

**ESG AND ERISA’S FIDUCIARY DUTIES: PAST AND FUTURE
EVOLUTION OF THE STATUTE’S REQUIREMENTS**

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ABSTRACT

As society changes, the law evolves to reflect societal shifts in attitudes and values. When the Employee Retirement Income Security Act (ERISA) was passed in 1974, the world was a much different place than it is today. This is especially true in the investment industry where, in the past few decades in particular, investors have become increasingly interested in putting their money toward causes and funds that reflect their personal beliefs. The recent advent of Environmental, Social, and Corporate Governance (ESG) investing has called into question the contemporary definition of ERISA’s fiduciary duty requirements and their impact on a retirement plan fiduciary’s ability to cultivate collateral benefits on behalf of plan participants with nonpecuniary interests. This note examines whether the statutory language under ERISA permits fiduciaries to consider retirement plan participants’ desired collateral benefits when crafting plan offerings, the barriers to such an interpretation, and the path forward in the evolution of ERISA’s statutory interpretation.

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I. INTRODUCTION

Under the Employee Retirement Income Security Act of 1974 (“ERISA”), fiduciaries engaging in the investment of retirement plan assets on behalf of plan participants and beneficiaries are required to follow strict standards of fiduciary duty to protect plan participants from mismanagement of funds.¹ However, certain trends in the investment industry over the last several decades have called into question the role this fiduciary duty currently plays, and *should* play, when considering different methods of investing.² As the investing interests of American society change, the factors that fiduciaries may consider, or are required to consider, have evolved to allow for the inclusion of a broader range of investments.³

Since the concepts of “social investing,” “socially responsible investing,” and “impact investing” were introduced in the 1960s and 1970s, the issue of whether or not these activities should have a place in the investment of retirement plan assets has been hotly debated.⁴ From the beginning, such social investments were often called “Economically Targeted Investments” (or ETIs) and were selected because of the “economic benefits they create apart from their investment return,”⁵ such as investment (or divestment) in certain countries based on the country’s dedication to

¹ Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C. § 1104.

² See Curtis King, *A Brief History of Sustainable Investing*, J.P. MORGAN WEALTH MGMT. (Apr. 18, 2022),

<https://www.chase.com/personal/investments/learning-and-insights/article/a-brief-history-of-sustainable-investing> [<https://perma.cc/X395-PU2T>].

³ John D. Martini et al., *DOL Issues Final Rule on Climate Change, ESG Factors for Retirement Plan Investments*, HOLLAND & KNIGHT (Dec. 7, 2022), <https://www.hklaw.com/en/insights/publications/2022/12/dol-issues-final-rule-on-climate-change-esg-factors-for-retirement> [<https://perma.cc/UR4P-THYQ>].

⁴ King, *supra* note 2.

⁵ TESSA HEBB & JAYNE ZANGLEIN, INSTITUTIONAL INVESTMENT AND FIDUCIARY DUTY 112 (2014).

human rights⁶ or by funneling investments into certain industries based on the impact they have on society.⁷ As these types of investments became more popular, questions naturally arose about whether consideration of such “collateral” benefits is permissible in certain circumstances, specifically when investment managers engage in decision-making for ERISA-governed retirement funds.⁸

The concept of ETIs has evolved since the 1960s to reflect the issues concerning Americans in the modern era.⁹ A recent phenomenon in the investment industry arising out of social investing and ETIs has been the increase of Environmental, Social, and Corporate Governance (ESG) investing.¹⁰ These three areas of concern are evaluated to “capture all the non-financial risks and opportunities inherent to a company’s day to day activities.”¹¹ This trend reflects the idea that investors and consumers do not want to put their money into companies that are merely “good stewards of capital,” but rather into companies that also value “natural and social capital” and that have a governance structure that will enable the company to pursue these standards.¹²

ESG investing considers collateral benefits that may arise from a particular investment rather than only looking at the financial, or pecuniary, results of the investment.¹³ After consideration of all factors, an ESG investor will choose the investment that has the greatest environmental, social, or corporate governance-related benefit, depending on the investor’s overall goal.¹⁴ As ESG investing becomes more popular, the issue of a fiduciary’s obligations when investing retirement plan assets in such

⁶ Gregory Gethard, *Protest Divestment and the End of Apartheid*, INVESTOPEDIA (July 2, 2022), <https://www.investopedia.com/articles/economics/08/protest-divestment-south-africa.asp> [<https://perma.cc/HF2V-NTZ3>].

⁷ King, *supra* note 2.

⁸ Bernard S. Sharfman, *ERISA and ESG Investing*, THE FINREG BLOG (Aug. 17, 2020), <https://sites.duke.edu/thefinregblog/2020/08/17/erisa-and-esg-investing> [<https://perma.cc/7RXB-LZDA>].

⁹ King, *supra* note 2.

¹⁰ Ross Kerber & Simon Jessop, *How 2021 Became the Year of ESG Investing*, REUTERS (Dec. 23, 2021, 4:20 PM), <https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/> [<https://perma.cc/PR6Y-WVR3>].

¹¹ *What is ESG?*, DELOITTE, <https://www2.deloitte.com/ce/en/pages/global-business-services/articles/esg-explained-1-what-is-esg.html> [<https://perma.cc/K2AF-GC6H>] (last visited Apr. 10, 2023).

¹² *Id.*

¹³ *What is ESG Investing?*, ADEC INNOVATIONS, <https://www.adecsg.com/resources/faq/what-is-esg-investing/> [<https://perma.cc/S269-NPPS>] (last visited Feb. 2, 2024).

¹⁴ *Id.*

ESG investments has become one of particular concern.¹⁵ Given the confusing and oscillating nature of guidelines in recent years, retirement plan fiduciaries have been hesitant to invest heavily in ESG investments, lest they make themselves vulnerable to lawsuits in the event that the ESG investment, chosen in lieu of another available alternative, does not perform as expected.¹⁶

There are a few notable aspects of the litigation arising out of ERISA's statutory language that investors must take into consideration when making decisions.¹⁷ These aspects, unique to litigation of this kind, can inform investors of the potentially risky actions that can cause a suit to be brought.¹⁸ Combined with the ever-evolving guidance relating to a fiduciary's responsibilities under ERISA, a prudent investor must be aware of the litigatory and regulatory landscape when considering adding an ESG-themed option to a retirement plan offering. This pressure to include ESG investments in retirement plans has increased in recent years and is expected to continue to build with the maturation of the nation's population and the younger generations' growing regard for socially-motivated investments.¹⁹ As market and government direction evolves, so too may the interpretation of certain laws concerned with ESG transactions. However, when it comes to ERISA, pushing the limits of the statute may be more difficult than it would be with other statutes lacking ERISA's history of debate.

II. BACKGROUND OF ERISA-BASED LITIGATION

¹⁵ Samantha J. Prince, *ERISA Plan Fiduciaries and ESG Factors*, REGUL. REV. (Apr. 26, 2023), <https://www.theregreview.org/2023/04/26/prince-erisa-plan-fiduciaries-and-esg-factors/#:~:text=It%20states%20that%20%E2%80%9Ca%20fiduciary's,fiduciary%20from%20selecting%20an%20ESG> [https://perma.cc/PX6X-9MFE].

¹⁶ See Eric Rothenberg et al., *DOL Issues Final ESG Rule, Allowing Latitude for Fiduciaries to Consider Environmental, Social, and Governance (ESG) Factors*, O'MELVENY & MYERS LLP (Dec. 12, 2022), <https://www.omm.com/resources/alerts-and-publications/alerts/dol-issues-final-esg-rule/> [https://perma.cc/T4SC-4XJB].

¹⁷ See *2022 ERISA Litigation and Significant Issues in Litigation*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/sol/divisions/plan-benefits-security/2022-ERISA> [https://perma.cc/NWA7-LR29] (last visited Jan. 26, 2024).

¹⁸ See *id.*

¹⁹ See Rachel Baker Mann, *It's Good for the Planet and It's Good for Your Portfolio: Encouraging Millennial Participation in 401(K) Plans Through Lowering Barriers to ESG Investing*, AM. BAR ASSOC. (Jan. 11, 2021), https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/issue-spring-2021/encouraging-millennial-participation/ [https://perma.cc/W4PU-2XX5].

“ERISA has its own civil enforcement scheme, and the universe of claims available to potential litigants is limited.”²⁰ In the modern era, ERISA is frequently a topic of litigation on both the state and federal level.²¹ Specifically, there have been several cases in recent years that exemplify the contention around the meaning of ERISA’s provision pertaining to a fiduciary’s delineated duties under the statute.²² While there is not yet much litigation involving ERISA’s fiduciary duty provision as it specifically relates to the inclusion of ESG-themed investments in retirement plan assets, recent updates from the Department of Labor have brought this issue into the public eye on a level it previously had not experienced.²³

In *Forman v. TriHealth, Inc.*, the Sixth Circuit considered whether a fiduciary acted imprudently when offering mutual fund shares that were more expensive than other available alternatives.²⁴ The court found that it was permissible for a fiduciary of a retirement plan fund to offer both actively managed funds and passively managed funds, and that those funds requiring more active management carry higher fees, thus costing plan participants more money.²⁵ The standard of review, as established under *Pfeil v. State Street Bank & Trust Company*,²⁶ requires that when evaluating how well a fiduciary carried out its fiduciary duties, one must look to the fiduciary’s decision-making process *at the time the investment decision was made*.²⁷ An aggrieved plan participant could not simply point to another investment that was available at the time the decision was made and argue that, because that investment performed better, the fiduciary should have chosen it from the outset.²⁸ *Forman* is significant to the ESG-ERISA debate because its decision includes a forward-thinking provision relating to ESG

²⁰ Randall Constantine & Emily Friedman, *ERISA Litigation Basics*, SMITH GAMBRELL RUSSELL, <https://www.sgrlaw.com/ttl-articles/erisa-litigation-basics/> [<https://perma.cc/9GAG-U7GD>] (last visited Jan. 27, 2023).

²¹ See *id.*; Eugene Scalia et al., *2021 ERISA Litigation Update*, GIBSON DUNN (Feb. 22, 2022), <https://www.gibsondunn.com/2021-erisa-litigation-update/> [<https://perma.cc/NVD6-8TR7>].

²² Rachel P. Kaercher & James Fielding, *Update in ERISA Litigation Involving Breaches of Fiduciary Duty Claims*, LITTLER (Jan. 25, 2023), [https://www.littler.com/publication-press/publication/update-erisa-litigation-involving-breaches-fiduciary-duty-claims#:~:text=In%20January%202022%2C%20the%20Supreme,401\(k\)%20retirement%20plan](https://www.littler.com/publication-press/publication/update-erisa-litigation-involving-breaches-fiduciary-duty-claims#:~:text=In%20January%202022%2C%20the%20Supreme,401(k)%20retirement%20plan) [<https://perma.cc/8GXN-RV6H>].

²³ See *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 29 C.F.R. § 2550 (2022).

²⁴ *Forman v. TriHealth, Inc.*, 40 F.4th 443, 447 (6th Cir. 2022).

²⁵ *Id.* at 450.

²⁶ *Pfeil v. State St. Bank & Tr. Co.*, 806 F.3d 377, 384-85 (6th Cir. 2015).

²⁷ *Id.*

²⁸ See *Forman v. TriHealth, Inc.*, 40 F.4th at 448.

investing in the context of actively-managed funds, stating that charging higher fees in an actively managed fund is permissible even if the fund considered nonpecuniary factors when making its investments, such as environmental, social, and corporate governance.²⁹

Another case that recently involved fiduciary duties under ERISA was *Hughes v. Northwestern University*,³⁰ however the case did not end up clarifying “the appropriate pleading standard for claims alleging a breach of the duties imposed under ERISA on the fiduciary of a 401(k) retirement plan.”³¹ Regardless, several cases, in numerous circuit courts, have recently applied the *Hughes* ruling to “evaluate whether an allegation of a breach of fiduciary duty by a fiduciary of a 401(k) retirement plan states a claim for relief under ERISA.”³²

Other recent cases of note in this area are *Thole v. U.S. Bank N.A.*³³ and *Ortiz v. American Airlines, Inc.*³⁴ However, these cases deal primarily with a plaintiff’s standing requirements to bring suit, rather than the interpretation of ERISA’s fiduciary duty provisions, and will not be evaluated here.

III. THE EVOLUTION OF REGULATORY GUIDANCE RELATING TO ERISA’S FIDUCIARY DUTIES

While there are several elements of ERISA-based litigation that an investor must be aware of when investing retirement plan assets governed by the statute, the better way to avoid issues of this kind is to ensure that the investor’s actions are compliant with ERISA itself. Because retirement plan asset investing is typically done by a plan manager with no relationship or affiliation with the plan’s participants or beneficiaries, ERISA imposes strict standards of care that fiduciaries must follow when engaging in this type of plan management.³⁵

The duty of fiduciaries, as established by the text of Section 404 of ERISA, is that a fiduciary must “discharge his duties with respect to a plan solely in the interest of the participants and

²⁹ *Id.* at 449.

³⁰ *Hughes v. Nw. Univ.*, No. 19–1401, slip op. at 1 (U.S. Jan. 24, 2022).

³¹ Kaercher & Fielding, *supra* note 22.

³² *Id.*

³³ 140 S. Ct. 1615 (2020).

³⁴ 5 F.4th 622 (5th Cir. 2021).

³⁵ Lionel M. Schooler, *Labor and Employment Law Update*, 41 TEX. TECH L. REV. 1097, 1121 (2008).

beneficiaries”³⁶ and for the “exclusive purpose” of “providing benefits to participants and their beneficiaries.”³⁷ Though this language may seem clear enough, the interpretation of these words has been hotly debated since the 1980s.³⁸ Importantly however, while the precise meaning of this provision has been frequently argued, all guidance issued in recent years has preserved this basic tenet: all participants are entitled to a higher degree of scrutiny by plan managers in the investment of retirement income assets.³⁹

While ERISA was not a controversial piece of legislation when it was passed in 1974, certain provisions of the Act have come under scrutiny in recent years and have become a topic of debate among investors and regulatory agencies.⁴⁰ The main provision at issue is Section 404, which deals with a fiduciary’s duties in the investment of retirement plan assets.⁴¹ Typically along party lines,⁴² the interpretation of this provision and the standard of care which must be taken by fiduciaries has vacillated between encouraging the consideration of ESG factors⁴³ and the stark prohibition of such factors in retirement plan asset investment.⁴⁴ These attitudes are reflected in the Department of Labor’s regulatory guidance in the

³⁶ Employee Retirement Income Security Act of 1974 § 404(a)(1), 29 U.S.C. § 1104.

³⁷ *Id.*

³⁸ Jeffrey Lieberman & Joseph Penko, *Retirement Benefits, Professional Perspective - ERISA Fiduciary Considerations for ESG Investments*, BLOOMBERG L. (Apr. 2023), <https://www.bloomberglaw.com/external/document/XDF4PBA4000000/retirement-benefits-professional-perspective-erisa-fiduciary-con> [https://perma.cc/U3A5-MF5Z].

³⁹ Adam B. Cantor, *DOL Guidance on ESG Investing by Retirement Plans: Investment Committees Should Handle with Care*, JACKSONLEWIS (July 21, 2020), <https://www.benefitslawadvisor.com/2020/07/articles/esg-investment/dol-guidance-on-esg-investing-by-retirement-plans-investment-committees-should-handle-with-care/> [https://perma.cc/466K-U44A].

⁴⁰ See David Baumann, *Conservatives Argue DOL Proposed ESG Rule “Not Consistent with ERISA,”* ALM BENEFITS PRO (Jan. 31, 2022, 3:27 PM), <https://www.benefitspro.com/2022/01/31/conservatives-argue-dol-proposed-esg-rule-not-consistent-with-erisa/> [https://perma.cc/HM52-4VAS].

⁴¹ Saul Ben-Meyer et al., *ERISA Fiduciary Decisions – Making Changes to Your Qualified Plan’s Investment Lineup*, ALSTON & BIRD (Nov. 13, 2014), <https://www.alston.com/en/insights/publications/2014/11/employee-benefits--executive-compensation-advisor> [https://perma.cc/X94M-EK5W].

⁴² Elizabeth Goldberg & Rachel Mann, *The Interplay Between ESG Investing and ERISA’s Fiduciary Duties*, MORGAN LEWIS (Sept. 21, 2022), <https://www.morganlewis.com/pubs/2022/09/the-interplay-between-esg-investing-and-erisas-fiduciary-duties> [https://perma.cc/FVW2-25JC].

⁴³ See, e.g., 29 C.F.R. § 2550.

⁴⁴ See, e.g., Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550).

form of Interpretive Bulletins (and in recent years, formal rules), Executive Orders directing the Department to take action on these issues, and the U.S. Securities and Exchange Commission's (SEC) response to certain investment trends that affect the intersection of ERISA and ESG issues.⁴⁵

The regulatory and sub-regulatory guidance from the previous five presidential administrations have consistently provided relatively clear and succinct expectations for fiduciaries' overall behavior when managing the investment of retirement plan assets.⁴⁶ However, the guidance has frequently been vague in how fiduciaries are expected to implement the policies endorsed by each bulletin or rule.⁴⁷ Combined with the fact that the guidance has flipped along party lines with respect to the overall attitude toward ESG and social investing, fiduciaries understandably experience confusion and whiplash when attempting to conform to the latest guidance.⁴⁸ Facing mounting pressure to include ESG investments into retirement plans, fiduciaries must stay updated on the latest official guidance.⁴⁹

Also of note, Congress has been divided on whether ESG investments should be allowed in the investment of retirement plan assets and thus, there is currently no enacted legislation directly addressing the issue.⁵⁰ Several bills have been introduced in recent years but lacked bipartisan support to pass both houses.⁵¹

A. Department of Labor Guidance Through the Years

The foundation for ERISA guidance under the Department of Labor was laid in 1975, when the Department issued ERISA Interpretive Bulletin 75-2 (IB 75-2).⁵² This initial bulletin cautioned fiduciaries to avoid transactions that caused a conflict of interest between the fiduciary and the organization where the fiduciary was

⁴⁵ Quinn Curtis et al., *Do ESG Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 396 (2021).

⁴⁶ See, e.g., Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 72,846.

⁴⁷ Liberman & Penko, *supra* note 38.

⁴⁸ See Goldberg & Mann, *supra* note 42.

⁴⁹ *Id.*

⁵⁰ Though there is not currently any legislation directing fiduciary duties and ESG, several bills were introduced during the 117th Congress attempting to clarify the issue. See, e.g., S. 4147, 117th Cong. (2022); S. 1762, 117th Cong. (2021); H.R. 3387, 117th Cong. (2021); H.R. 3504, 116th Cong. (2019).

⁵¹ See, e.g., *id.*

⁵² 29 C.F.R. § 2509.75-2 (1975).

investing retirement plan assets.⁵³ IB 75-2 resulted in many letters from investors and corporate officials seeking guidance from the Department about whether their retirement asset investing activity complied with ERISA's requirements.⁵⁴ However, after the initial rush of requests and advisory opinions, the Department's guidance on these issues remained largely dormant until 1994.⁵⁵ Since the Clinton administration, there has been a back-and-forth issuance of guidance from every subsequent administration.⁵⁶

Though the concept of ETIs has been around since the 1960s, the practice of social investing became highly politicized in the 1980s and 1990s as the United States experienced economic turbulence.⁵⁷ This politicization was spurred by a movement of investors pulling their money from entities with operations in South Africa, in an effort to influence the end of apartheid.⁵⁸ Further interest increased with a growth in overall retirement plan asset investment in the mid-1990s, naturally breeding the question of how this large and continuously increasing pool of money could be used to stimulate economic and social development in the United States and abroad.⁵⁹

The Department issued Interpretive Bulletin 94-1 (IB 94-1) in 1994, with the stated objective of combating a growing misconception that investing retirement plan assets in ETIs is incompatible with ERISA's fiduciary standards.⁶⁰ This misconception arose out of the fact that ETIs consider "collateral" or "ancillary" benefits beyond the financial viability of the

⁵³ *Id.*

⁵⁴ *See, e.g.*, 29 C.F.R. § 2550.

⁵⁵ *See, e.g.*, 29 C.F.R. § 2509.94-2 (1994).

⁵⁶ *See, e.g.*, Ira G. Bogner et al., *DOL's Latest ESG Proposal: The More Things Change, the More They Stay the Same*, PROSKAUER (Nov. 22, 2021), <https://www.ERISAPRACTICECENTER.COM/2021/11/DOLS-LATEST-ESG-PROPOSAL-THE-MORE-THINGS-CHANGE-THE-MORE-THEY-STAY-THE-SAME/> [<https://perma.cc/5L2G-WA4D>].

⁵⁷ Lauren F. Dixon & Tom Woelfel, *The Pursuit of Financial Return and Societal Benefit: An Examination of Pension Fund Economically Targeted Investments*, INSIGHT AT PAC. CMTY. VENTURES 5 (June 2017).

⁵⁸ William Donovan, *The Origins of Socially Responsible Investing*, THE BALANCE (Apr. 30, 2022), <https://www.thebalancemoney.com/a-short-history-of-socially-responsible-investing-3025578> [<https://perma.cc/EQL7-9DD8>].

⁵⁹ *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2021*, EMP. BENEFITS SEC. ADMIN. (Sept. 2023), <https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf> [<https://perma.cc/VGU2-746X>].

⁶⁰ U.S. Dep't of Lab. Interpretive Bulletin 94-1, 29 C.F.R. § 2509 (1994) [hereinafter I.B. 94-1].

investment.⁶¹ Because ERISA clearly states that a fiduciary must act “solely in the interest of the plan’s participants and beneficiaries” and for the “exclusive purpose” of providing benefits to these plan participants and beneficiaries,⁶² some investors believed that consideration of anything besides financial (or “pecuniary”) factors would be in violation of this provision.⁶³ IB 94-1 was the first formal sub-regulatory guidance issued by the Department outlining how ERISA’s fiduciary duties should be interpreted.⁶⁴

IB 94-1 articulated and clarified that ERISA’s requirements do not prevent plan fiduciaries from choosing ETIs, provided that the ETI is economically viable and has an expected rate of return similar to that of other non-ETI investments available to the plan.⁶⁵ The ETI investment may not be chosen with the express purpose of inuring a social, environmental, or other benefit, and a fiduciary cannot accept a lower rate of return or higher risk in pursuit of those benefits.⁶⁶ This became known as the “all things being equal” test.⁶⁷ IB 94-1 also promulgated the concept of the “tie-breaker.”⁶⁸ When a plan fiduciary encounters two viable investment alternatives with nearly identical risk and return factors, the tie-breaker test allows the fiduciary to consider collateral or “non-pecuniary” factors to make a decision.⁶⁹ However, while this approach makes sense in theory, in practical situations there are very few instances in which a true tie occurs.

⁶¹ *Fact Sheet: Economically Targeted Investments (ETIs) and Investment Strategies that Consider Environmental, Social and Governance (ESG) Factors*, U.S. DEP’T OF LAB. (Oct. 22, 2015), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/etis-and-investment-strategies-that-consider-esg-factors.pdf> [https://perma.cc/7WNV-MW3D].

⁶² Employee Retirement Income Security Act of 1974 § 404, 29 U.S.C. § 1104 (emphasis added).

⁶³ I.B. 94-1, *supra* note 60.

⁶⁴ See Hupart et al., *ERISA Fiduciaries May Consider ESG Factors in Selecting Investments and Exercising Shareholder Rights*, MINTZ: INSIGHT CTR. (Nov. 30, 2022), <https://www.mintz.com/insights-center/viewpoints/2786/2022-11-29-erisa-fiduciaries-may-consider-esg-factors-selecting> [https://perma.cc/3MPS-5PDW].

⁶⁵ I.B. 94-1, *supra* note 60.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Employee Benefits and Executive Compensation Group, *DOL Proposes New Regulations on ESG Investments in Retirement Plans*, BALLARD SPAHR (June 25, 2020), <https://www.ballardspahr.com/insights/alerts-and-articles/2020/06/dol-proposes-new-regulations-on-esg-investments-in-retirement-plans> [https://perma.cc/HW5X-2VVP].

⁶⁹ *Id.*

IB 94-1 remained the primary source of guidance on ERISA's fiduciary duties until the waning months of President George W. Bush's administration, when the Department issued Interpretive Bulletin 2008-01 (IB 2008-01).⁷⁰ IB 2008-01 marked a stark reversal in the vague promotion of the consideration of collateral benefits found in IB 94-1 and encouraged a move away from the "tie-breaker" rule.⁷¹ IB 2008-01 most significantly raised the minimum requirements a fiduciary must meet before considering collateral benefits.⁷² IB 2008-01 stated that a fiduciary must establish that the investment alternatives in question are "economically indistinguishable" before considering collateral benefits and deciding between the two investments.⁷³ This more rigid framework placed a greater emphasis on "truly equal" investments, rather than IB 94-1's emphasis on similar rates of risk and return.⁷⁴

Currently, the Department condemns IB 2008-01 and stated that it "unduly discouraged" fiduciaries from considering ETIs and ESG factors.⁷⁵ Specifically, the Department mentioned the potential that IB 2008-01 may have "dissuaded fiduciaries from (1) pursuing investment strategies that consider environmental, social, and governance factors, even where they are used solely to evaluate the economic benefits of investments and identify economically superior investments, and (2) investing in ETIs even where economically equivalent."⁷⁶

In the years following the 2008 guidance, the issue of social investing and the consideration of collateral benefits when investing retirement plan assets became more contentious and consequential among investors and regulatory bodies.⁷⁷ The guidance that followed frequently vacillated between permitting or subtly encouraging social investing and tolerating or, in some cases, prohibiting it.⁷⁸ Following the 2008 guidance, each presidential administration swayed the guidance via the issuance of executive

⁷⁰ 29 C.F.R. § 2509.08-1 (2008).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Fact Sheet*, *supra* note 61.

⁷⁶ *Id.*

⁷⁷ See Joshua Gotbaum, *Moving DoL's Fiduciary Standards into the 21st Century: The Case of ERISA Investing*, BROOKINGS INST. (Oct. 22, 2015), <https://www.brookings.edu/articles/moving-dols-fiduciary-standards-into-the-21st-century-the-case-of-erisa-investing/> [<https://perma.cc/C2EF-F9HM>].

⁷⁸ 29 C.F.R. § 2550.

orders directing the Department to issue new guidance and increasingly formal rules.⁷⁹ The executive orders issued in this era highlight each administration's goals with respect to this issue.

In 2015, President Obama signed Executive Order 13,693, titled "Planning for Federal Sustainability in the Next Decade."⁸⁰ This executive order was aimed at continuing the United States' growth in sustainability and reduction in greenhouse gas emissions by establishing sustainability goals for executive agencies, with directives for the agencies to create policies intended to encourage the development of a "clean energy economy."⁸¹ Further goals of the order were to "foster innovation, reduce spending, and strengthen the communities in which Federal facilities operate."⁸² This order indicates a general support toward more sustainable energy sources and more investment into the industries targeted by the problems outlined in the order.⁸³

As directed by President Obama's executive order, the Department issued Interpretive Bulletin 2015-01 (IB 2015-01) to combat continuing confusion arising out of IB 2008-01.⁸⁴ Specifically, the basic permissibility of investing ERISA retirement plan assets had become muddled by previous guidance and investors had largely stayed away from engaging in the practice for fear of liability.⁸⁵ IB 2015-01 is most notable in the modern context because it shifted the Department's position toward the direction of the environmental, social, and corporate governance standards recognized today.⁸⁶ IB 2008-01 imposed greater restrictions on fiduciaries attempting to utilize collateral benefits in their investment decision-making, allowing fiduciaries only to consider nonpecuniary benefits after a rigorous analysis had been done to test the viability of two alternatives.⁸⁷ IB 2015-01 clarifies that the use of these collateral benefits is permissible, provided that the standards of financial analysis are met, and broadens the range of benefits that may be considered as well as the stage in the analysis process where they may be factored in.⁸⁸

⁷⁹ Exec. Order No. 13,693, 3 C.F.R. § 281 (2016); Exec. Order No. 13,868, 3 C.F.R. § 292 (2020); Exec. Order No. 13,990, 3 C.F.R. § 428 (2022).

⁸⁰ Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 25, 2015).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 29 C.F.R. § 2509.2015-01 (2015).

⁸⁵ *Id.*

⁸⁶ Lisa K. Loesel & Brian J. Tieman, *DOL Clarifies Guidance on Socially Responsible Investing*, MCDERMOTT WILL & EMERY (Sept. 25, 2018), <https://www.mwe.com/insights/dol-guidance-socially-responsible-investing/> [<https://perma.cc/2KTE-TEF2>].

⁸⁷ 29 C.F.R. § 2509.08-1 (2008).

⁸⁸ 29 C.F.R. § 2509.2015-01 (2015).

IB 2015-01 did not stop at merely allowing collateral benefits to be more easily considered in retirement plan asset investing. IB 2015-01 goes even further to expand the types of collateral factors that may be considered when weighing two alternative investments and emphasizes the importance of considering the impact of such factors on the investment's financial soundness: "Environmental, social, and governance issues may have a direct relationship to the economic value of the plan's investment. In these instances, such issues are not merely collateral considerations or tie-breakers, but rather are proper components of the fiduciary's primary analysis of the economic merits of competing investment choices."⁸⁹

This new guidance not only encourages fiduciaries to consider collateral benefits when making investment decisions on behalf of a retirement plan, but also cautions fiduciaries from neglecting such collateral factors that might have an impact on the economic value of a viable investment option.⁹⁰ Though IB 2015-01 does not state this explicitly, there is an indication that refusal to consider ESG factors where they may have a "direct relationship to the economic value of the plan's investment" may, in and of itself, be a breach of fiduciary duty.⁹¹ Further driving home its approval of ESG investment of ERISA assets, IB 2015-01 states, "fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors."⁹² IB 2015-01 has been noted as an important step in "expanding the use of environmental, social, and governance (ESG) investing principles" under ERISA.⁹³

However, the Obama administration's encouragement to properly evaluate all factors of ESG investments, including nonpecuniary benefits, was soon diminished. In 2018, the Trump administration issued its first guidance relating to ERISA and ESG in the form of Field Assistance Bulletin 2018-01 (FAB 2018-01).⁹⁴

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Rebecca Moore, *DOL Clarifies How ESG Investment Considerations Should Be Made Under ERISA*, PLANADVISER (Apr. 24, 2018), <https://www.planadviser.com/dol-clarifies-esg-investment-considerations-made-erisa/> [https://perma.cc/H5VH-EWEM].

⁹⁴ Field Assistance Bulletin No. 2018-01, U.S. DEP'T OF LAB. (Apr. 23, 2018), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field->

Field assistance bulletins are “written by the Office of Regulations and Interpretations to the Director of Enforcement and Regional Directors to provide guidance in response to questions that have arisen in field operations.”⁹⁵ In contrast, an interpretive bulletin (also known as interpretive rule) is a statement issued by an agency to notify the public of its definitions and interpretations of the statutes under its jurisdiction.⁹⁶ The field assistance bulletin is a lower level of guidance than an interpretive bulletin and is issued rather quickly, typically to clarify issues among practitioners.⁹⁷ The distinction between these forms of guidance is significant in that it illustrates how quickly each new administration may attempt to effect change in this area to reflect its views.

Rebutting the Department of Labor’s caution of skepticism against ESG investments, FAB 2018-01 warns investors about “too readily” accepting collateral benefits of an investment as contributing to the economic value of the investment.⁹⁸ While FAB 2018-01 concedes that some ESG issues may pose “material business risk or opportunities” important in the investment decision-making process, thus rendering these factors “more than mere tie-breakers,” it also specifies that fiduciaries must maintain their duty of prioritizing the financial performance of the plan and remain appropriately skeptical of ESG investments.⁹⁹ FAB 2018-01 further states that a retirement plan investor must maintain focus on the risks and returns typically tolerated by the plan in question when considering such factors, and that just because an ESG-themed investment may promote growth generally, it may not be the appropriate choice.¹⁰⁰

In the final days of the Trump administration, in response to the growing interest in ESG investing and as directed by Executive Order 13,868,¹⁰¹ the Department of Labor issued a formal Rule titled *Financial Factors in Selecting Plan Investments* (2021 Final

assistance-bulletins/2018-01 [<https://perma.cc/S7Y2-FSJN>] [hereinafter FAB 2018-01].

⁹⁵ *Field Assistance Bulletins*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins> [<https://perma.cc/DS2Z-UKEQ>] (last visited Jan. 27, 2024).

⁹⁶ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 64 (5th ed. 2012).

⁹⁷ *Field Assistance Bulletins*, WAGE & HOUR DIV.: U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/whd/field-assistance-bulletins> [<https://perma.cc/74M3-KX85>] (last visited Feb. 8, 2024).

⁹⁸ FAB 2018-01, *supra* note 94; 29 C.F.R. § 2509.2015-01 (2015).

⁹⁹ FAB 2018-01, *supra* note 94.

¹⁰⁰ *Id.* at 2, 4.

¹⁰¹ Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,497 (Apr. 15, 2019).

Rule).¹⁰² It cited “lack of precision and consistency in the marketplace with respect to defining ESG investments and strategies” and “shortcomings in the rigor of the prudence and loyalty analysis by some participating in the ESG investment marketplace” as reasons for taking regulatory action.¹⁰³ The 2021 Final Rule highlighted the duty of a fiduciary engaging in the investment of retirement plan funds to maintain a “‘single eye’ to maximiz[e] the funds available to pay benefits under the plan.”¹⁰⁴ Underscoring this principle, the 2021 Final Rule states conclusively, “plan assets may never be enlisted in pursuit of other social or environmental objectives at the expense of ERISA’s fundamental purpose of providing secure and valuable retirement benefits.”¹⁰⁵ While this aligns with previous guidance which largely stated that the primary objective of an investment decision must be for the benefit of the plan participants and beneficiaries, the use of the word *never* and a clear statement of this prohibition is a stark reversal (and warning to investors) of the Obama administration’s interpretive bulletin on the topic.

The 2021 Final Rule also elevates the analysis and documentation requirements imposed on retirement plan investors looking to implement some form of ESG-themed investments into their investment portfolio and explicitly prohibits the inclusion of ESG investments into default options that plan participants may be opted into.¹⁰⁶ Notably, this rule went into effect January 12, 2021, shortly before the inauguration of the incoming president.¹⁰⁷

Within the first week of his presidency, President Biden addressed the previous administration’s Final Rule in Executive Order 13,990, titled *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*.¹⁰⁸ The title of the executive order emulates that of the order enacted by the Obama administration¹⁰⁹ and was issued in direct response to recent actions

¹⁰² Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72,846 (Nov. 13, 2020) (to be codified at 29 C.F.R. pts. 2509, 2550).

¹⁰³ *Id.* at 72,847. This is a noticeable elevation from the previous purely interpretive guidance to a more formal rulemaking process. *See, e.g.*, Interpretive Bulletin Relating to Investing in Economically Targeted Investment, 73 Fed. Reg. 61,734 (Oct. 18, 2008); Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65,135 (Oct. 26, 2015).

¹⁰⁴ *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. at 72,846.

¹⁰⁵ *Id.* at 72,848.

¹⁰⁶ *Id.* at 72,851.

¹⁰⁷ *Id.* at 72,846.

¹⁰⁸ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

¹⁰⁹ Exec. Order No. 13,693, 80 Fed. Reg. 15,871 (Mar. 25, 2015).

taken by the previous administration, with explicit instructions for agencies to review all federal agency activity previously taken under President Trump.¹¹⁰ Shortly after this executive order, the Department of Labor announced in a press release that it would be pausing enforcement of the Final Rule until the review prescribed by the President's Executive Order was completed and necessary revised rules were put into effect.¹¹¹ Executive Order 13,990, along with the executive order issued in May 2021, became the driving force in pushing forward the Biden administration's Final Rule on the issue of ERISA's fiduciary duties and ESG.¹¹²

The Department proposed, and subsequently finalized, a final rule in December of 2022 with an effective date of January 30, 2023 (2023 Final Rule).¹¹³ The 2023 Final Rule cites the previous rule's "chilling effect on appropriate integration of climate change and other ESG factors in investment decisions" as the Department's reason for taking regulatory action.¹¹⁴ The 2023 Final Rule also highlights yet another round of confusion for investors who had previously included ESG investments under the Obama-era interpretations.¹¹⁵ Substantively, the 2023 Final Rule returns to the guidance issued in Interpretive Bulletin 2015-01, underscoring the importance of analyzing collateral factors that may have the economic value that fiduciaries are required to consider.¹¹⁶ The new Final Rule even takes this guidance a step further and explicitly permits fiduciaries to account for plan participants' interest in ESG-themed investments, as a way to increase retirement plan savings.¹¹⁷ The 2023 Final Rule also takes the guidance of Interpretive Bulletin 2015-01 a step further to encourage the consideration of collateral benefits, coming just short of requiring fiduciary consideration of such factors.¹¹⁸ The 2023 Final Rule also reverses the ancillary provisions of the Trump-era Final Rule relating to additional

¹¹⁰ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

¹¹¹ Press Release, U.S. Dep't of Lab., U.S. Department of Labor Statement Regarding Enforcement of its Final Rules on ESG Investments and Proxy Voting by Employee Benefit Plans (Mar. 10, 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf> [<https://perma.cc/CN3N-XAW4>].

¹¹² Exec. Order No. 14030, 86 Fed. Reg. 27,967, 27,967-69 (May 25, 2021).

¹¹³ 29 C.F.R. § 2550.

¹¹⁴ *Id.* at 73,825.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 73,824; 29 C.F.R. § 2509.2015-01 (2015).

¹¹⁷ 29 C.F.R. § 2550.

¹¹⁸ *Id.* at 73,824.

documentation impositions and the prohibition of ESG-themed investments acting as default options for plan participants.¹¹⁹

B. SEC Responses to Investment Trends

Though not specifically issued in response to ESG and ERISA investing, there are also several recent updates from the SEC issued in response to broader investment trends in the marketplace that have the potential to impact the decision-making process of retirement plan investors.¹²⁰ These updates have the primary focus of further protecting consumers from retirement fund mismanagement.¹²¹ Among the proposals are rules regulating investment company names to avoid misconceptions about the company's investment activities,¹²² enhanced disclosures about companies' ESG investment practices,¹²³ and enhanced standards for climate-related disclosures.¹²⁴

The SEC recently introduced the Climate and ESG Task Force, under the Division of Enforcement, to “develop initiatives to proactively identify ESG-related misconduct consistent with increased investor reliance on climate and ESG-related disclosure and investment.”¹²⁵ The task force has already filed several ESG-related enforcement actions since its inception in early 2021.¹²⁶ Combined with the Department of Labor's recent final rule encouraging investors to consider ESG-themed options when investing retirement plan assets, several regulatory bodies have begun to address the potential hazards of ESG investing on the

¹¹⁹ *Id.* at 73,827, 73,842.

¹²⁰ See generally *Investor Alert: Self-Directed IRAs and the Risk of Fraud*, SEC. & EXCH. COMM'N (Feb. 7, 2023), <https://www.sec.gov/investor/alerts/sdira> [<https://perma.cc/UF2X-BXRP>].

¹²¹ *Id.*

¹²² Investment Company Names, 87 Fed. Reg. 36,594 (June 17, 2022) (to be codified at 17 C.F.R. pt. 270).

¹²³ Enhanced Disclosures by Certain Investment Advisors and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36,654 (June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279).

¹²⁴ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

¹²⁵ *Enforcement Task Force Focused on Climate and ESG Issues*, SEC. & EXCH. COMM'N, <https://www.sec.gov/spotlight/enforcement-task-force-focused-climate-esg-issues> [<https://perma.cc/UP23-736B>] (last modified Apr. 11, 2023).

¹²⁶ *Id.*

general public and instituted guidance and rules to protect both investors and retirement plan participants.¹²⁷

IV. A PATH FORWARD TO FURTHER INTEGRATION OF ESG INVESTMENT OF ERISA PLAN ASSETS

The back-and-forth nature of interpretations relating to ERISA's fiduciary duties illuminates the constantly evolving perception of what the statute requires of fiduciaries. However, the language of the statute itself remains ambiguous in its definition of fiduciary duties, requiring only that they "discharge their duties with respect to a plan solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of "providing benefits to participants and their beneficiaries."¹²⁸ Yet, one of the most enduring features of the United States' legal system is that, while the language of a law may remain the same, the laws are interpreted many times over, and these interpretations change as the composition of society changes.¹²⁹ In the most extreme cases, laws are interpreted in ways their drafters never anticipated.¹³⁰ In the context of the debate surrounding ERISA's fiduciary duty requirements in relation to ESG investments, the question arises of whether these fiduciary duty standards may be open for interpretation in ways the law's original drafters did not anticipate. Specifically, the question arises if plan fiduciaries may make some types of investment decisions in pursuit of collateral benefits, if doing so would, from the perspective of plan participants and beneficiaries, satisfy the exclusive purpose and sole interest requirements of ERISA. Perhaps the benefits a fiduciary must provide to the plan's beneficiaries may not have to be entirely pecuniary to satisfy the statute's language.

A. Current Barriers to a Fiduciary's Ability to Freely Invest Retirement Plan Assets in ESG-themed Investments

The Department of Labor's guidance over the years has evolved to a more tolerant perspective when it comes to ESG

¹²⁷ See, e.g., *The Division of Examinations' Review of ESG Investing*, SEC. & EXCH. COMM'N (Apr. 9, 2021), <https://www.sec.gov/files/esg-risk-alert.pdf> [<https://perma.cc/KVX6-Q7LN>].

¹²⁸ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1)(A)(i).

¹²⁹ Jeffrey G. Miller, *Evolutionary Statutory Interpretation: Mr. Justice Scalia Meets Darwin*, 20 PACE L. REV. 409 (Apr. 2000).

¹³⁰ See *id.* at 410.

factors.¹³¹ The newest rule even underscores the possibility that certain ESG factors may be important indicators of an investment's eventual success and, thus, fiduciaries are under an obligation to consider those factors.¹³² This idea is likely to gain even more traction as younger generations become active in the investment of retirement plan assets.¹³³ Yet, investors remain apprehensive when it comes to making ESG-themed investment decisions for ERISA-governed assets, likely because of the Department of Labor's inconsistent guidance over the years.¹³⁴ Additional litigatory activities over the years have also contributed to fiduciary uncertainties.¹³⁵ These barriers, among others, stand in the way of fiduciaries who wish to act on behalf of values-based plan participants by creating offering menus heavily influenced by ESG factors.¹³⁶

Under the current rule, a plan fiduciary is still not permitted to "add imprudent investment options to menus just because participants request or would prefer them."¹³⁷ As applied to ESG-themed investments, some investors interpret this rule to mean that

¹³¹ Marty Walsh, *Removing Barriers to Considering ESG Factors in Retirement Plan Investments*, U.S. DEP'T. OF LAB. BLOG (Nov. 22, 2022), <https://blog.dol.gov/2022/11/22/allowing-esg-factors-in-retirement-plan-investments> [<https://perma.cc/2N7B-RV5D>].

¹³² Rachel Baker Mann, *It's Good for the Planet and It's Good for Your Portfolio: Encouraging Millennial Participation in 401(K) Plans Through Lowering Barriers to ESG Investing*, AM. BAR ASS'N. (Jan. 11, 2021), https://www.americanbar.org/groups/labor_law/publications/ebc_news_archive/issue-spring-2021/encouraging-millennial-participation/ [<https://perma.cc/9JAG-YBUZ>].

¹³³ Andrew Silverman, *ESG Investment Is Most Popular with Younger Generations: Chart*, BLOOMBERG L. (Dec. 30, 2022, 11:54 AM), <https://news.bloomberglaw.com/esg/esg-investment-is-most-popular-with-younger-generations-chart> [<https://perma.cc/3DE7-LXLY>].

¹³⁴ See Elizabeth S. Goldberg, *Can ERISA Fiduciaries Use ESG? Yes, and Case Law Can Provide Some Guidelines*, LEXIS NEXIS PRAC. GUIDANCE (2021), <https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2021/canerisafiduciariesuseesgyesandcaselawcanprovidesomeguidelines.pdf> [<https://perma.cc/WC9N-LSWQ>].

¹³⁵ See Rick S. Horvath et al., *The Developing Litigation Risks from the ESG Backlash in the United States*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 12, 2023), <https://corpgov.law.harvard.edu/2023/07/12/the-developing-litigation-risks-from-the-esg-backlash-in-the-united-states/> [<https://perma.cc/PBK9-TU2R>] (discussing various ESG-related lawsuits alleging a violation of fiduciary duties).

¹³⁶ See Mann, *supra* note 132.

¹³⁷ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. at 73,822, 73,842; see also Kristina M. Zanotti et al., *ESG Investing and Proxy Voting: DOL's New Final Rule*, NAT'L L. REV. at 4 (Dec. 12, 2022), <https://www.natlawreview.com/article/esg-investing-and-proxy-voting-dol-s-new-final-rule> [<https://perma.cc/EX2V-BCJM>].

ESG investments will usually generate a lower rate of return than other non-ESG related investments.¹³⁸ However, as interest in social investing grows, ESG investments as a whole typically perform just as well, and in some cases better, than non-ESG investments.¹³⁹ This element of the new rule also does not necessarily mean that an investor can never present to plan participants a full menu of viable ESG-themed investment options, though some would prefer to interpret the rule this way.¹⁴⁰ Rather, this wording merely means that fiduciaries must remain prudent and mindful of the plan's overall performance and risk.¹⁴¹ This continued perception that ESG investments are of lower quality is a large barrier for fiduciaries.¹⁴² However, the greatest remaining barrier is fear of potential repercussions if consideration of ESG factors may be perceived as violating ERISA's fiduciary duty requirements.¹⁴³

One commonly understood guideline for the limits of ERISA was created by the Supreme Court's comment in the dicta of *Fifth Third Bancorp v. Dudenhoeffer*.¹⁴⁴ The court opined that,

the term 'benefits' . . . must be understood to refer to the sort of *financial benefits* (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. . . . The term does not cover nonpecuniary benefits like those supposed to arise from employee ownership of employer stock.¹⁴⁵

While this comment indicates a general unwillingness by the court to consider nonpecuniary benefits of any type as falling under the term "benefit," this statement was made as dicta not pertaining to retirement asset funds that are commonly litigated under ERISA.¹⁴⁶ Further, it is possible for fiduciaries to offer investment menus heavily influenced by ESG investments that are not imprudent on their face, thus providing pecuniary benefits along with

¹³⁸ Mann, *supra* note 132, at 5.

¹³⁹ *Id.* at 6.

¹⁴⁰ See Zanotti, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² James Woolery & Tim Martin, *ESG and Fiduciaries: A New Age Dawns*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 15, 2023), <https://corpgov.law.harvard.edu/2023/06/15/esg-and-fiduciaries-a-new-age-dawns/> [<https://perma.cc/C7E6-E5LD>].

¹⁴³ Goldberg, *supra* note 134.

¹⁴⁴ *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014).

¹⁴⁵ *Id.*

¹⁴⁶ Goldberg, *supra* note 134.

nonpecuniary ones.¹⁴⁷ This action would likely not be prohibited by the Department of Labor's newest guidance, nor would it violate the Supreme Court's decision in *Fifth Third Bank v. Dudenhoeffer*.

B. Evolving Investment Trends

An important consideration in analyzing what it means for a fiduciary to act for the exclusive purpose of providing benefits to plan participants, and one that has been neglected by recent Department of Labor guidance, is the evolving composition of plan participants. The nation's younger generations, particularly millennials and members of Generation Z who are becoming of age to invest in 401(k) plans, are significantly more interested in ESG-themed investment options than previous generations.¹⁴⁸ Further, younger investors are typically able to accept more risk when investing, "because they have more time to recover in the event of a market downturn."¹⁴⁹ This risk appetite combined with the overall willingness of younger investors to funnel their money toward more "worthy" investments indicates a need for a change in the retirement asset investment industry. Yet, despite a recent increase of interest in ESG investing across all sectors of the investment industry, "few public and private retirement plans in the United States provide retirement plan options utilizing sustainable investment strategies."¹⁵⁰

Many proponents of ESG investing in ERISA-governed plans have advocated over many years for the Department of Labor to rewrite its relevant rules to lower barriers preventing fiduciaries from including more ESG investments in retirement asset plans.¹⁵¹ While the newest rule comes as close as any other rule before it has to encouraging this type of investment, the guidance still lacks an

¹⁴⁷ *DOL Final Rule on ESG Factors to Take Effect February 1, 2023*, LATHAM & WATKINS (Jan. 24, 2023), <https://www.lw.com/admin/upload/SiteAttachments/Alert%203058.pdf> [<https://perma.cc/QG5M-3BHB>].

¹⁴⁸ Indeed, millennials are more likely than previous generations to consider a company's values when deciding brand loyalties. This attitude extends to their investment decisions. *See* Mann, *supra* note 132.

¹⁴⁹ *Constructing a Portfolio Using Investor Profiles*, BARNETT FIN. PLAN. (Mar. 29, 2022), <https://www.barnettwealthadvisors.com.au/latest-news/47698> [<https://perma.cc/48KN-7B8G>].

¹⁵⁰ *GAO Report Validates Role of ESG in Retirement Plans*, F. FOR SUSTAINABLE & RESP. INV. (Aug. 2018), https://www.ussif.org/files/Public_Policy/Comment_Letters/GAO%20Report_8.14.18.pdf [<https://perma.cc/8CVU-Q4Z7>].

¹⁵¹ Mann, *supra* note 132.

explicit endorsement of the inclusion of ESG investments in ERISA plans. As noted by some scholars, such an explicit endorsement could have the added benefit of encouraging more values-based investors to participate in a retirement plan offering, thus increasing the pool of money coming under ERISA's governance.¹⁵²

Another recent investment trend that should be considered to inform a change in the interpretation of ERISA's statutory language is the increased interest investors have shown in non-traditional types of currencies and securities, such as cryptocurrency.¹⁵³ In fact, a bill was proposed during the last Congress attempting to allow the investment of cryptocurrency in 401(k) plans.¹⁵⁴ While the bill ultimately failed, its proposal illustrates that modern investment trends may find a place among the investment of retirement assets which have been somewhat traditionally invested.¹⁵⁵

C. Practical Implementation – How Can Heavy ESG Investment of ERISA Plan Assets Remain in Compliance with ERISA's Guidelines?

The most recent rule from the Department of Labor is an important step forward for those fiduciaries seeking to include more ESG investments in their retirement plan offerings. However, with the potential for the next presidential administration to reverse guidance, a more explicit endorsement of this type of investment must be promulgated either in a new rule or new legislation.

During the 117th Congress, several proposed bills sought to address this issue but ultimately failed, due to disagreement between Republicans and Democrats about the inclusion of ESG-themed investments in retirement plan assets.¹⁵⁶ To further illustrate the Republican perspective on this issue, on January 26, 2023, a group of 24 Republican-led states' Attorneys General sued the Biden

¹⁵² *See id.*

¹⁵³ CONG. RSCH. SERV., IF12153, CRYPTOCURRENCY IN 401(K) RETIREMENT PLANS (2022).

¹⁵⁴ S. 4973, 117th Cong. (2022); *see also* Shawn Amick, *U.S. Lawmakers Draft Bill to Allow Bitcoin, Crypto In 401(k) Plans*, NASDAQ (Sept. 29, 2022), <https://www.nasdaq.com/articles/u.s.-lawmakers-draft-bill-to-allow-bitcoin-crypto-in-401k-plans> [<https://perma.cc/ZGR6-9VTE>].

¹⁵⁵ *See* Mann, *supra* note 132.

¹⁵⁶ David Baumann, *Conservatives Argue DOL Proposed ESG Rule "Not Consistent with ERISA"*, BENEFITS PRO (Jan. 31, 2022), <https://www.benefitspro.com/2022/01/31/conservatives-argue-dol-proposed-esg-rule-not-consistent-with-erisa/> [<https://perma.cc/T66V-RJHQ>].

administration over its newly passed (and soon to be implemented) rule to stop its enforcement, calling the rule's permissibility of ESG considerations "ill-defined."¹⁵⁷ The fear, as articulated by Texas Attorney General Ken Paxton, is that the new rule could "potentially allow investment managers to substitute their own ESG policy preferences instead of prioritizing long-term financial stability for their clients."¹⁵⁸ On February 1, 2023, Senate Republicans announced that they would reintroduce legislation to overturn the new rule under the Congressional Review Act.¹⁵⁹ On March 1, 2023, a House of Representatives Joint Resolution was passed by the Senate aiming to nullify the Department of Labor's new Rule.¹⁶⁰ President Biden vetoed the resolution on March 20, 2023, marking the first veto of his presidency.¹⁶¹ These recent oppositions exemplify another significant barrier to the progression of ESG investing in retirement income plans.

Among these failed pieces of legislation is S. 1762, titled the "Financial Factors in Selecting Retirement Plan Investments Act."¹⁶² The bill, mirroring the nomenclature of the Trump-era Final Department of Labor Rule, was introduced with the intended goal of amending, "the Employee Retirement Income Security Act of 1974 to permit retirement plans to consider certain factors in investment decisions."¹⁶³ The bill would have permitted fiduciaries to consider collateral benefits of certain investments (including ESG benefits) as part of the fiduciary's usual analysis of all available alternative options, including when comparing investments in a tie-breaker situation, provided that the fiduciary discharges its duties.¹⁶⁴ Additionally, the bill would not have imposed, "greater documentation, substantiation, or other justification" requirements proving that the fiduciary undertook the proper steps in its analysis.¹⁶⁵ Finally, the bill would have allowed for ESG-themed investments (and all other investments falling under the bill) to be

¹⁵⁷ Janet Miranda, *Red States Sue to Block Labor Department's 'Woke' ESG Rule*, BLOOMBERG L. (Jan. 26, 2023), <https://news.bloomberglaw.com/litigation/texas-ag-paxton-blast-esg-rule-as-woke-files-lawsuit> [<https://perma.cc/Y4U5-UNKK>].

¹⁵⁸ *Id.*

¹⁵⁹ Douglas Hallward-Driemeier et al., *Department of Labor's ESG Rule Attacked on Multiple Fronts*, ROPES & GRAY (Feb. 9, 2023), <https://www.ropesgray.com/en/newsroom/alerts/2023/02/dols-esg-rule-attacked-on-multiple-fronts> [<https://perma.cc/VW7L-RKTD>].

¹⁶⁰ H.R.J. Res. 30, 118th Cong. (2023).

¹⁶¹ *Id.*

¹⁶² S. 1762, 117th Cong. §1 (2021).

¹⁶³ S. 1762, 117th Cong. (2021).

¹⁶⁴ *Id.* at §§ 2(3)(A)(i), (ii).

¹⁶⁵ *Id.* at § 2(3)(B).

used as default alternatives for plan participants to choose.¹⁶⁶ The bill, if enacted, would have rendered the Trump-era Final Rule ineffective. House companion bill H.R. 3387 followed the same structure and included the same provisions as S. 1762.¹⁶⁷

Another failed piece of legislation, the Retirees Sustainable Investment Opportunities Act of 2021, would have allowed for “consideration and disclosure by retirement plans of Sustainable Investment Policies,” aligning with the goals set out by President Biden’s climate change themed Executive Order.¹⁶⁸ The bill also echoed guidance from the Obama administration (that was subsequently reinforced in the Biden-era Final Rule) that certain ESG factors which have material economic impacts on an investment’s performance should and must be considered and that plan participants should be afforded the opportunity to include “sustainable investments” into their investment portfolios.¹⁶⁹ The bill would have provided a pathway for retirement asset plans to implement “sustainable investment policies” available to plan participants.¹⁷⁰

While the most recent Department of Labor Rule integrates many of the principles of these proposed bills,¹⁷¹ there is still work to be done to ensure that ESG investments have a permanent place in ERISA asset plans. In order for legislation to bridge the gap between both political parties, a middle ground or carveout needs to be found. For example, legislation allowing for plan participants to consent to purely ESG investment offering menus may find more success in Congress. Alternatively, Congress could pass a bill delineating clearer guidelines for how a plan fiduciary may implement ESG investments into an existing retirement asset plan without running afoul of ERISA’s requirements. More explicit guidance is likely to encourage fiduciaries to expend more resources in evaluating ESG investments for those participants who are interested in such offerings.

¹⁶⁶ *Id.* at § 2(c).

¹⁶⁷ H.R. 3387, 117th Cong. (2021).

¹⁶⁸ H.R. 3604, 117th Cong. (2021); Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

¹⁶⁹ H.R. 3604, 117th Cong. (2021).

¹⁷⁰ *Id.*

¹⁷¹ See U.S. Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments, U.S. DEP’T OF LAB. (Nov. 22, 2022), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122> [<https://perma.cc/8SMC-TQKB>].

Another way forward for fiduciaries to include more ESG investments in their retirement plan menus is to create such plans under ERISA Section 404(c), which affords protections to fiduciaries who allow plan participants to direct investment decisions.¹⁷² By complying with this section's notice and control requirements, a fiduciary interested in providing an offering that is heavily influenced by ESG may be shielded from civil liability if the investments do not perform as expected.¹⁷³

Under ERISA Section 404(c), fiduciaries are not held liable for "any loss or breach resulting from the participant's exercise of control over his/her account done in accordance," with this section.¹⁷⁴ The rules associated with this type of exercise are called the 404(c) Rules.¹⁷⁵ These 404(c) Rules require that participants be given the opportunity to exercise control over their accounts and to direct the manner in which some or all of the accounts' assets are invested.¹⁷⁶ The 404(c) Rules also require that the participants receive notice that the assets are participant-directed (and explaining the rights and limitations therein) and that the participants are provided with sufficient information to make informed investment decisions.¹⁷⁷ The fiduciaries creating these investment menu offerings may include a variety of different investment opportunities, provided that they are all prudent and viable investments.¹⁷⁸ This could include an offering composed entirely of ESG investments, if there is a market interest.

However, while this section of ERISA creates an avenue for fiduciaries to place more money into ESG investments without assuming liability for resulting losses, this section is only utilized by participants who wish to direct their own plan.¹⁷⁹ According to the Employee Benefits Security Administration (EBSA) Fact Sheet relating to its "Final Rule to Improve Transparency of Fees and

¹⁷² Employee Retirement Income Security Act of 1974 § 404(c)(1)(A), 29 U.S.C. § 1104.

¹⁷³ *Id.*

¹⁷⁴ Jeff Chang, *Rules Governing Your Participant-Directed 457(b) or Defined Contribution 401(a) Plan*, FOCUS ON PUB. BENEFITS (Dec. 19, 2019), <https://focusonpublicbenefits.com/rules-governing-your-participant-directed-457b-or-defined-contribution-401a-plan/> [<https://perma.cc/X6PA-JZXT>].

¹⁷⁵ *See id.*

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ Kenneth F. Ginder, *ERISA Section 404(c) Protection: A Refresher for Fiduciaries*, VERRILL DANA LLP (Oct. 19, 2022), <https://www.verrill-law.com/benefits-law-update/erisa-section-404c-protection-a-refresher-for-fiduciaries> [<https://perma.cc/5MHB-GRSY>].

Expenses to Workers in 401(k)-Type Retirement Plans,” only about 483,000 of the 708,000 private pension plans overseen by EBSA are participant-directed, leaving about 31% of pension plans directed by fiduciaries.¹⁸⁰ Given the current general investment interests among Americans, it can be assumed that many of the participants in fiduciary-directed plans desire to have their money placed in ESG-themed investments, but are restricted by the statutory language of ERISA.

In order for the inclusion of ESG investments in retirement plans to match the interests of the American people, more concessions need to be made around fiduciaries’ consideration of collateral benefits when crafting plan offerings. Given the failure of legislation in the past, the path forward on this issue may be an evolved interpretation of the definitions of “exclusive purpose” and “solely in the interest” of plan’s participants and beneficiaries, while relying on other elements of the statute’s language to restrict fiduciary actions as necessary.¹⁸¹ With the assets governed by ERISA totaling over \$12 trillion,¹⁸² expanding the definitions of these provisions has the potential to change the country and world for the better, while still protecting plan participants and beneficiaries from imprudent managers. Especially given the recent updates from the Biden administration and attempts from Congress to pass legislation allowing for more ESG investment, there is an argument to be made that the evolution of these elements of ERISA’s language would not be in violation of the statute or its intended purpose.

V. CONCLUSION

Reflecting the attitude of the Biden administration toward ESG investing, the 2023 Final Rule comes as close as any other Department of Labor Rule or interpretive guidance has ever come to encouraging fiduciaries to invest in more ESG-aligned

¹⁸⁰ *Fact Sheet: Final Rule to Improve Transparency of Fees and Expenses to Workers in 401(k)-Type Retirement Plans*, U.S. DEP’T OF LAB. (Feb. 2012), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-improve-transparency-of-fees-and-expenses.pdf> [https://perma.cc/MA6A-Q239].

¹⁸¹ See Samantha J. Prince, *ERISA Plan Fiduciaries and ESG Factors*, THE REGUL. REV. (Apr. 26, 2023), <https://www.theregreview.org/2023/04/26/prince-erisa-plan-fiduciaries-and-esg-factors/> [https://perma.cc/C73U-23XE].

¹⁸² Brandon Chesner, *ESG & Retirement Funds: Considering Non-Pecuniary Factors by ERISA Plan Fiduciaries*, FORDHAM J. CORP. & FIN. L. BLOG (Mar. 18, 2023), <https://news.law.fordham.edu/jcfl/2023/03/18/esg-retirement-funds-considering-non-pecuniary-factors-by-erisa-plan-fiduciaries/> [https://perma.cc/Q3CN-CZC9].

investments. The anticipated effect of this new rule is that fiduciaries will become less hesitant to engage in “social investing” due to a reduced fear of legal action being brought against them.

While fiduciaries may be enabled by the new Department of Labor Rule to include more ESG or social investments when investing retirement plan assets, thus reducing a potential plaintiff's ability to bring suit, there are also some benefits that will be bestowed upon such plaintiffs. Both the Department of Labor Rule and upcoming proposed SEC rules provide for enhanced disclosure for the benefit of consumers.¹⁸³ This potentially means that plaintiffs will face a lower barrier in satisfying their burden of proof because more information will be readily available to them, rather than being subject to discovery. This additional disclosure could also potentially enable plaintiffs to satisfy standing requirements more easily and to be more generally aware of improper retirement plan management by fiduciaries.

However, while these benefits are inherently good news for investors and plan participants alike, the back-and-forth nature of Department of Labor regulations in recent years still maintains an air of uncertainty and volatility. Investors may feel safe including ESG-themed options in retirement plan offerings today just for the next administration to flip the interpretation yet again. Recent efforts from the legislative body to counteract this cycle have been unsuccessful and the only way to find a legislative solution that reaches across the aisle may be to change the approach of legislation. Efforts could be made to impose additional restrictions on the Department of Labor's ability to pass multiple actions in a single year without proof of the previous actions' inefficiency or ineffectiveness. Legislative action simply clarifying the expectations of fiduciaries under ERISA may also be able to ameliorate the constant state of confusion and hesitancy facing investors of retirement plan assets in the modern day, without taking the drastic measure of amending ERISA's language.

In order to ensure that fiduciaries feel comfortable integrating ESG-themed investments into retirement plans, both to meet the desires of younger investors entering the retirement fund marketplace and to reflect modern investment trends, additional guidance from the Department of Labor or Congress must be issued to ease fiduciaries' concern of liability. Such guidance would not be inconsistent with ERISA's statutory language provided that the offerings provided to plan participants and beneficiaries are prudent and do not sacrifice returns in pursuit of collateral benefits. This can

¹⁸³ See 29 C.F.R. § 2550.

apply to investment menus heavily influenced by, or solely reflecting, ESG investments if plan participants consent to the aggressive use of ESG factors in investment decisions. Other elements of the statute provide for the involvement of plan participants in the management of their assets in the form of participant-driven actions. To address the desires of plan participants who may not wish to take an active role in the management of their retirement plan, fiduciaries must be able to make such considerations without fear of repercussion. Increased freedom for fiduciaries has the limitless potential to bring positive change in the world, without sacrificing the financial performance of participants' retirement plans.