



Comments of the Regulatory Action Center

RE: Prudence and Loyalty in Selecting Plan Investments and Exercising
Shareholder Rights

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The Regulatory Action Center at FreedomWorks Foundation is dedicated to educating Americans about the impact of government regulations on economic prosperity and individual liberty. FreedomWorks Foundation is committed to lowering the barrier between millions of FreedomWorks citizen activists and the rule-making process of government agencies to which they are entitled to contribute.

On behalf of our activists nationwide, FreedomWorks Foundation appreciates the opportunity to offer these comments regarding the notice and request for comments on prudence and loyalty in selecting plan investments and exercising shareholder rights.

In November 2020, the Trump Administration’s Labor Department adopted a rule clarifying years of sub-regulatory guidance on fiduciaries’ investing of pension funds and funds from other employer-provided benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA). In adopting the rule, the Department noted that:

ESG investing raises heightened concerns under ERISA. Public companies and their investors may legitimately pursue a broad range of objectives, subject to the disclosure requirements and other requirements of the securities laws. Pension plans and other benefit plans covered by ERISA, however, are bound by statute to a narrower objective: Prudent management with an “eye single” to maximizing the funds available to pay benefits under the plan. Providing a secure retirement for American workers is the paramount, and eminently worthy, “social” goal of ERISA plans; plan assets may never be enlisted in pursuit of other social or environmental objectives at the expense of ERISA’s fundamental purpose of providing secure and valuable retirement benefits.¹
[internal citation omitted]

Now, however, the Biden Administration’s Labor Department proposes to ignore ERISA’s clear statutory dictate—investing retirement and pension funds solely to maximize benefits—and allow injection of so-called Environmental, Social, and Governance considerations into fiduciaries’

¹ 85 FR 72848 (Nov. 13, 2020).

decisions as to how to invest funds. This violates ERISA's fundamental principles of fiduciaries' duties of loyalty and prudence. It would also swing the door wide open for fiduciaries to insert their own political preferences in selecting investments, rather than being required to focus only on monetary returns.

Investing to address ESG issues rather than to maximize returns is a growing trend among fiduciaries. Over the last few years, flows into these ESG funds have quadrupled. The problem is that often, these funds provide lower rates of return and charge higher fees.

ESG investing may make investment managers feel like they are doing something "good" for society--but their idea of what's "good" is often to promote environmental extremism, social upheaval, and race and sex quotas for corporations. So not only does "woke investing" deprive Americans of retirement savings--it also supports beliefs that many do not agree with. So they'll have to delay retirement or get by on less money--solely to advance a fiduciary's political agenda.

If individuals want to invest their own money in ESG funds, that is their choice. It is quite another matter, however, for fiduciaries entrusted with growing employees' retirement savings to accept lower returns in exchange for promoting their own ideas of "doing good."

When Congress enacted ERISA, it made clear that a "fiduciary's evaluation of plan investments must be focused solely on economic considerations that have a material effect on the risk and return of an investment based on appropriate investment horizons, consistent with the plan's funding policy and investment policy objectives. The corollary principle is that ERISA fiduciaries must never sacrifice investment returns, take on additional investment risk, or pay higher fees to promote non-pecuniary benefits or goals."²

When it drafted ERISA, Congress decided that retirees' financial security was the sole objective that fiduciaries were allowed to consider. Congress could have required that social goals be considered as well, but it did not. The Department of Labor's regulations must implement the statute that Congress passed. It has no authority to rewrite the statute and alter Congress' determination of ERISA's paramount goal. This proposed regulation violates the statute and robs potentially millions of hardworking Americans of a secure retirement.

Respectfully submitted,

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² Ibid.