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General Comment

Thank you for the opportunity to submit a comment regarding this important action. I am submitting an article of mine that originally appeared in the Washington Examiner on July 24th, 2020 as my comment on the EBSA proposed rule.

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Labor Secretary Eugene Scalia is on the right track with activist investor reform
by Charles Sauer

Should people be able to invest in ventures that aim to have a social or environmental impact? The answer is yes. In fact, people should be able to invest in, buy stock in, and even bet on anything they want. However, fiduciaries (those that manage other people's investments) must follow some rules.

The first rule of a fiduciary should be to put the economic interests of its clients first. Some haven't exactly followed that rule and have let personal politics and beliefs get in the way,

investing in assets that sacrifice returns for environmental, social, and governance activism also known as ESG. On the individual level, this is not an issue, but someone else making a political point with your 401(k) money should be a choice that is off the table.

Fortunately, the Trump administration is looking to codify this simple idea and help refocus fiduciaries on their jobs: making money for their clients. In 2018, the Department of Labor issued guidance stating that "plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk as a means of using plan investments to promote collateral social policy goals." Now, in 2020, the administration is attempting to codify this guidance.

In a Wall Street Journal op-ed discussing the proposed rule, Secretary of Labor Eugene Scalia summed up the issue well:

ESG investing poses particular concerns under the Employee Retirement Income Security Act, or Erisa, the federal law governing private retirement plans. At the heart of Erisa is the requirement that plan fiduciaries act with an "eye single" to funding the retirements of plan participants and beneficiaries. This means investment decisions must be based solely on whether they enhance retirement savings, regardless of the fiduciary's personal preferences. The basic idea is that fiduciaries for private pension beneficiaries cannot invest in socially responsible index funds, religious belief investment funds, or environmental and sustainable investment funds, if the investments de-emphasize financial returns in favor of a non-monetary agenda. As with all investment decisions, making a particular investment means forgoing another possible investment. Again, fiduciaries should always strive to make the best economic investment for their clients.

It isn't just activist investors, though, who have pushed an ESG agenda. Sometimes, a small group of participants in a private pension plan, the type of plan overseen by the Department of Labor under the Employee Retirement Income Security Act, can push and advocate for fiduciaries to make ESG investments instead of investments that would provide greater returns for the pension. Therefore, even some of the private pension fund fiduciaries in the past have been supportive of these changes because they help clarify how, why, and what information they can use to make their decisions.

Given the bad historical returns of ESG investments, a fiduciary's decisions shouldn't be too hard. In fact, ESG investments were found to produce almost 50% less return than standard index funds such as an S&P 500 index fund, according to a Pacific Research Institute study.

Nothing is prohibiting individuals from pursuing ESG investments. Individuals should be able to make bad decisions all they want, as long as it only affects themselves. But a fiduciary's job description is to provide the biggest returns possible for clients. Investors shouldn't purposely make bad investment decisions just because it makes themselves or a small group feel better about it. In effect, the Labor Department is attempting to practice one of the most important social justice causes: protecting wealth creation.