



July 30, 2020

Jason DeWitt
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Amendments to the Department of Labor's Investment Duties Regulation Under Title 1 of the Employee Retirement Income Security Act (ERISA) RIN 1210-AB95

Dear Mr. DeWitt:

For the last several years, there has been increased activism in the marketplace to elevate non-pecuniary Environmental, Social and Governance (ESG) factors over traditional evaluation of investment risk and returns. Western Energy Alliance shares the department's concern that pension plan fiduciaries are making investment decisions to advance certain policy and political objects rather than to maximize returns to beneficiaries, mitigate legitimate risks, and defray expenses. We appreciate the proposed amendments to the Investment Duties Regulation, as they will help clarify the rule and ensure that ERISA plans are focused on maximizing returns and minimizing expenses, not on advancing political policies that cannot otherwise be enacted through proper democratic processes.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fourteen employees.

Western Energy Alliance members have embraced the true spirit of ESG. Our members constantly innovate to improve the efficiency of operations and to lessen environmental impact. We continue to meet every legitimate environmental challenge. With continual improvements in horizontal drilling combined with hydraulic fracturing, we produce more energy from each well while reducing impact on the land by nearly 70%, and decreasing air emissions and fresh water use per unit of production.¹ Every energy source has an environmental impact, whether oil, natural gas, coal, wind, solar, nuclear, biofuels or hydroelectric. Whereas some sources are not held to account for their full impacts, oil and natural gas is heavily regulated at the federal and state levels. In addition, companies routinely go above and beyond what is required by regulation to implement best practices,

¹ ["Oil and gas impacts on Wyoming's sage-grouse"](#), *Human-Wildlife Interactions*, David H. Applegate, Nicholas Owens, October 2014.

innovate, and further reduce impacts. ESG reporting has given companies a means to tell these good stories.

Likewise, the industry has long been a leader in advancing societal goals. Oil and natural gas companies and philanthropists have supported the arts, hospitals, schools, civic associations, conservation, homeless shelters, and many other charities since the days of Rockefeller and Getty. Companies regularly give significantly to the communities in which they operate. Employees are integrated into these communities and volunteer their time meeting a diversity of needs. The oil and natural gas industry is the largest source of funding for conservation as the sole contributor to the Land and Water Conservation Fund, which has provided \$18.9 billion since 1965. We're proud of the commitment companies and employees have for communities and society.

Our Interests in the Rule

Western Energy Alliance is providing comments to this rule not as an entity directly impacted by the rule. As a trade association for the upstream petroleum industry, we do not manage pension plans nor are we directly engaged in the financial sector. Rather, our members are affected indirectly but materially when asset managers make investment decisions based on non-pecuniary factors that largely result from misdirected ESG advocacy by some activists.

We have observed how ESG advocacy has negatively affected the industry's access to capital over the last few years, and greatly appreciate that DOL is addressing the larger issue through this rule. The rule will help ensure that activism regarding pension plans does not morph into a halt to investment in the sector that provides nearly 70% of American energy, a nonsensical outcome given the impact throughout the entire economy.² Denying those holding defined benefit or defined contribution plans access to that value would not be in their best interests, nor to the eminently worthy social goal of providing a secure retirement for American workers. This rule is an important part of ensuring that pension funds adhere to ERISA by reasserting financial interests as paramount over nonpecuniary interests and political agendas.

ERISA Plans Are Not a Vehicle for Political Activism

Shareholder activists have been pressuring companies, investors, and pension funds to make financial decisions that reflect political objectives they have been unable to achieve through the normal democratic process. For example, Western Energy Alliance members have been a primary target for climate change campaigners who wish to hold the oil and natural gas industry accountable for the emissions that result from the consumption of our products. Never mind that there is not an alternative source of energy that does everything oil and natural gas do in a reliable and affordable manner. The fact that our

² [U.S. primary energy consumption by energy source, 2019](#), U.S. Energy Information Administration (EIA), as updated May 7, 2020.

products are used in just about every facet of modern life speaks to their intrinsic value, and hence, their investment worthiness. Any reasonable energy projection shows oil and natural gas remaining a primary energy source until 2050 and beyond.³

Activist groups have been able to convince neither the American people nor the majority of their representatives in Congress to stop using our products before a viable alternative is found, as it would mean fundamentally altering their healthy, safe and prosperous lifestyles. Knowing that they cannot get Congress to pass laws that prevent people from using our products or that prevent us from producing them, activists have shifted to pressuring pension funds and other financial entities to divest from fossil fuels. Interim steps to that ultimate goal include advocating for countless regulations on the industry as a way to make development and production too expensive. Overregulation increases costs, and as with increased taxes, is a way to get less of something, in this case American production. Another tactic is to require climate change disclosures that likewise are not required by statute or regulation. These investor pressures can detract companies from focusing on returning maximum value to shareholders.

Fund Returns v. Political Activism

We applaud DOL for strengthening the guidance that has been supported by both Democratic and Republican presidents that “all things being equal,” fiduciaries violate ERISA if they accept reduced returns or greater risks to secure social, environmental, or other policy goals. We also applaud the recognition in the preamble that, “Providing a secure retirement for American workers is the paramount and eminently-worthy ‘social’ goal of ERISA plans.” (39115-6).

In addition to the benefits oil and natural gas provide in meeting the energy needs of Americans, the value created supports \$1.4 trillion of annual economic impact. On the other hand, many policies advanced by orthodox environmental groups are actually very damaging to the environment. Michael Schellenberger has documented extensively many such policies in his new book *Apocalypse Never*.⁴ Bjorn Lomborg documented a similar breadth of environmental misconceptions advanced by traditional environmental groups nearly 20 years ago.⁵

For the oil and natural gas industry, advocacy on methane leaks is one such example. Activists wish to shut down American oil and natural gas for small leaks of methane, estimated to be between 1.1 and 1.65% of production. Many companies have driven that leak rate at the wellhead much lower. Although activists have not been able to achieve their zero emissions goal in law or regulation, they have turned to investor pressure to short-circuit the democratic process otherwise required. Besides being an unrealistic goal

³ [Annual Energy Outlook 2020](#), EIA, January 29, 2020.

⁴ *Apocalypse Never: Why Environmental Alarmism Hurts Us All*, Michael Schellenberger, June 2020.

⁵ *The Skeptical Environmentalist: Measuring the Real State of the World*, Bjorn Lomborg, August 2001.

for mechanical systems and for safety reasons, the attempt to shut down American oil and natural gas production is simply not good for the environment. Most obviously the result would be increased energy imports from other countries, most of which do not require stringent environmental controls, not to mention the increased greenhouse gas emissions from transportation.

Further, increased use of natural gas is the primary reason the United States has reduced more greenhouse gas (GHG) emissions than any other nation. Our industry has reduced more GHGs than wind and solar energy combined over more than a decade. On balance, we reduced 267.8 more million metric tons of carbon dioxide equivalents than we emitted in 2018 because of the enormous emissions reductions we achieve in the electricity sector with fuel switching to natural gas power generation. None of these benefits would be accounted for in an orthodox ESG/green/sustainable analysis, yet on balance in that regard and others, oil and natural gas energy is more economically and environmentally sustainable than politically preferred wind and solar energy.⁶ If something is not economically viable it is certainly not “sustainable.”

We share DOL’s concern that the growing emphasis on ESG investing may be prompting fiduciaries to make investment decisions for reasons other than maximizing return to beneficiaries. The proposed rule clarifies that ERISA plan fiduciaries may not invest in ESG funds when the investment strategy of the fund subordinates return or takes on additional investment risk or costs for purposes of non-pecuniary objectives. We support the addition of paragraph (c) to the rule to clarify consideration of pecuniary versus non-pecuniary factors; and in paragraph (c)(1) to explain that it is unlawful for a fiduciary to sacrifice return or accept additional risk to promote a public policy, political or any other non-pecuniary goal. Perhaps the paragraph would be strengthened by a definition of what “generally accepted investment theories” are, however, as that seems a bit vague. Alternatively, the sentence could just be shortened to “Environmental, social, corporate governance, or other similarly oriented considerations are pecuniary factors only if they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations ~~under generally accepted investment theories.~~” It seems that the factors listed in paragraph (b)(2)(ii) define the “material economic considerations” and the additional prepositional phrase is not necessary.

Time Horizon

ESG advocates are often pushing climate change policies, the effects of which are so far into the future that they should not affect investments for today’s workers. While it is widely recognized that a company or investment plan is more financially healthy when it does not sacrifice long-term performance for short-term gain, the time horizon of 2100 for climate change policies has virtually no bearing on the retirement needs of today’s workers, even those just now embarking on their careers. Net-zero carbon by 2050 is a

⁶ See our position paper [Natural Gas Climate Benefits](#) for the full data sources for this and the previous paragraph.

recent policy innovation on that long-term time horizon, but is still too far into the future to justify sacrificing returns for the vast majority of today's workers. We suggest that "appropriate investment horizon" be better defined in the definition of "*pecuniary factor*" in paragraph (f)(3) to ensure that the long-term horizons for certain policy objectives are not substituted for those relating to the time-horizon of the retiree.

Legitimate Pecuniary Concerns

As the preamble to the proposed rule points out, ESG concerns are legitimate when a company assumes additional risk and cost by not complying with environmental regulations or for other behavior that increases risk. Such concerns are directly related to the value of an investment, and therefore, a legitimate, pecuniary consideration.

However, shareholder activism that involves forcing a company to advocate for or comply with non-existing regulations presents the risk itself. The activism itself is the source of the increased costs in the form of imposition of more regulatory burden. We have seen plenty of examples of activist groups themselves creating risk by elevating an issue that may or may not be a real problem or have, on balance, a significant environmental impact. Activist groups artificially create the risk that companies then have to mitigate. Operations well within established health standards suddenly become "risky" by the activities of activist investors themselves.

As discussed in the preamble p. 39115, "...that there could be instances when ESG issues present material business risk or opportunities to companies...that qualified investment professionals would treat as economic considerations under generally accepted investment theories." In such cases, the factors are not considered nonpecuniary "tie-breakers," but are "risk-return" factors that are indeed pecuniary. It would be helpful if the department clarified that these pecuniary factors are related to actual regulatory risks, not preferred regulations that activists wish to impose but which states or the federal government have not adopted through a legitimate regulatory process.

We have seen instances where pension plans attempt to require companies to comply with regulations that "could" come in the future. But there is not a risk to not complying with a future regulation. In fact, early compliance with a regulation that may or may not actually be imposed by a state or federal government represents additional cost that arguably detracts from shareholder value. Any new regulation that is properly promulgated by a state or the federal government has a compliance date, at which point companies must comply. There is only risk if they do not comply by the effective date of the regulation, but no reduced risk, only added cost, of complying before that date. DOL may wish to clarify that noncompliance with regulations for which ESG advocates wish existed but do not is not a legitimate pecuniary factor.

All Things Being Equal

We support the requirement in (c)(2) that fiduciaries must “document why the selected investment was chosen based on the purposes of the plan, diversification of investments, and the interests of plan participants and beneficiaries in receiving benefits from the plan,” when investments are determined to be “economically indistinguishable” under generally accepted investment theories and an ESG plan is chosen under the “tie breaker” principle. We support requiring fiduciaries to document the basis for determining that a distinguishing factor could not be found, particularly since this requirement does not impose an undue paperwork burden, as such information is normally documented by prudent investment managers.

Default Plan Options

We support the proposed rule’s prohibition against funds which have non-pecuniary objectives being a default investment option for individual plans. It seems eminently reasonable for those plans to be actively sought out by those willing to invest based on political objectives, and not unwittingly defaulted into for those whose political objectives may or may not align with those objectives.

In the proposed rule, DOL has identified research showing that individual investors expect socially responsible mutual funds to have lower returns and higher fees than conventional ones, and that social signaling is often the goal of such investors (39120). While that is the prerogative of individual investors seeking plans aligned with their beliefs, such plan options should never be a default requiring individuals to actively recognize the option may be misaligned with their own desire for higher returns or political views. Of course, it would be antithetical, by definition, for a fiduciary to choose reduced returns for a large group of beneficiaries based on his/her own individual political preferences.

Defining ESG

We regret that we missed the window of opportunity to comment on the Securities and Exchange Commission’s rule on fund names, which is referenced on page 39115 of this proposed rule. To the extent that the name of funds influences the investment duties addressed by this rule, and to the extent that DOL shares information with SEC over similar issues, we offer the perspective of how ill-defined “sustainable”, “green”, “ESG” and such terms often are, meaning very different things to different people.

The lack of a clear definition cascades into efforts to rate ESG plans and investments. Further, rating entities that provide “ESG certification” are not regulated. There is no certification for those doing the rating, and no accountability or professional signature from a rating company when completing its evaluation. We suggest DOL not accept an ESG index rating as proof that a fiduciary has met the requirement to document an ESG tie break. Perhaps a sentence could be appended at the very end of paragraph (c)(2)

Investment Duties Rule
July 30, 2020

Page 7 of 7

Economically indistinguishable alternative investments along the lines of: “As there is not an established regulatory standard for ESG scoring or certification, and entities making such ratings are unregulated, an ESG score is not considered sufficient documentation to meet the requirements of this paragraph.”

In conclusion, the rule is important for maintaining the integrity of ERISA defined benefit and defined contribution plans in the face of increased political activism in the marketplace. We appreciate the department’s recognition of the need to strengthen guidance on fiduciary responsibility by completing this rule. Thank you for considering our input.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K M Sgamma', with a long horizontal flourish extending to the right.

Kathleen M. Sgamma
President