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December 13, 2021

RIN-1210-AC03

Submitted via: www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655 US Department of Labor
200 Constitution Ave. NW
Washington DC 20210

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

Comments in Response to Proposed Rulemaking

To Whom It May Concern:

Please accept the following comments of the American Jewish Committee (“AJC”) on the proposed rule regarding prudence and loyalty in selecting plan investments and exercising shareholder rights.

The comments below are directed solely at the portions of the proposed regulation dealing with the ‘S’ component of ESG investing and proxy voting rules. Our comments are not to be understood as applying to either the environmental or governance aspects of the proposed rule.

We begin with two bedrock propositions: The first is reflected in the proposed rules and the accompanying justification—that people who hold other people’s retirement funds have a single presumptive duty—to maximize the return, in financial terms, of those assets unless and until, and only if, the holder of the funds specifically agrees otherwise. It is not the place or function of fund fiduciaries to use other people’s money to advance their own agendas.

A second bedrock proposition is that it must be assumed that most retirement fund investors are not going to the trouble or burden of challenging social justice decisions by fiduciaries as unjustifiable in financial terms.

Even if lawsuits advancing such challenges were viable—an issue currently pending before the U.S. Supreme Court—given the ease of constructing *ex nihilo* financial justifications for almost anything, such lawsuits are not realistically going to restrain ideologically minded fiduciaries. The rule should not depend on lawsuits as a safeguard against misuse of social justice investments.

As a general matter, we note that while the proposed rule and the accompanying explanation of the proposal offer persuasive arguments and tangible examples of how environmental and governance concerns could affect financial value, it is noticeably silent about justifications for including social justice under the same rubric.

And, indeed, we are hard-pressed to think of any, except possibly avoiding public attacks by hard-core advocates for one cause or another. We do not see it as a legitimate interest of government to encourage the politicization of the corporate sector in the name of a concept as nebulous and ill-defined as social justice. We note that the proposed rules offer no definition of what social justice means. Indeed, no such definition is realistically possible, at least not one that is relevant to hotly contested issues in our society.

People who support reproductive choice think that social justice means allowing women to choose whether to have an abortion. People who oppose abortion think that abortion is a great social injustice. Much the same can be said for human rights, racial justice, criminal justice reform and many other issues. Even if financial returns are equal, pensioners shouldn't be shunted into funds whose vision of social justice differs from theirs.

The government (or AJC) may think one or the other of those views correct. In its own actions, subject to the constraints of the Constitution and the democratic process, government is free to adopt one or the other social justice policy. What the government should not do is decide that people—not subject to democratic checks—should be pushed to invest their funds in accordance with the government's (or some self-described social activist's view) of social justice.

More precisely, one should not have to take special care to avoid being dragooned into making such investments. Rather their burden should be the opposite, that one needs to take special steps to invest on the bases of social justice. Thus, we believe that funds using social justice criteria should not be allowed to be default investment options.

It is not an answer to say that fiduciaries need a financial reason for their investments. No doubt advocates for one or the other cause can spin out makeweight financial arguments in favor of their causes. These should be seen for what they typically are: fig leaves for a decision based on other grounds entirely. As noted, we see no reason to think breach of duty lawsuits will be a sufficient guarantor of proper behavior.

None of these arguments are sufficient to justify a full ban on social justice investments. We would oppose such a ban. We are not asserting that fiduciaries should be flat out banned from considering social justice policies in making investment decisions. On the contrary, where retiree/investors want such matters considered by their retirement funds, fiduciaries should by all means execute those desires.

The very point of default options is that people don't spend the time to learn about their retirement investments. Even if adequate disclosures are made about what social justice factors are considered—a point to which we return below—the simple fact is that most people won't read through them and won't consider all their implications.

Allowing S factor funds to be the default option is to strengthen the hand of those who invoking the rubric of social justice to bludgeon corporations into adopting their agendas simply to avoid bad publicity. Too many social justice advocates fail to accept that others have very different ideas of social justice, and that those different perspectives are legitimate.

The proposed regulations do call for disclosure about the criteria for making social justice investments. That impulse is correct, but we think that the regulations need to spell out that those disclosures must be specific about causes and that generic terms like ‘compliance with international norms’, ‘peaceful resolution of disputes’, ‘religious liberty’, ‘equity’ or ‘racial justice’ simply lack sufficient content to let investors know what is being done with their money.

Finally, we think that the rules ought to be explicit—no retirement fund should be allowed to offer only investments that have a social justice component.

Sincerely,

A handwritten signature in blue ink, appearing to be 'M. Stern', written over a horizontal line.

Marc D. Stern
Chief Legal Officer
American Jewish Committee