A Union of Professionals

American Federation of Teachers, AFL-CIO

AFT Teachers
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December 13, 2021

Ali Khawar
Acting Assistant Secretary
U.S. Department of Labor
Room N-5655
200 Constitution Ave. N.W.
Washington, DC 20210

RE: Proposed rule on Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)

Dear Mr. Khawar:

Thank you for the opportunity to provide comments in response to the U.S. Department of Labor's Notice of Proposed Rulemaking titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," published in the Federal Register on Oct. 13, 2021.[1] The American Federation of Teachers welcomes the NPRM as advancing the critical goal of providing retirement security to America's working families. Importantly, the NPRM corrects flaws in two rules that were adopted by the department in late 2020, "Financial Factors in Selecting Plan Investments"[2] and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,"[3] which have sowed confusion and uncertainty for fiduciaries.

The AFT is a union of 1.7 million members, including pre-K through 12th-grade teachers; paraprofessionals and other school-related personnel; higher education faculty and professional staff; federal, state and local government employees; and nurses and other healthcare professionals. The majority of AFT members participate in public sector defined benefit pension plans totaling an estimated $4 trillion. Many of these retirement plans have an established track record of making well-advised investments that create collateral benefits for communities, while simultaneously producing competitive risk-adjusted returns to pay benefits. While the NPRM will not apply directly to public pension plans, many of these plans look to the Employee Retirement Income Security Act of 1974 for guidance and best practice and have been voting proxies consistent with ERISA's duties of prudence and loyalty and the department's long-standing interpretive guidance. Therefore, the NPRM will

[1] 86 Fed. Reg. 57272, https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf.
[2] 85 Fed. Reg. 72846, https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf.
[3] 85 Fed. Reg. 81658, https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf.

certainly have an important, clarifying impact on the defined benefit pension plans that our members contribute to and rely on for a secure retirement.

The AFT was one of many individuals and organizations that provided comments on the department's 2020 rulemakings and argued that the previously adopted rules were based on a flawed understanding of the current state of investment understanding and practice with respect to environmental, social and governance factors, undermined the purpose and intent of ERISA, and would discourage the use of ESG factors by fiduciaries in allocating plan assets. Such actions could potentially force participants into lower-performing investments resulting in lost long-term retirement savings. In contrast to the 2020 rulemakings, the NPRM recognizes the importance of ESG in retirement investments, and the AFT strongly agrees with the department's assessment that "if a fiduciary prudently concludes that climate change or other ESG factor is material to an investment or investment course of action under consideration, the fiduciary can and should consider it and act accordingly."[4]

Consideration of ESG factors in investing is now a mainstream and popular practice among institutional investors in the United States and globally, and ESG considerations are often integrated for the purpose of improving returns and mitigating risk in investment portfolios. A number of studies have demonstrated that the consideration of ESG factors in investment decision-making typically results in performance equal or superior to non-ESG investments:

- According to a 2018 Government Accountability Office review of five years' worth of peer-reviewed academic studies, "The vast majority (88 percent) of the scenarios in studies we reviewed … reported finding a neutral or positive relationship between the use of ESG information in investment management and financial returns in comparison to otherwise similar investments."[5]
- According to Morningstar, a majority of U.S. mutual funds that self-identified as sustainable using ESG factors outperformed their conventional peers in 2019.[6]

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[4] 86 Fed. Reg. 57272, https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf.

[5] U.S. Government Accountability Office, "Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful," May 2018, https://www.gao.gov/assets/700/691930.pdf.

[6] Gunnar Friede, Timo Busch and Alexander Bassen, "ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies," *Journal of Sustainable Finance & Investment* 5, no. 4, (2015): 210-33, https://doi.org/10.1080/20430795.2015.1118917.

- A 2020 analysis by S&P Global Market Intelligence found that ESG fund performance has outperformed the S&P 500 even during the COVID-19-related stock market volatility.[7]

According to the US SIF Foundation's 2020 biennial "Report on US Sustainable and Impact Investing Trends," sustainable investing assets now account for $17.1 trillion—or 1 in 3 dollars—of the total U.S. assets under professional management, a 42 percent increase over 2018.[8] Additionally, a 2021 survey by the Callan Institute found that 49 percent of surveyed U.S. institutional investors (including 20 percent of surveyed corporate plans) have incorporated ESG factors into their investment decision-making process, up 7 percentage points from last year's level and more than double the share in 2013.[9]

**Proxy Voting**

Over the years, the department has consistently viewed proxy voting as a fiduciary obligation. Prior to 2020, the department's guidance on fiduciary duties regarding proxy voting was addressed in sub-regulatory guidance. However, in 2020, the department finalized a proxy rule that was to be effective in January 2021. Before the regulation was fully applied, the department announced that it was re-examining the rule and would not enforce it. The October 2021 NPRM adds four major changes related to the exercise of shareholder rights, which are consistent with the department's pre-2020 proxy voting advice:

- It eliminates the 2020 proxy rule that forces fiduciaries to keep extra records on proxy voting activities. We concur with the department's view that ERISA's general framework sufficiently governs records for proxy voting.
- It removes the provision in the 2020 proxy rule that sets out specific monitoring duties when proxy voting authority has been delegated to an investment manager or proxy voting firm. We agree with the notion expressed in the preamble to the NPRM that the prudence and loyalty standards under ERISA already impose an important monitoring requirement that is clear-cut and appropriate.

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[7] Esther Whieldon, Robert Clark and Michael Copley, "ESG Funds Outperform S&P 500 amid COVID-19, Helped by Tech Stock Boom," S&P Global Market Intelligence, Aug. 13, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/esg-funds-outperform-s-p-500-amid-covid-19-helped-by-tech-stock-boom-59850808.
[8] US SIF Foundation, "Report on US Sustainable and Impact Investing Trends 2020," Nov. 16, 2020, http://www.ussif.org/trends.
[9] Thomas Shingler, "Callan Survey Finds Nearly 50% of Respondents Incorporate ESG, Highest Level Ever," Callan, Nov. 5, 2021, https://www.callan.com/blog-archive/2021-esg-survey/.

- It removes two safe harbor examples from the 2020 proxy rule. The first would limit proxy voting to proposals that only have a material effect on the value of the business. The second would permit fiduciaries to adopt a proxy policy that lets them avoid voting if the asset is below a certain percentage of the total portfolio. We agree that these two safe harbors may inappropriately discourage plan fiduciaries from proxy voting and should be removed.
- It reiterates the department's historical view that proxies should be voted as part of the process of managing plan assets unless the cost or effort creates a substantial burden on the plan. This position has been adopted by fiduciaries of teacher and other public employee pension plans, and we concur with this view.

The AFT believes that a pension plan fiduciary must act solely in the economic interest of plan participants and beneficiaries and must consider the cost and benefit in exercising shareholder rights. We are certain that adoption of the NPRM will provide the necessary framework for fiduciaries to meet their ERISA duties of prudence and loyalty as they engage in ESG investing and proxy voting on behalf of plan participants and beneficiaries.

We appreciate the opportunity to provide the department with our views on the NPRM. Please feel free to contact me if you require any further information. Thank you for your consideration of these comments.

Sincerely,

Randi Weingarten
President, American Federation of Teachers

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