Committee For Justice
Holding Judges and Politicians Accountable to the Constitution

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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor, Room N-5655
200 Constitution Avenue NW
Washington, DC 20210

RE: PROPOSED RULE ON FINANCIAL FACTORS IN SELECTING PLAN INVESTMENTS

REGULATORY IDENTIFIER NUMBER: 1210-AB95
SUBMITTED: JULY 30, 2020

CURT LEVEY
PRESIDENT
THE COMMITTEE FOR JUSTICE

We at the Committee for Justice (CFJ) write to the Department of Labor (DOL) in support of its proposed rule to clarify provisions of the Employee Retirement Income Security Act of 1974 (ERISA) in order to ensure that pensions and other retirement savings plans meet the statutory requirement that plan fiduciaries make investment decisions based on the best financial interests of plan participants.[1] We believe this rule will enhance the retirement security of many millions of American workers.

Founded in 2002, CFJ is a nonprofit, nonpartisan legal and policy organization that promotes and educates the public and policymakers about the rule of law, constitutionally limited government, and regulatory reform.

THE GROWTH OF ESG INVESTING AND CONCERNS FOR AMERICAN WORKERS AND RETIREES

Americans are living longer than ever but many workers are unable to save enough for retirement.[2] More than ever, today's workers must be focused on the financial return of their investments for retirement. Employers play an important role in this process by offering retirement savings options to suit the individual circumstances of employees. ERISA's purpose is not to supplant the informed decisions of employers or employees, but rather to ensure that financial planning professionals managing retirement assets adhere to strict standards, including prioritizing the financial well-being

[1] https://beta.regulations.gov/document/EBSA-2020-0004-0002
[2] https://news.stanford.edu/2018/10/22/americans-not-financially-prepared-old-age-study-finds

of plan beneficiaries. The DOL's proposed rule strengthens its ability to maintain this safeguard.

The growing push to deploy public and private pension plans in the service of progressive political priorities is a matter of concern for CFJ. Earlier this year, we filed comments with the Securities and Exchange Commission (SEC) about why it should step up its monitoring and reporting on the role of proxy advisory firms in facilitating investments favoring so-called environmental, social and governance issues ("ESG investing").[3]

Our concerns about the impact of this trend on the retirement security of millions of workers also motivate our support for the Labor Department's proposed rule to clarify and enhance ERISA standards. The rule does not impose an entirely new set of reporting and enforcement regulations. It merely affirms existing law and regulations aimed at shielding workers' savings from politics. CFJ supports this modest step to shore up the integrity of an important safeguard for American workers.

In addition, we suggest that the DOL's final rule go one step further and apply its principles to the proxy voting issues we raised in our comments to the SEC. The proposed DOL rule is silent on proxy voting and shareholder activism even though these areas were addressed in the Department's 2018 field interpretative bulletin.[4] The DOL's final rule should stipulate that under ERISA, private pension fund fiduciaries are prohibited from exercising ESG-driven proxy voting or shareholder activism. In most cases, this activity does not prioritize financial returns for pension beneficiaries.

ENSURING COMPLIANCE WITH ERISA

As DOL explains in the background section of the proposed rule, Sections 403(c) and 404(a) of ERISA "require fiduciaries to act solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to their participants and beneficiaries and defraying reasonable expenses of administering the plan. … The Supreme Court as recently as 2014 unanimously held in the context of ERISA retirement plans that such interests must be understood to refer to *'financial'* rather than 'nonpecuniary' benefits."[5]

[3] https://news.stanford.edu/2018/10/22/americans-not-financially-prepared-old-age-study-finds

[4] https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01

[5] https://beta.regulations.gov/document/EBSA-2020-0004-0002

In light of the growing popularity of ESG investing,[6] coupled with well-planned strategies by activist investors to persuade financial professionals to embrace ESG investing,[7] CFJ believes DOL's proposed rule is necessary to maintain the letter and spirit of this statutory requirement. As DOL has explained, ESG-oriented investment funds often offer a lower return on investment, increased risk, or higher fees compared to non-ESG options. ERISA requires that fiduciaries evaluate these factors so as to maximize the financial well-being of plan participants. Our public policies have and should continue to emphasize this principle, rather than giving way to prevailing political or ideological fashions.

SOCIAL IMPACT INVESTING OPTIONS ARE WIDELY AVAILABLE

The proposed rule is no threat to ESG investing. Advocates of ESG investing and others who want to invest to advance preferred corporate or social policies have no shortage of options. The financial services marketplace has created a specialized segment to serve such investors. The only issue here is ensuring that the ESG approach to investing is not sanctioned by the government in ERISA-protected plans when it comes at the cost of maximizing the financial benefits to plan participants.

GOVERNMENT SILENCE IS GOVERNMENT CONSENT

In the absence of the proposed rule's clear statement, advocates of ESG investing are likely to assume government regulators sanction giving the non-pecuniary objectives of ESG investing the same priority as the financial well-being of plan beneficiaries . That is why we support DOL's unequivocal statement that ESG investing that carries greater risk or lower investment returns is likely to depart from ERISA's fiduciary requirements.

CONCLUSION

An effective and transparent regulatory structure requires revising regulations to keep up with changing circumstances. Given the rapid growth of ESG investing and evidence that this trend could undermine ERISA protections for workers, DOL's proposed rule is a needed enhancement to those protections that is modest and sensible and should be adopted as soon as possible.

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[6] https://www.cnbc.com/2019/12/14/your-complete-guide-to-socially-responsible-investing.html

[7] https://www.aei.org/articles/proxy-advisory-firms-and-the-need-for-sec-protection-of-investors-fiduciary-interests