



July 14, 2020

The Honorable Eugene Scalia  
Secretary  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

**Via Federal eRulemaking Portal ([www.regulations.gov](http://www.regulations.gov))**

Re: Financial Factors in Selecting Plan Investments (RIN: 1210-AB95)

Dear Secretary Scalia:

We at the Free Enterprise Project<sup>1</sup> of the National Center for Public Policy Research<sup>2</sup> appreciate the opportunity to submit this comment on the above-styled proposed rule (Proposal) that would confirm that investment managers of plans governed by the Employee Retirement Income Security Act of 1974 (ERISA)<sup>3</sup> must select investments based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment strategy. It would clarify that such managers are not permitted to select investments that are less objectively likely to bring the highest

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<sup>1</sup> Launched in 2007, the National Center for Public Policy Research's Free Enterprise Project focuses on shareholder activism and the confluence of big government and big business. The Free Enterprise Project (FEP) is the conservative movement's only full-service 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](#).

<sup>2</sup> 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](#).

<sup>3</sup> 28 U.S.C. ch. 18, §§ 1001, *et seq.*

risk-appropriate return to the plan because the preferred investments better comport with the personal policy preferences of the plan managers or any other parties.

We commend the Department for promulgating this proposed rule. Policy-based investing has grown more popular among institutional investors, including ERISA-governed funds, in recent years. But 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. This rule correctly confirms these principles that have been clearly and repletely established in statute and legal precedent. While we will make two minor suggestions for expanding the reporting obligations that fund managers will face under this rule and for offering a fully representative variety of policy-based alternatives to participants in defined-contribution individual account plans if any such policy-based options are offered, we otherwise heartily congratulate the Department on its clear and faithful expression of the law in this area.

## **I. Background**

Investment to achieve political or policy goals has occurred for some time.<sup>4</sup> There can be no objection to such policy-based investment by individual investors or private investment pools. Such investment, however, has proven increasingly popular amongst institutional investors, who owe overriding fiduciary duties to the parties on whose behalf they invest.

In the case of pension funds regulated by ERISA, those fiduciary duties are clear. Managers of these funds must act “solely” in the interest of maximizing the value of the plan for purposes of meeting plan obligations, primarily payment obligations to beneficiaries.<sup>5</sup> The assets of the plan cannot be used to benefit any other parties in any other ways – including by satisfying the personal policy preferences of managers, employers, or any other parties.<sup>6</sup> Nevertheless, in recent years ERISA-governed plan managers have followed the lead of a wide array of public pension fund managers<sup>7</sup> in

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<sup>4</sup> See, e.g., Mary McMahon, *What is a Divestment Campaign?*, WISEGEEK (last edited June 17, 2020), available at <https://www.wisegeek.com/what-is-a-divestment-campaign.htm> (last accessed July 14, 2020).

<sup>5</sup> See 29 U.S.C. § 1104(a).

<sup>6</sup> 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).

<sup>7</sup> 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/sustainable-investings-secret-weapon-public-pensions-idUSKCN1NH24M> (last accessed July 14, 2020).

making investments on the basis of policy rather than according to their clear fiduciary duty.<sup>8</sup>

The gravity of this deviation from duty has been exacerbated by the condition in which so many ERISA-governed pension funds currently find themselves. 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.<sup>9</sup> Multiemployer plans, which cover unionized workers and are run by joint committees of representatives of unions and employers, have been particularly susceptible to underperformance.<sup>10</sup> Some had even begun formally reducing payouts.<sup>11</sup> 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.<sup>12</sup> The pandemic and its resulting economic dislocations have only made this situation worse.<sup>13</sup>

All of this 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 directly reduce the financial well-being of those beneficiaries. This is unconscionable. And while there has been some discussion of a federal bailout of these funds,<sup>14</sup> the

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<sup>8</sup> See, e.g., John Manganaro, *2019 Could Be Banner Year for ESG in ERISA Plans*, PLANSPONSOR (Jan. 16, 2019), available at <https://www.plansponsor.com/in-depth/2019-banner-year-esg-erisa-plans/> (last accessed July 14, 2020); 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 July 14, 2020).

<sup>9</sup> See, e.g., Stephen Miller, *114 Multiemployer Pension Plans Projected to Fail Within 20 Years*, SHRM (August 29, 2017), available at <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/multiemployer-pension-fail.aspx> (last accessed July 14, 2020) (“Multiemployer Pension Plans”).

<sup>10</sup> See *id.*; PBGC Public Affairs, *Blog Archive PBGC Releases FY 2016 Projections Report*, PBGC (Aug. 9, 2017), available at <https://www.pbgc.gov/about-pbgc/who-we-are/retirement-matters/pbgc-releases-fy-2016-projections-report> (last accessed July 14, 2020) (“PBGC Report”).

<sup>11</sup> See, e.g., *Multiemployer Pension Plans*, *supra* note 9.

<sup>12</sup> See, e.g., *PBGC Report*, *supra* note 10.

<sup>13</sup> See, e.g., MP McQueen, *Multiemployer pension plans' troubles worsening due to COVID-19: Milliman*, BENEFITSPRO (May 4, 2020), available at <https://www.benefitspro.com/2020/05/04/multiemployer-pension-plans-in-growing-trouble-due-to-covid-19-milliman/> (last accessed July 14, 2020).

<sup>14</sup> See, e.g., Elizabeth Bauer, *Does Multi-Employer Pension Reform Belong In A 'Phase Four' Coronavirus Bill?*, FORBES (April 7, 2020), available at <https://www.forbes.com/sites/ebauer/2020/04/07/does-multi-employer-pension-reform-belong-in-a-phase-four-coronavirus-bill/#1103d7c52b80> (last accessed July 14, 2020); Rachel Greszler, *A Public Health Crisis Is No Time for Private Pension Bailouts*, DAILY SIGNAL (March 25, 2020), available at <https://www.dailysignal.com/2020/03/25/a-public-health-crisis-is-no-time-for-private-pension-bailouts/> (last accessed July 14, 2020); Hazel Bradford, *Senate reintroduces multiemployer pension reform bill*, PENSIONS & INVESTMENTS (July 24, 2019), available at <https://www.pionline.com/legislation/senate-reintroduces-multiemployer-pension-reform-bill> (last

possibility of such a bailout can do nothing to absolve plan managers of their sole duty to invest for maximum returns, for then every indulgence of their personal policy preferences would create a direct tax on the American taxpayers who would be providing any bailout that might arise.<sup>15</sup>

## II. The Proposal

The Proposal takes simple cognizance of the statutory fiduciary obligations of ERISA-governed plan managers, confirming that such managers may not make Environmental, Social, or Governance (ESG)-directed investments in any situation in which the investment would subordinate the maximization of return to the achievement of policy-related objectives.<sup>16</sup> In determining which investments will provide maximum return, managers are not permitted to give inappropriately heavy weight to – or otherwise misweigh, as by giving inappropriate consideration to all of the risks involved in the pecuniary analysis – potential pecuniary aspects of investments in which they might be interested for, in part, non-pecuniary reasons.<sup>17</sup>

In order to ensure that inappropriate weighting is not occurring, and inappropriate policy-based factors are not being considered in plan-manager decision making, the Proposal would also require that managers “adequately document” occurrences in which the managers have used policy-based considerations to “break a tie,” a situation in which two potential investments or investment strategies are equally attractive on pecuniary grounds.

Finally, the Proposal would bar ERISA-governed plans from making policy-focused investment vehicles the default investment vehicle for investors in “defined contribution individual account plans.”<sup>18</sup> As the Proposal explains, “it is inappropriate for participants to be defaulted into a retirement savings fund with other objectives absent their affirm decision,”<sup>19</sup> and especially into a default that would “favor the fiduciary’s own personal policy preferences.”<sup>20</sup>

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accessed July 9, 2020); Lorie Konish, *These pension plans are at risk of going broke. Now lawmakers need to agree on a fix*, CNBC (July 12, 2019), available at <https://www.cnbc.com/2019/07/12/these-pension-plans-are-at-risk-of-going-broke-lawmakers-need-a-fix.html> (last accessed July 14, 2020).

<sup>15</sup> See *id.*

<sup>16</sup> See Employee Benefits Security Administration, Department of Labor, *Financial Factors in Selecting Plan Investments*, 85 FR 39113, 39116, 39117 (June 30, 2020), available at <https://www.federalregister.gov/documents/2020/06/30/2020-13705/financial-factors-in-selecting-plan-investments> (last accessed July 14, 2020).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 39118.

<sup>19</sup> See *id.* at 39119.

<sup>20</sup> See *id.*

### III. Suggested Emendations

We would like to suggest two enhancements to the Proposal.

First, we think that plan managers' reporting requirements should be expanded. In its current iteration, the Proposal would require enhanced reporting only in situations in which plan managers have determined, in the course of their normal evaluation process, that a "tie" between otherwise equally financially beneficial plans has arisen, thus allowing them to use policy-based factors in breaking the tie. While this is a valuable inclusion, it will not capture situations in which plan managers who are inclined toward policy-based investment have used policy-based metrics in their evaluation of the pecuniary value of an investment or investment plan that are either self-referential or result-anticipating. This sort of biased, policy-based metric arises regularly in the analyses of the policy-based investment strategies by organizations that support those strategies.<sup>21</sup>

One common example appears in analyses of the risk and reward appending to carbon-abatement investment strategies.<sup>22</sup> There, proponents of such strategies assume as part of their analysis that, for instance, United Nations carbon-reduction targets are both achievable and will in fact be achieved in ways that will leave investments that would not conform with United Nations metrics as "stranded assets" from which significant value would be lost.<sup>23</sup> But any serious evaluation of the pecuniary value of such investments would have to consider, and fully incorporate into the analysis, the possibilities that the United Nations' metrics are faulty; that their goals cannot be achieved; that their goals will not be achieved by federal legislation that would require the stranding of the relevant assets; and other contingencies.<sup>24</sup>

Because the reporting requirements as currently constructed would not capture instances in which plan managers made pecuniary-value determinations based on metrics that were inherently biased toward inappropriate overestimations of the pecuniary value of policy-infused investment decisions, we suggest that the reporting requirement be expanded to require complete explanation and documentation any time policy-based analysis plays any role in the determination of the anticipated pecuniary value of an investment or investment strategy.

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<sup>21</sup> See, e.g., Free Enterprise Project, National Center for Public Policy Research, INVESTOR VALUE VOTER GUIDE 10-18 (April 2020), available at [https://nationalcenter.org/wp-content/uploads/2020/04/Investor\\_Value\\_Voter\\_Guide\\_2020\\_web.pdf](https://nationalcenter.org/wp-content/uploads/2020/04/Investor_Value_Voter_Guide_2020_web.pdf) (last accessed July 14, 2020).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

Second, we suggest that individual account participants be given a fully representative menu of policy-influenced investment options if any such options are offered. We applaud the Proposal's provision that the default plan for defined-contribution individual plans not be a policy-influenced plan. Unless participants in individual plans select otherwise, they should be presumed to have an overriding interest in maximizing their retirement benefits, not in satisfying the personal policy preferences of plan managers. We would move a step beyond the Proposal, however, to require that if plan managers elect to include in its menu of non-default investment options *any* policy-influenced plans, that it include a suite of such plans that reasonably achieve a mix of policy-influenced plans that would appeal to participants who ascribe to any of the wide array of policy dispositions that characterize the American people. A menu of plans that permit value maximization or investing to favor traditionally left-leaning policies (such as carbon divestment or the establishment of hiring quotas for company boards and workforces) but that included no options that would be favored by right-leaning participants (such as plans that would push companies toward divestment from Chinese-government-influenced firms or toward policies of nondiscrimination on the basis of political or social viewpoint) would represent a second-order instantiation of the personal policy preferences of plan managers that would no more comport with their duties to plan participants than would making other decisions on the basis of their own personal policy preferences.

Again, we commend the Department's Proposal and its leadership on this vital national issue. 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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