RealClear Foundation

The Biden Administration's ERISA Work-Around

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The Biden administration is finalizing a rule to loosen safeguards under the Employee Retirement Income Security Act of 1974 ("ERISA") that serve to protect private retirement savings. The intent behind the new rule, "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," is to embed ESG investing in retirement plans, to push retirement savings into sectors deemed climate-friendly, and divert capital from politically disfavored sectors. In short, if the proposed rule goes forward, the retirement savings sponsored by private employers of American workers will no longer be fully protected by ERISA's rule that retirement savings be invested for the exclusive purpose of providing retirement income.* Rather, the proposed rule seeks to, and would operate to, redirect the capital flow provided by retirement savings to starve politically disfavored sectors of capital and to support political objectives.

On May 20, 2021, President Biden signed an Executive Order on Climate-Related Financial Risk, which sets out ambitious policy goals to achieve a net-zero emissions economy by 2050, to create well-paying jobs, and to address disparate impacts on disadvantaged communities and communities of color. The executive order directed senior White House advisers to develop a strategy for financing the achievement of these goals, including the role that private investments could play in reaching them.

There has long been tension between employing private retirement savings to provide for retirement and employing private retirement savings to finance political goals. As a result, Congress charged the U.S. Department of Labor (DOL), under ERISA, with protecting private retirement savings from just such a danger. Under ERISA, retirement savings must be invested *for the exclusive purpose* of providing retirement benefits. Indeed, the May 2021 climate financial-risk executive order illustrates the very danger that ERISA's exclusive purpose rule serves to protect against. To achieve the policies set forth in his order, Biden directs DOL (*the very agency charged with protecting against such dangers*)** to "suspend, revise or rescind" two Trump-era rules that upheld the integrity of ERISA's exclusive purpose rule.

Legal debate on overreach by the administrative state focuses on whether agencies overstep the authority granted them by Congress. Can EPA regulate greenhouse gas emissions? In 2007, the Supreme Court decided that greenhouse gases fit well with the Clean Air Act's "capacious definition" of air pollutants. Did CDC, as the Biden administration argued, have the authority to impose a nationwide moratorium on evictions? The Supreme Court stated: "It strains credibility to believe that [the] statute grants the CDC the authority that it asserts." Can OSHA mandate Covid vaccinations? The Biden administration unsuccessfully argued that the Occupational Safety and Health Act gives OSHA such authority in an emergency.

*See ERISA, sec. 404(a)(1)(A), which requires that those who manage retirement plan assets must do so for the exclusive purpose of: (i) providing benefits to participants and beneficiaries; and (ii) defraying reasonable expenses of administering the plan.

**The mission of the Employee Benefits Security Administration (EBSA) (www.dol.gov/agencies/ebsa/about-us/mission-statement) is "to ensure the security of the retirement … benefits of America's workers and their families."

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Administrative state overreach is not the issue here. No one questions DOL's authority to regulate private retirement savings. However, DOL's duty is, in relevant part, to protect the retirement savings of America's workers. Instead, DOL turned its back on that mission. The stratagem that DOL adopted to carry out the executive order's instructions is breathtaking in its audacity. Through ambiguous and contradictory drafting, the effect of the rule—if finalized as proposed—is to nullify the clear, unambiguous intent of ERISA's exclusive-purpose rule enacted by Congress. The rule would be to the detriment of American workers, private employers who fund retirement savings, and the vibrancy of American capitalism and economic performance.

It's audacious, and it's also high risk. Since mid-December 2021, DOL has been reviewing comment letters on its proposed rulemaking. The letters should lead DOL to reconsider. In a December letter, GOP senators Pat Toomey, Mike Crapo, Richard Burr, and Tim Scott, ranking members of the committees on banking, finance, health, and aging, respectively, warned the Secretary of Labor, Martin Walsh, about the proposed rule's use of "inchoate" ESG terminology, given that DOL in 2020 had been convinced by its review of public comments that the term is "not a clear or helpful lexicon for a regulatory standard."

Even ardent supporters of ESG and the proposed rule express concern about the proposal. In their comment letter, the Sierra Club and 11 other NGOs write that by listing some ESG factors and not others, the rulemaking departs from "typical" ESG classifications in a way that could bias investment toward factors itemized in the proposal and discourage consideration of ESG factors that are not, thereby confirming that DOL had been right in 2020 to remove references to ESG terminology in the 2020 Financial Factors rule. This makes the proposed rule, as currently drafted, vulnerable to legal challenge. As the four GOP senators observe: "The use of such [ESG] terminology in the proposal is arbitrary and capricious under the Administrative Procedure Act."

DOL has created numerous problems for itself with its proposed rule, but the fundamental problem is that ESG embodies two incompatible propositions, which, in large part, explains what the four senators describe as the inchoate nature of ESG investing. The first proposition—first in time, as it dates back to the 1970s and the ethical investment movement—is that investing should be about more than financial returns and should have regard to wider societal issues. In a January 2022 interview with *Barron's*, Amy Domini, who cofounded KLD Research & Analytics in 1984, objected to ESG rules that required investing solely in "economic value of the plan":

> The big picture is we have got to get rid of this concept of economic value. This is about making life better for plan participants. I don't care if I've got an extra 50 bucks in my pocket if it's dangerous to walk down the sidewalk, or if my grandson has leukemia because the water system is so polluted.

When it comes to sacrificing financial performance, Domini is as good as her word. In his comment letter, AEI senior fellow Benjamin Zycher cites a comparison showing the MSCI KLD 400 Social Index underperforming the MSCI USA Investable Market Index by 8.59% in the 15 years to November 30, 2018.

The second ESG proposition contradicts the first. Far from sacrificing financial returns, ESG investing boosts returns. "Our investment conviction," BlackRock states in its comment letter, "is that incorporating sustainability-related factors—which are often characterized and grouped into ESG categories—*can* provide better risk-adjusted returns to investors over the long-term" (emphasis added). The sharp-eyed will readily understand that BlackRock is playing a shell game in its advocacy: with a sufficiently wide and flexible definition, one can *ex post* cherry-pick the ESG-themed investment products that outperform the relevant index and taint the comparison with confirmation bias.*

*In its comment letter, CalPERS, the nation's largest pension fund, asserts that "the data shows that investors do not give up returns or pay higher costs with ESG Funds." Zycher notes that for the 12 months before June 20, 2020, the net rate of return on the publicly traded equity portion of CalPERS $389 billion in assets was a derisory 0.6% when the S&P 500 delivered a rate of return of 7.5%. "Can anyone believe that ESG investing had little to do with this vast under-performance?" Zycher asks.

When addressing a different audience, BlackRock whistles a different tune. In his 2021 paper, "The Conflict Between BlackRock's Shareholder Activism and ERISA's Fiduciary Duties," RealClear Foundation senior fellow Bernard Sharfman notes BlackRock's corporate strategy to market ESG-style investment products to millennials, who are expected to inherit $24 trillion in wealth from their boomer parents. Sharfman points to BlackRock CEO Larry Fink's 2019 letter to CEOs in which he cites a survey of millennials. When asked what the primary purpose of businesses should be, 63% more said "improving society" than said "generating profit."

So, on the one hand, ESG advocates argue that ESG investing means subordinating financial returns for the greater good of society but that, on the other hand, doing so results in higher returns. Lucky millennials, foolish boomers: willingness to sacrifice financial returns means ending up with more of them. Of course, it is a fairy tale spun for the purposes of a work-around of the strict letter of the law. BlackRock's special pleading to DOL is shown for what it is by Fink's 2022 letter to CEOs, "The Power of Capitalism." "Make no mistake," Fink tells his fellow CEOs, "the fair pursuit of profit is still what animates markets; and *long-term profitability is the measure* by which markets will ultimately determine your company's success" (emphasis added), a position that comports beautifully within the letter and spirit of the 2020 Financial Factors rule and ERISA's strict fiduciary requirements.

According to Sharfman, Congress had been obsessed with financial corruption in private pension plans during the 1950s and 1960s, including the widespread looting of union-controlled employee retirement plans. In its comment letter on behalf of its 37 million members, AARP notes that Democratic senator Harrison Williams stated that among Congress's objectives in passing ERISA was the establishment of "uniform fiduciary standards to prevent transactions which dissipate or endanger plans assets."

ERISA's duty of loyalty, described by AARP as one of ERISA's bedrock principles, draws much of its content from the common law of trusts, Justice Stephen Breyer wrote for the Supreme Court in a 1996 case. "We also recognize, however," Breyer wrote, "that trust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection." It is that explicit congressional determination and the body of court rulings that flows from it that DOL now seeks to anesthetize in order to redirect private retirement savings in accordance with the strategic plan developed by the executive branch in response to the May 20, 2021, executive order on climate financial risk. Because, as Zycher writes,

> this proposed rule in effect would rewrite ERISA, any such revision of the law must be enacted by the Congress. Accordingly, the proposed rule is inconsistent with the structure and constraints imposed by the constitution, and thus would erode our constitutional institutions.

DOL is in this position because it responded to political pressure from the White House, rather than to genuine problems with the two 2020 rules that the new one is designed to supersede (see **Political Motive** below). It then engaged in secretive talks—presumably, with investment firms keen to dilute ERISA's stringent fiduciary requirements (**Collusive Process**) to help craft an ostensible purpose, one that does not withstand scrutiny when assessed against the text of the Financial Factors rule (**Spurious Justification**). Sowing confusion in order to undo the 2020 rule leads DOL to put forward ambiguous and contradictory language that worries even supporters of the change (**Maze of Confusion**).

The proposal's loosening is most evident in situations where two alternative investments are equal, except for ESG-style collateral benefits. The proposal's approach risks creating a near-universal exemption from ERISA's fiduciary obligations (**Tiebreaker Loophole**), thereby fulfilling the executive order's direction of deploying private capital to achieve political goals. Comment letters in favor of this loophole illustrate the likelihood of bringing about the socialization of retiree savings, something that ERISA and the courts seek to prevent (**The Honeypot Outcome**).

In addition, the proposal would reverse DOL's 2020 rule on fiduciary duties with regard to proxy voting, by creating a presumption that fiduciaries should delegate proxy-voting decisions to the proxy-advisory duopoly whose voting guidelines often promote ESG-style policies rather than economic value (**Proxy Voting for Progressive Causes**).

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Political Motive

In a major speech unveiling his economic policy in July 2020, Joe Biden declared: "It's way past time we put an end to the era of shareholder capitalism." He went on to give a standard justification for ESG investing:

> The idea the only responsibility a corporation has is with shareholders, that's simply not true, it's an absolute farce. They have responsibility to their workers, their community, to their country.

Within hours of being sworn in, President Biden signed an executive order on tackling the climate crisis. The order directs all departments to review and take action on Trump-era regulations that impede the fight against climate change. Richard Morrison, at the Competitive Enterprise Institute, points out that DOL cites the executive order, which has tackling the climate crisis" as its primary goal, in the preamble of the proposed rule and "the creation of the well-paying union jobs necessary to deliver on these goals." Although these may be laudable goals, Morrison comments,

> they have nothing to do with securing the retirement future of American workers. Worse, to the extent that they distract pension fiduciaries from that primary goal, they actually threaten it.

Not only that. These goals fall far outside the "eye single" that the courts and ERISA require of plan fiduciaries to the interests of plan participants and beneficiaries.

Collusive Process

Jonathan Berry, DOL's former Acting Assistant Secretary for Policy, led DOL's regulatory reform effort under the previous administration. In his comment letter, Berry, now a partner at Boyden Gray & Associates, observes that career staff at DOL's Employee Benefits Security Administration (EBSA) initiated secretive private meetings after the November 2020 election—possibly even before the new administration was sworn in—to build support and find cause to overturn the 2020 rules. Because these meetings were not held as part of an open, transparent process, the impression is created that the meetings were with "those who seek to use pension funds to promote pet policy goals or who might benefit from honeypot access."

Who were these parties? In its comment letter, BlackRock praises DOL for its "thoughtful analysis of the challenges presented by the 2020 rules" and for incorporating feedback from a "wide range of stakeholders."

The outcome of this secretive process was a DOL press release on March 10, 2021, announcing the nonenforcement of the two 2020 rules on the basis of stakeholder feedback that claimed that the 2020 rulemaking had been rushed and had not addressed evidence from commenters. "These rules have created a *perception* that fiduciaries are at risk if they include *any* environmental, social and governance factors in the financial evaluation of plan investments," said Ali Khawar, EBSA Principal Deputy Assistant Secretary (emphasis added in the quote).

Spurious Justification

The operative words in Khawar's statement are *perception* and *any*, as they form the basis of DOL's spurious justification for the new rule. As noted earlier, in response to comments, DOL removed references to ESG from the text of the Financial Factors rule. Far from ruling out consideration of *any* ESG factor, its preamble states that

> the proposal fundamentally accepted, rather than ignored, as claimed by some commenters, the economic literature and fiduciary investment experience that showed ESG considerations may present issues of material business risk or opportunities.

The preamble went on to clarify that

> from a fiduciary perspective, the relevant question is not whether a factor under consideration is "ESG," but whether it is a pecuniary factor relevant to an evaluation of the investment or investment course of action under consideration.

In order to create a justification for changing the 2020 rule, it is perverse for a public agency to be complicit in fostering the misperception that ESG factors are presumed to be nonmaterial, when the 2020 states precisely the opposite. If such a misperception exists, argues Berry, "it could have been easily dispelled in a *public* hearing process (or by issuing clarifying FAQs) that reiterated the statements in the preamble to the 2020 rule."

This misperception about the Financial Factors rule has gained considerable currency. The consequence of DOL promoting it—and, at the very least, failing to correct it—in effect means that DOL is validating a dangerously erroneous view of the legal duties of ERISA fiduciaries. Thus, the Natural Resources Defense Council (NRDC), an organization fielding one of the largest lobbying efforts in the capital, wrongly claims in its comment letter that the 2020 rule

> depended on the false premise that a fiduciary would consider ESG factors such as climate change only because of their collateral benefits and not because of the financial benefits to the retirement plan.

NRDC proceeds to argue that DOL had introduced a "conceptual muddle" in making a distinction between "pecuniary" and "non-pecuniary" factors in investment decisions and "a prohibition on the use of 'non-pecuniary' factors," a distinction that NRDC claims is not needed when the distinction is axiomatic to how the courts interpret ERISA's duty of loyalty.

Maze of Confusion

To align with the January 20, 2021, executive order on tackling the climate crisis, the proposed rule's now-notorious paragraph (b) (2) (ii) (C) states that consideration of projected investment plan returns "may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors." In its comment letter, the American Retirement Association (ARA), representing 27,000 actuaries and plan administrators, states that this provision

> strongly implies that fiduciaries not only have the option to consider ESG investments but *should be* considering climate change and other ESG factors.*

ARA flags up the danger that the proposal

> departs from well-established ERISA principles of deference to fiduciaries' judgment by implying that fiduciaries should consider a particular investment strategy. Interjecting any methodology to a fiduciary's prudent process is not supported by the statute, risks a response by a subsequent administration, raises prospects of increased litigation risk, and is not in the best interest of participants and beneficiaries.

ARA's recommendation that DOL develop "neutral language" that does not preclude consideration of ESG factors would, if adopted, take the proposal back to the position of the current Financial Factors rule. For that reason, it is unlikely to be adopted, even though BlackRock signaled concern that the phrase "may often require" in paragraph (b) (2) (ii) (C) "could be confusing" and might lead to fiduciaries interpreting the provision "either more or less broadly than the DOL intended."

*Emphasis in the original.

Like ARA, Jonathan Berry believes that the language of paragraph (b) (2) (ii) (C) introduces regulatory bias and will be construed as mandating consideration of ESG. He notes the contradiction in DOL's conduct in ostensibly acting to remove the alleged thumb on the scale against ESG factors by putting it on the other side of the scale and warns:

> It is internally inconsistent, and therefore arbitrary and capricious, for an agency to "eliminate" a perceived problem about bias by simply switching from bias in *favor* of that action to bias *against* it. At the very least, it would be arbitrary and capricious for the Department not to recognize and explain this obvious inconsistency.*

Tiebreaker Loophole

DOL's intention to perform an ERISA work-around is most blatant in the proposal's dilution of the stringent tiebreaker provision of the 2020 rule. Consistent with previous DOL guidance, the 2020 rule permits fiduciaries to "break the tie" between two options that appear "economically indistinguishable" with a non-pecuniary factor, a circumstance that DOL anticipated would rarely, if ever, occur. In such circumstances, the 2020 proxy rule requires fiduciaries to document their decision process.

The proposal replaces "economically indistinguishable" with "equally serve the interests of the plan" and ditches the documenting requirement in a move that Heritage's David Burton sees as the DOL "inviting fiduciaries to politicize their investment decisions and telling them that this will be okay in practice." By contrast, ARA argues that DOL's proposed standard is untenable on the grounds that it is "literally impossible" to demonstrate that an investment is "equally serving" and proposes text to permit noneconomic criteria in selecting investments that are "more 'values-driven.'" The price of reducing litigation risk for ARA members is to drive a coach and horses through ERISA, making it, as Burton contends, "an invitation to ERISA fiduciaries to pursue their political or social goals at the expense of plan beneficiaries."

When tiebreakers are invoked, the proposed rule would require fiduciaries to identify the collateral benefit, a stipulation in the interests of transparency that is welcomed by Berry, who suggests that any disclosure should also identify the benefit as collateral and the alternative investment rejected because of the tiebreaker.

DOL's limited proposal for tiebreaker transparency is too much for BlackRock and elicits a spectacularly slippery and self-serving passage worthy of Wall Street's finest. Disclosure, BlackRock argues, should be limited to the "name, investment objective, goal or strategy of the investment alternative" (i.e., a brand name and optional marketing fluff). Transparency might mislead plan beneficiaries into believing that the collateral benefits an investment alternative "provides to the plan" (a dishonest piece of drafting because, as a matter of definition, collateral benefits are those that *don't* accrue to the plan) are not always "inherently non-financial" (they are, which is why they can be used only to break a tie; otherwise, they could be used in a financial risk/return appraisal). BlackRock warns that mandating disclosure could provide "an unprecedented window into fiduciary's decision-making process" (a bad thing?) that might be understood as constituting an investment recommendation, requiring further disclosure. Not for BlackRock is sunlight the best disinfectant.

The tiebreaker is put into context by Edward Zelinsky, professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University. In his comment letter, Zelinsky notes that

> the duty of loyalty requires *exclusive* consideration of participants' welfare—even in the face of so-called "ties." Under the proposed regulations, fiduciaries desiring to pursue otherwise proscribed collateral benefits will, deliberately or inadvertently, be encouraged to declare ties to free themselves from the duty of loyalty and its prohibition on the pursuit of third party benefits. Contrary to the teaching of the proposed regulations, the duty of loyalty is not suspended in the presence of "ties."**

*Emphasis in the original.

**Emphasis in the original.

The tiebreaker rule creates a loophole from ERISA's duty of loyalty. It is an invitation to a fiduciary wanting to pursue collateral benefits—and to justify higher active investment-management fees— "to declare a tie to relieve himself of his obligation of loyalty to the plan's participants and beneficiaries."

Zelinsky argues that ERISA's stringent duty of loyalty, combined with its command to prudently diversify, indicates that plan trustees should split investments 50–50 between equally good alternatives. In rare cases where diversification is not possible (if one option is illiquid, it is hard for it to be ranked equivalent to a liquid one), Zelinsky suggests that it would be better to flip a coin than to permit consideration of collateral benefits in fiduciaries' decision-making. Zelinsky's argument for diversification makes a convincing case for closing the tiebreaker loophole and the DOL-sanctioned ERISA loyalty abuse that it invites.

The Honeypot Outcome

The outcome of loosening ERISA loyalty safeguards is the progressive socialization of retiree savings, or, as Berry puts it, "liberalizing access to the great honeypot of retirement savings to use for social engineering." If this characterization sounds excessive, it is what Section 2 of the climate financial-risk executive order called for when it directed White House staff to develop a "comprehensive, Government-wide strategy," in conjunction with the secretary of the Treasury and the director of the Office of Management and Budget, regarding:

> (b) financing needs associated with achieving net-zero greenhouse gas emissions for the U.S. economy by no later than 2050, limiting global average temperature rise to 1.5 degrees Celsius, and adapting to the acute and chronic impacts of climate change; and
>
> (c) areas in which private and public investments can play complementary roles in meeting these financing needs—while advancing economic opportunity, worker empowerment, and environmental mitigation, especially in disadvantaged communities and communities of color.

It is unsurprising, therefore, that climate change is mentioned 129 times in the proposed rule. The NRDC comment letter quotes the Financial Stability Oversight Council, which is chaired by the Treasury secretary, saying that climate change is an emerging threat to financial stability. However, this concern is not reflected in the data. A November 2021 staff paper by the New York Fed, "How Bad Are Weather Disasters for Banks?," notes that more extreme weather is one potential vector from climate change to bank and financial stability. "Our findings suggest the disaster channel is not likely a material source of instability for banks," the reason being that disasters increase the demand for loans.

Climate change is not the only systemic risk that fiduciaries should consider, argues the Sierra Club, in a list of risks that includes racial and economic inequality and threats to democracy. "By adhering to minimum standards for considering systemic risks in investments, engagement and voting, fiduciaries can directly bolster long-term retirement income in ways that also confer socioeconomic benefits that further improve retirees' economic well-being," the Sierra Club and 11 other NGOs argue in their comment letter.

If the language in the proposed rule stands, DOL would have created a precedent of telling fiduciaries how to carry out their investment function—precisely the danger that ARA warns against. "The Department could develop educational materials and convene workshops providing instructions and encouragement on development of Sustainable Investment Policies," the Sierra Club suggests, referencing the United Nations–backed Principles for Responsible Investment, which helps "investors align their responsible investment practices with the broader sustainable objectives of society" defined by the UN and its 17 Sustainable Development Goals and their 169 targets.

Proxy Voting for Progressive Causes

The proposal also seeks to rewrite the December 2020 DOL rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights." That rule restates the principle that in exercising proxies, fiduciaries must not subordinate the interests of plan beneficiaries and participants in their retirement benefits, and clarifies that fiduciaries are not obligated to vote plan proxies, the sole criterion being to secure economic benefits to plan participants and beneficiaries.

The proposal's preamble enunciates a bias against abstention ("abstaining from a vote is not a neutral act"). The solution to the costs of exercising proxies is not total abstention but "wherever possible" to rely on efficient structures, which, in practice, means the proxy advisory duopoly of Institutional Shareholder Services and Glass, Lewis. Jonathan Berry notes that the duopoly's proxy-voting policies "are not always tied to economic factors but rather to furthering policy goals." The proposal thus amounts to ERISA plan assets being deployed to further the May 20, 2021, climate financial-risk executive order's ESG-type goals.

In their comment letter, Bernard Sharfman and Manhattan Institute senior fellow James Copland focus on the anomaly of investment advisers voting proxies in respect of stock that they do not have an economic interest in, so-called empty voting, and point out that DOL guidance on the management of voting rights has not kept pace with the dramatic rise of mutual funds and exchange-traded funds (ETFs). These enable investment advisers such as BlackRock, Vanguard, and State Street to vote proxies opportunistically, an example being the 2020 GameStop proxy fight, when the three lent out GameStop stock. As a result, only a small number of shares were eligible to be voted at the annual meeting. In exchange for enhancing their fee income, "these investment advisers gave up the opportunity to vote an overwhelming proportion of their GameStop shares."

The issue that Sharfman and Copland identify is whether ERISA fiduciaries that put plan funds where voting authority is delegated to an investment adviser have a fiduciary duty to investigate the investment advisers' voting and engagement policies and record. ERISA's duty of prudence implies that plan fiduciaries should satisfy themselves that an investment adviser's shareholder activism is consistent with plan managers' duty of loyalty under ERISA. Fiduciaries cannot simply delegate away their fiduciary duties when delegating shareholder voting authority to an investment adviser. This lacuna in ERISA rules should be addressed by DOL in its current rulemaking, Sharfman and Copland argue. Failure to do so could constitute grounds for a legal challenge under the Administrative Procedure Act.

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DOL's Prudence and Loyalty proposal is a model of poor agency rulemaking. It sows confusion where there was clarity; it substitutes faithfulness to the law with an invitation to subvert it; it is a response to a political directive, not a solution to an objective problem. Its purpose is to pick the lock of strict fiduciary loyalty and open the gates to a vista flowing with ESG milk and honey at the expense of those whom ERISA was enacted to protect.

If finalized as proposed and left unchallenged in the courts, the proposed rule would invert the primacy of statute law over executive-agency rulemaking. It would also fundamentally alter the nature of American capitalism, corralling capital for political ends, enabled by multitrillion-dollar investment advisers eyeing the prospect of higher fees.

Will the rule of law prevail?

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