

United States Senate
WASHINGTON, DC 20510

March 18, 2021

Mr. Al Stewart
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Enforcement of the DOL Investment Duties Regulation

Dear Acting Secretary Stewart:

We are concerned by the Department of Labor's (DOL) March 10, 2021 statement that it will not enforce two important final rules that were issued in 2020 to protect the retirement savings of millions of American workers. These rules, which amended the Investment Duties regulation under the Employee Retirement Income Security Act of 1974 (ERISA), collectively prohibit the fiduciaries of private-sector retirement plans from making investment decisions and exercising shareholder rights in a manner that subordinates the financial interests of workers and retirees to non-pecuniary interests, such as environmental, social, and governance (ESG) objectives. Both rules are the products of open and transparent notice and comment rulemaking processes.

DOL should immediately reverse its ill-considered decision to not enforce these rules. DOL has a legal responsibility to enforce ERISA and the rules issued thereunder. The final rules are based on the common-sense, unobjectionable principle that fiduciaries of retirement plans must put the financial interests of plan participants and beneficiaries first.

The specific details of these rules are equally unobjectionable. For example, one of the rules requires plan fiduciaries, when making investment decisions, to consider factors such as diversification, liquidity, and projected and current returns. The other rule requires plan fiduciaries to act in accordance with the financial interest of plan participants and beneficiaries when deciding whether and how to vote proxies and exercise shareholder rights. DOL's refusal to enforce these rules will harm Americans' retirement savings by allowing plan fiduciaries to sacrifice investment returns to promote non-pecuniary policy objectives like social justice, diversity quotas, and lower carbon emissions.

In addition, DOL's decision encourages plan fiduciaries to take actions that may make them vulnerable to class action liability under ERISA. For example, DOL's non-enforcement policy may prompt a plan fiduciary to make investment decisions based on non-pecuniary policy objectives in violation of DOL's Investment Duties regulation. While DOL would not take action against a plan fiduciary for such action, plaintiffs' lawyers could by bringing a class action lawsuit under ERISA.

DOL's decision to not enforce rules that protect the retirement savings of American workers is

particularly concerning because it reportedly came after Wall Street asset managers lobbied the incoming Biden administration for this outcome.¹ Asset managers that sell ESG funds—which “are a growing profit center for asset managers”—stand to benefit from DOL’s decision.² Since DOL is allowing plan fiduciaries to put non-pecuniary policy objectives above the financial interests of plan participants and beneficiaries, fiduciaries are now free to include ESG funds in their plans even if they have lower returns, higher costs, and/or higher risks.

In the interests of protecting the retirement savings of millions of American workers, we ask that DOL enforce the important rules issued in 2020 that amended DOL’s Investment Duties regulation.

Sincerely,



Richard Burr
Ranking Member
U.S. Senate
Committee on
Health, Education,
Labor and Pensions



Mike Crapo
Ranking Member
U.S. Senate
Committee on
Finance



Pat Toomey
Ranking Member
U.S. Senate
Committee on
Banking, Housing,
and Urban Affairs

cc: Ali Khawar, Principal Deputy Assistant Secretary, EBSA

¹ See Dawn Lim, *Wall Street Lobbies to Bring More ESG Funds Into 401(k)s*, Wall Street Journal (Mar. 3, 2021), available at: <https://www.wsj.com/articles/wall-street-lobbies-to-bring-more-esg-funds-into-401-k-s-11614767400>.

² *Id.*; see also Michael Wursthorn, *Tidal Wave of ESG Funds Brings Profit to Wall Street*, Wall Street Journal (Mar. 16, 2021), at https://www.wsj.com/articles/tidal-wave-of-esg-funds-brings-profit-to-wall-street-11615887004?mod=md_mf_news (“Exchange-traded funds that explicitly focus on socially responsible investments have 43% higher fees than widely popular standard ETFs”).