/.

[57] Timothy M. Doyle, *The Conflicted Role of Proxy Advisors* at 23, AMERICAN COUNCIL FOR CAPITAL FORMATION (May, 2018), *available at* https://accf.org/wp-content/uploads/2018/05/ACCF-The-Conflicted-Role-of-Proxy-Advisor-FINAL.pdf (last accessed Dec. 8, 2021).

[58] *See* Glass Lewis Website, *Company Overview*, *available at* https://www.glasslewis.com/company-overview/ (last accessed Dec. 10, 2021).

Glass Lewis, the second largest proxy-advisory firm in the United States, is similarly owned by a foreign entity. Previously owned by two Canadian pension funds, the Ontario Teachers' Pension Plan Board and Alberta Investment Management Corp,[59] Glass Lewis announced earlier this year it was being acquired by Canadian company Peloton Capital Management and a Canadian "financial services entrepreneur," Stephen Smith.[60] As these companies are foreign owned, they have a vested interest in pushing European and Canadian levels of regulation and inefficiency on American companies to help their bigger home client bases.

The Department of Labor's task in this instance is to ensure that pension-fund managers act to maximize benefits for pension beneficiaries. This proposed rule instead would enrich giant investment houses at the expense of those beneficiaries while effectively delegating proxy decision making to profoundly conflicted proxy-advisory services whose interests in no real way align with those of pension beneficiaries and who fail to justify and substantiate their advice. It is, therefore, entirely illegitimate.

### C. *The Proposal Removes Vote Monitoring Safeguards for Pension Holders*

Under the current rule, fund managers may not simply rely blindly on proxy-advisory services. The rule requires plan fiduciaries to "prudently monitor the proxy voting activities of investment managers or proxy-advisory firms to whom that authority to vote proxies or exercise shareholder rights has been delegated."[61] This was done to protect the financial interests of fund participants since, as previously discussed, proxy-advisory firms such as ISS and Glass Lewis demonstrate a history of advising on self-interested and politically motivated grounds instead of on purely financial interests.

The proposed rule purports to eliminate that requirement. "The revised text does not represent a change in the Department's view or requirements under the current regulation. Rather, the Department believes that, as previously expressed in [prior sub-regulatory guidance], the general prudence and loyalty duties under ERISA [] already impose a monitoring requirement."[62] The Department goes on to claim that it is concerned that the current monitoring requirement "may be read as requiring some special obligations above and beyond

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[59] Svea Herbst-Bayliss & Jessica DiNapoli, *New Glass Lewis chief to expand abroad amid U.S. regulatory clamp-down,* REUTERS (Oct. 4, 2019), *available at* https://www.reuters.com/article/us-glasslewis-future-idUSKBN1WJ1J4 (last accessed Dec. 10, 2021).

[60] *See* Glass Lewis Press Release, *Acquisition positions leading provider of global governance solutions to address the global demands of shifting governance activities*, (Mar. 16, 2021), *available at* https://www.glasslewis.com/press-release-peloton-capital-management-and-stephen-smith-acquire-glass-lewis/?utm_campaign=Brand%20-%20General%20Updates&utm_medium=email&_hsmi=116125884&_hsenc=p2ANqtz--ggelYt5v7XcUHhwQ8ooKE38d8Fzg2VL8w-0O2whqXZ_ojU5Mx5hQ7ozfteZ-N4VotuTuAowGg4IvXgbFZlTCpfxg8-eY_Mu6mWwySZ2zz7IfQHG6dfV1lL_fE4xxtiFDF8BU4&utm_content=116125884&utm_source=hs_email (last accessed Dec. 10, 2021).

[61] 85 Fed. Reg. 81,684 (Dec. 16, 2020).

[62] 86 Fed. Reg. 57,281 (Oct. 14, 2021).

the statutory obligations of prudence and loyalty that generally apply to monitoring the work of service providers."[63]

Instead of being concerned about investment managers potentially spending too much time and effort attending to their fiduciary duty, the Department should be concerned about violations of fiduciary duties should investment managers blindly follow proxy-advisory firm advice. As the National Center previously pointed out in its comment in support of the current regulation that is now being revised, proxy-advisory firms frequently vote in ways that are not only contrary to a policy holder's financial interest, but contrary to the evidence. ISS, for instance, regularly and without competent evidence recommends votes in favor of proposals that would require surface-characteristic quotas on corporate boards[64] while recommending votes against proposals that would require viewpoint diversity on the same boards.[65] It makes these recommendations despite strong peer-reviewed evidence that viewpoint diversity enhances corporate (and other organizational) value, while there appears to be no evidence to suggest that surface-characteristic quotas create any enhancements that are themselves not ultimately a result of increased viewpoint diversity rather than surface-characteristic difference.[66]

Exacerbating the problem is that advisory services are also insufficiently staffed[67] and otherwise ill-suited to conduct the sort of research required under fiduciary law.[68] The result, when fund managers rely on the recommendations of these firms, is that no one has done the necessary and appropriately focused research. When fund managers rely on the unexplained or insufficiently explained and supported guidance of proxy-advisory firms, they may well commit, each time, a *per se* violation of their duty of care by making decisions the basis for which they know little about. Even if the violation is not *per se*, it will in many, many cases constitute a violation in fact. Fund managers should not be putting themselves into that sort of danger, and rather than covering up such malfeasance by removing critical oversight provisions in the current regulatory scheme designed to shed light on this very problem, the Department should vigorously enforce the current monitoring provisions.

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[63] *Id.*

[64] Jason Del Rey, *Amazon shareholders are getting opposite advice on whether diversity should be mandated for the company's board*, RECODE (May 12, 2018), *available at* https://www.vox.com/2018/5/12/17345502/amazon-jeff-bezos-rooney-rule-diversity-proposal-board-iss-glass-lewis (last accessed Sept. 11, 2020).

[65] Press Release – Free Enterprise Project, *Eli Lilly Rejects Call to Increase Viewpoint Diversity on Its Board of Directors*, NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (May 4, 2020), *available at* https://nationalcenter.org/ncppr/2020/05/04/eli-lilly-rejects-call-to-increase-viewpoint-diversity-on-its-board-of-directors/ (last accessed Sept. 11, 2020).

[66] *See* Free Enterprise Project, INVESTOR VALUE VOTER GUIDE 2020, at 19-32 (April 2020), *available at* http://nationalcenter.org/IVVG/ (last accessed Sept. 11, 2020).

[67] *See, e.g., Proxy Advisory Reform*, *supra* note 9, at 16 (citing Nicholas Donatiello & Harvey L. Pitt, *Protecting Shareholders from Activist Proxies,* WALL ST. J. (May 28, 2015)).

[68] Consider, for instance, that proxy advisory services are under no fiduciary duty to anyone; that they seldom explain the bases for their recommendations, far less providing solid empirical support for them; and that they are implicated in conflicts of interest. *See id*.

Withal, this proposed rule, in combination with other Administration actions, appears to be a rather transparent, hyper-partisan effort to assert, in violation of underlying law, that fund managers' fiduciary duties are either cancelled or satisfied if they invest in or vote in favor of leftwing causes favored by the present Administration. Everyone knows that the proxy-advisory services make recommendations that favor leftwing causes, and that the services cannot possibly be conducting complete and objective research to determine whether each recommendation coincides with the pecuniary interest of the company at which the proposal has been made or the client seeking the advice. The services also don't provide enough information to allow clients to make that pecuniary-interest evaluation themselves without further research. Appointees of this Administration have blocked duly enacted regulations that would require them to make even slightly more disclosure. And now a department of this Administration is effectively telling fund managers that their blind reliance on these biased and opaque proxy-advisory services offers them a safe harbor against determinations of breach of fiduciary duty.

Of course, as suggested earlier, it is beyond the power of this proposed rule or of the Department to delegate to these proxy-advisory services the power to granting fund managers safe-harbor status, or of giving the services' unexplained recommendations the sanction of correctness. The duties that ERISA ascribes to fund managers will remain regardless of this proxy rule. If fund managers follow this rule and thereby blindly follow the recommendation of the proxy-advisory duopoly without independently substantiating the value to their funds of following those recommendations, the fund managers will be guilty of fiduciary breach. Nothing in this or any other proposed rule can change that fact.

## III. **Conclusion**

The current rule correctly interprets fund managers' duties with regard to investments and the voting *vel non* of shareholder proxies held on behalf of fund beneficiaries. Fund managers may only act in the pecuniary best interest of their funds. They may not act on the basis of any policy preferences, either theirs or those of superiors. There is nothing that the Department can do to change those underlying obligations or to delegate those duties to third parties – especially highly conflicted third parties who do not even purport to provide recommendations on the basis of the fully and objectively determined pecuniary best interest of either the underlying companies or their clients.

Fund managers must act without regard to partisan considerations. This proposed rule is an attempt to force them to act in favor of leftwing – and explicitly and exclusively leftwing – partisan considerations. It therefore misinterprets the underlying statute and is beyond the Department's authority to enact.

Were the Department, despite all of this, to enact this proposed rule, we hope and trust that it would be struck down in the courts. Were it to survive judicial review, then it would set the precedent for pension-fund managers to face the obligation to shift both their funds' investments and their voting procedures each time an incoming administration evinced a

different partisan outlook than the proceeding administration. After all, if this Administration is permitted to make pension-fund investing a hyper-partisan activity, then all future administrations must similarly be permitted to.

That's no way to run a railroad – or a railroad pension fund.

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Thank you for your consideration of this comment. Please feel free to contact us if we can be of any further assistance in this matter.

Sincerely,

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