
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

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Investors are demanding greener and cleaner investment options. These values-based investors are increasingly pursuing a strategy known as ESG, where a company's environmental, social, and governance decisions are included in the overall investment process. This strategy is especially popular among millennials, who are particularly concerned about climate change and other social justice issues. In a recent survey, 90% of millennials stated they would be interested in an ESG option in their 401(k)-retirement plan lineup. Yet only 3% of employers offer one.

Employers' reticence to offer an ESG option is understandable in light of historical Department of Labor regulations that suggest doing so might violate the strict fiduciary requirements under the federal law regulating employee benefit plans (known as ERISA.) The Department of Labor ("DOL") under the Trump Administration characterized ESG investing as a suspect strategy that values a positive impact on the planet over maximizing financial returns. But long-term research into ESG investing shows this concern is unwarranted—ESG investments perform as well, and sometimes better than, non-ESG investments, which makes sense when you understand the ESG strategy to be simply another layer of investment analysis and risk management.

The Biden Administration's DOL has proposed new regulations relating to ESG investing. These proposed regulations frame ESG as a win-win, better both for long-term investment returns and for Planet Earth. If the regulations are adopted as proposed, they would likely spur employers to offer ESG options in their 401(k) lineups in response to employee demand. This change could encourage more employees, particularly millennials, to participate in the plan, thus saving more for retirement while providing a market incentive for companies to get greener.

The proposed ESG regulations are good law and good policy and should be adopted as-is into law. Not only do they align with decades of ERISA case law's understanding of retirement plan fiduciaries' duties, but they may also lead to increased retirement security and a more sustainable future.

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INTRODUCTION

Imagine the stereotypical millennial—what comes to mind? Do you think of avocado toast?² Side parts and skinny jeans?³ Maybe you think of the recent runup of GameStop and the increasing popularity of millennial investing websites like Robinhood,⁴ or the millennial (and Gen-Z) dominated protests for climate change⁵ and racial equity.⁶

Stereotypes aside, one of the defining features of the millennial generation is its focus on corporate values and sustainability. 71% report feeling their lives are immediately threatened by climate change.⁷ 70% of millennials actively consider a company's values when making a purchase, as compared with 52% of all adults.⁸ 90% say they want to tailor their investments to their values.⁹

Millennials' focus on sustainability and values-based investing is no surprise, given the increasing threat of climate change that looms over this generation. But many millennials, and Americans in general, do not have access to a sustainable investment option that might accord with their values. For more than 20% of Americans, their only form of investment vehicle is their 401(k),¹⁰ and only 3% of employers offer a sustainable investment option in their 401(k) lineup.¹¹ It is possible that encouraging more employers to offer sustainable investment options

² Sam Levin, *Millionaire Tells Millennials: If you Want a House, Stop Buying Avocado Toast*, THE GUARDIAN (May 15, 2017), <https://www.theguardian.com/lifeandstyle/2017/may/15/australian-millionaire-millennials-avocado-toast-house>.

³ Erica Tempesta, *Millennials Go to War with Gen Z Over Skinny Jeans and Side Parts*, THE DAILY MAIL (Feb. 5, 2021), <https://www.msn.com/en-us/lifestyle/lifestyle-buzz/millennials-go-to-war-with-gen-z-over-skinny-jeans-and-side-parts/ar-BB1dr8l3>.

⁴ Miles Brignall, *How GameStop Traders Fired the First Shot in Millennials' War on Wall Street*, THE GUARDIAN (Jan. 30, 2021), <https://www.theguardian.com/business/2021/jan/30/how-gamestop-traders-fired-the-first-shots-in-millennials-war-on-wall-street>; Dave Fogel, *Millennials and the Robinhood Revolution*, AMERICAN BAR ASS'N: AFTER THE BAR, https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/student-loans-and-finances/millennials-robinhood-revolution/.

⁵ Matthew Ballew, Jennifer Marlon, et al, *Young Adults, Across Party Lines, Are More Willing to Take Climate Action*, YALE PROGRAM ON CLIMATE CHANGE COMMUNICATION (April 28, 2020), <https://climatecommunication.yale.edu/publications/young-adults-climate-activism/>.

⁶ Ruth Milkman, *A New Political Generation: Millennials and the Post-2008 Wave of Protest*, 82(1) AM. SOCIOLOGICAL R. 1, 1 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/0003122416681031>.

⁷ *Climate Change Will Still Matter to Gen Z & Millennials—Here's How We Know*, YPULSE (April 22, 2020), <https://www.ypulse.com/article/2020/04/22/climate-change-will-still-matter-to-gen-z-millennials-heres-how-we-know/>.

⁸ Anjali Lai, *Millennials Call for Values-Driven Companies, But They're Not the Only Ones Interested*, FORBES (May 23, 2018), <https://www.forbes.com/sites/forrester/2018/05/23/millennials-call-for-values-driven-companies-but-theyre-not-the-only-ones-interested/?sh=1a6d0d7d5464>.

⁹ MSCI, SWIPE TO INVEST: THE STORY BEHIND MILLENNIALS AND ESG INVESTING 1 (March 2020), <https://www.msci.com/documents/10199/07e7a7d3-59c3-4d0b-b0b5-029e8fd3974b#:~:text=%E2%80%9CDemand%20for%20sustainable%20investments%20is,management%20clients%20at%20Ernst%20%26%20Young>.

¹⁰ GARY MOTTOLA, A SNAPSHOT OF INVESTOR HOUSEHOLDS IN AMERICA, FINRA INVESTOR EDUCATION FOUNDATION (Sept. 2015), available at <https://www.sec.gov/spotlight/fixed-income-advisory-committee/finra-investor-education-foundation-investor-households-fimsa-040918.pdf>.

¹¹ Ron Lieber, *How to Get Socially Conscious Funds Into Your 401K*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2020/01/10/your-money/esg-funds-retirement-401k-plan.html> (“Just 2.9 percent of 401(k) plans have even a single fund dedicated to environmental, social and governance issues, according to the Plan Sponsor Council of America's most recent member survey.”).

in their 401(k) lineups could encourage more millennials, who are vastly under saving for retirement,¹² to participate more and contribute in greater amounts to their 401(k)s.

Millennials are not the only group interested in sustainable investing. A sustainable investment strategy known as “ESG investing” is popular across all generations. Individual and institutional investors are increasingly promoting ESG investing. This strategy involves identifying companies that have a positive impact on the planet (using certain environmental, social, and governance, or “ESG”, factors) and then directing assets towards those companies, either through purchasing individual stocks or bonds, or through building and buying ESG-friendly funds.¹³

Currently, a third of all U.S. professionally managed assets are held in funds using some form of ESG investing strategy, to the tune of \$17 trillion dollars.¹⁴ And over \$1.7 trillion are invested directly in ESG funds¹⁵ (not all funds using ESG strategies self-identify as an “ESG fund.”)¹⁶ But these dollars invested in ESG funds are overwhelming in taxable accounts and are almost exclusively *not* in retirement accounts. In fact, less than 0.1% of total 401(k) assets (less than \$9 billion) are invested in ESG funds.¹⁷ ESG is vastly underrepresented in 401(k) plans.

The discrepancy between taxable assets invested in funds using ESG investing strategies and employer-sponsored retirement assets invested in ESG-type funds is because of a lack of ESG-friendly 401(k) investment options. Fewer than 3% of employers offer an ESG investment in their 401(k) lineup.¹⁸ The dearth of ESG in 401(k) plans makes it harder for employees to access ESG and likely makes 401(k) plans less desirable savings vehicles for values-based investors, such as many millennials. This lack of ESG access for retirement plan investors is due to decades-long uncertainty about the Department of Labor’s (“DOL”) position of values-based or “impact” investing with retirement plan assets. Most recently, the Trump-era DOL further dampened employer appetite for ESG investment options with regulation increasing the cost and liability risks of offering these sorts of options. This article argues that this anti-ESG rule is currently the biggest barrier to 401(k) plan adoption of ESG investment options. The Biden Administrations’ proposed revisions to the rule would encourage adoption of ESG options and increase millennial retirement savings as a result.

¹² *Employment Alert: Young Workers Face Hard Times in Retirement*, 1 EMP. ALERT 11, 28 (Jan. 14, 2011), available at [https://www.westlaw.com/Document/I873fa4701d7c11e08b05fd15589d8e8/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I873fa4701d7c11e08b05fd15589d8e8/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (finding that millennials are at the highest risk of retirement insecurity compared to older generations, and predicting that eight out of ten millennials will not be able to meet their financial needs in retirement without significant changes in their saving and investing behaviors.)

¹³ Alana Benson, *ESG Investing: A Beginner’s Guide*, NERDWALLET (April 6, 2020), <https://www.nerdwallet.com/article/investing/esg-investing>.

¹⁴ PARNASSUS INVESTMENTS, REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 1 (2020), <https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf>.

¹⁵ Simon Jessop & Elizabeth Howcroft, *Sustainable Fund Assets hit Record \$1.7 Trillion in 2020: Morningstar*, REUTERS (Jan. 28, 2021), <https://www.reuters.com/article/us-global-funds-sustainable/sustainable-fund-assets-hit-record-1-7-trln-in-2020-morningstar-idUSKBN29X2NM>.

¹⁶ Sophie Baker, *Global ESG-data Driven Assets Hit \$40.5 trillion*, PENSIONS & INVESTMENTS (July 2, 2020), <https://www.pionline.com/esg/global-esg-data-driven-assets-hit-405-trillion>.

¹⁷ Greg Iacurci, *Climate Funds Hold Less than 1% of 401(k) Money. Here’s Why*, CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/11/heres-why-401k-plans-lag-in-green-investment-options.html>.

¹⁸ Ron Lieber, *How to Get Socially Conscious Funds Into Your 401K*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2020/01/10/your-money/esg-funds-retirement-401k-plan.html> (“Just 2.9 percent of 401(k) plans have even a single fund dedicated to environmental, social and governance issues, according to the Plan Sponsor Council of America’s most recent member survey.”).

A Trump Administration U.S Department of Labor regulation¹⁹ entitled “Financial Factors for Selecting Plan Investments,” —also known as the ESG Rule²⁰— increased the burden upfront for retirement plan providers who want to offer an ESG option in their lineup by requiring them to excessively document the process and rationale upfront for selecting a fund relying on “non pecuniary” factors, such as ESG. The Labor Department justified this strict regulation of ESG investing by centering it within the narrow focus that the Employee Retirement Income Security Act of 1974 (ERISA) takes towards ensuring retirement security. To ensure that workers’ retirement savings are adequately managed, ERISA sets out strict fiduciary duties of loyalty solely to the plan beneficiaries and prudence as to the process of selecting and monitoring fiscally responsible investment options.²¹ But ruling out ESG funds for fiduciary reasons is flawed for (at least) two reasons.

First, this justification sets up a false dichotomy between good financial returns and ESG factors. It fails to recognize that employers and their fiduciaries can increase retirement saving *through* allowing values-based investing. A well-selected ESG investment option has as much of a chance of providing positive returns as a well-selected non ESG investment option.²² It is neither disloyal to the plan participant nor fiscally imprudent to offer a well-managed and thoughtfully constructed ESG investment option that will both provide excellent returns for the beneficiary and have a positive impact on global sustainability.

Second, this justification takes too narrow of a look at how fiduciaries can facilitate retirement security for employees. It is insufficient to focus solely on risk/return of plan participants without also encouraging employees to opt into the plan in the first place. If millennials are choosing not to invest in their retirement plan but are using apps like Robinhood to direct values-based investments using other discretionary funds,²³ fiduciaries can entice these values-based millennial investors to continue to invest in sustainable business, but with tax-advantaged retirement savings and an employer match instead.²⁴

The Biden DOL issued a proposed rule entitled Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (the “Proposed Rule”) in October 2021 that would turn the ESG Rule on its head and likely encourage more employers to offer ESG options in plan lineups.²⁵ This paper will argue that the Proposed Rule should be adopted in its current form (or close to it) to provide employers with comfort around offering an ESG option. Not only is banning ESG from retirement plans short sighted (because it dissuades climate-conscious value-based investors from participating in their retirement plan to begin with), but it is also bad

¹⁹ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2509, available at

<https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments>.

²⁰ Maureen J. Gorman & Debra B. Hoffman, *The Department of Labor’s ESG-less Final ESG Rule*, MAYER BROWN: BENEFITS & COMPENSATION BLOG (Nov. 11, 2020), <https://www.usbenefits.law/2020/11/the-dol-final-esg-rule/>

²¹ <https://www.federalregister.gov/d/2020-24515/p-36>.

²² Madison Sargis & Patrick Wang, *How Does Investing in ESG Companies Affect Returns*, MORNINGSTAR (Feb. 19, 2020), <https://www.morningstar.com/insights/2020/02/19/esg-companies>

²³ Dave Fogel, *Millennials and the Robinhood Revolution*, AMERICAN BAR ASS’N: AFTER THE BAR, https://www.americanbar.org/groups/young_lawyers/publications/after-the-bar/student-loans-and-finances/millennials-robinhood-revolution/.

²⁴ *The Tax Benefits of Your 401(k) Plan*, TURBOTAX, (2020), <https://turbotax.intuit.com/tax-tips/investments-and-taxes/the-tax-benefits-of-your-401k-plan/L8QHCzbiO>.

²⁵ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (to be codified at 29 CFR 2550).

law—nothing in ERISA suggests that a fund with a well-developed ESG strategy cannot be included in a 401(k)-plan lineup.²⁶

ESG investing is particularly attractive to millennials, a generation that has been hard hit both by increased climate change and increased retirement insecurity.²⁷ According to recent surveys, millennial investors are twice as likely as the general investor population to invest in companies with ESG related goals.²⁸ 90% of millennial investors stated they want an ESG option in their 401(k) plan.²⁹ Many of these values-driven millennials are also not adequately saving for retirement, and at least a small portion of them are under saving in their 401(k)s because they are saving in other types of investment vehicles.³⁰ Providing a greener and cleaner ESG option in their tax-advantaged retirement plans could redirect millennial investment dollars into 401(k)s, encouraging millennials to save more towards retirement and facilitating ERISA’s overall goal of ensuring retirement security for American workers.

This article argues that, if the Proposed Rule is adopted and lowers the burden of offering an ESG option in a retirement plan lineup, retirement investors, particularly millennials, would likely redirect some or all of their retirement plan assets towards a sustainable investment option. This would not only be good for the planet, since it would direct more dollars towards companies with a sustainable footprint and incentivize other companies to get on board but would be good for millennial retirement plan participants. Giving those investors a greener, cleaner retirement plan option aligned to their millennial values might prompt more millennials and other values-driven retirement plan investors to participate in greater numbers and invest in higher amounts in their retirement plans. Given the power of compound interest, even a marginal change in millennial participation in 401(k) plans as a result of increased access to ESG investing would have an outsized impact on their economic stability in retirement.

It is important to note that this article does not pretend to offer an easy Labor Department regulatory fix to all of the millennial generation’s economic hardships. ESG investing will not somehow magically cure millennials of a debt crisis caused by ballooning costs of higher education and a depressed job market post Great Recession and the COVID-19 pandemic. But marginal retirement investing at a young age has enormous returns, thanks to compound interest. And this Proposed Rule is a cheap and easy way to encourage a *bit* more saving, while also increasing investment in sustainable businesses and encouraging companies to care about climate change.

²⁶ See Section III(C) *supra*.

²⁷ THE DELOITTE GLOBAL MILLENNIAL SURVEY 2020 3, 7, 9-11 (2020), available at <https://www2.deloitte.com/global/en/pages/about-deloitte/articles/millennialsurvey.html>; Audrey Choi, *How Younger Investors Could Reshape the World*, MORGAN STANLEY: WEALTH MANAGEMENT (Jan. 24, 2018), <https://www.morganstanley.com/access/why-millennial-investors-are-different> (“In 2012, 31 percent of millennials participated in an employer-sponsored program, whether a defined benefit plan such as a pension or a defined contribution plan such as a 401(k). About half of Gen Xers participated in a plan that year, while 56 percent of baby boomers took part in one. Though traditional pensions were once the more typical way to build retirement income, participation rates for defined benefit plans varied in a relatively narrow range, rising from 6 percent for millennials to 13 percent for boomers. Participation rates in defined contribution plans rose more dramatically by generation, from 25 percent for millennials to 40 percent for Gen Xers and 43 percent for boomers.”)

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Generational Retirement Trends Study*, T. ROWE PRICE (2015), at slide 12, available at https://www.slideshare.net/TRowePrice/generational-retirement-trends-study-2015/12-1212By_Worker_GenerationMajor_Reasons_for.

Plenty has been written about ERISA’s regulation of plan investments, and in the past few years there have been strong pieces of scholarship on the role the Labor Department should play in regulating ESG in ERISA-regulated lineups.³¹ This article adds to the body of scholarship in two ways. First, it argues that ERISA and the Labor Department should actively encourage ESG investing, and that intelligent and modern approaches to ESG investing do not run afoul of ERISA’s duties of loyalty and prudence. Second, this article novelly suggests that lowering the burden, or even encouraging, fiduciaries to include ESG investment options in their plan lineup might encourage more retirement savings in general.

This article will proceed in four parts. Part I will provide background on ESG—the history of values-based investing, changing approaches to ESG investing, and increased individual and institutional investor appetite for ESG investment options.

Part II will dive into the marginal positive impacts that opening up access to retirement plan investing in ESG could have on retirement saving in general. This section will discuss the general retirement savings crisis in the United States, and the particular hurdles the millennial generation faces with retirement saving. This section will posit that allowing employees to invest their retirement savings into ESG funds could, on the margin, increase retirement savings, which for young employees could have a large financial impact thanks to compound interest.

Part III will examine the relationship between ERISA, the Department of Labor, and ESG investing. This Part will discuss how ESG investing fits into ERISA’s regulation of fiduciaries and suggest how fiduciaries could include ESG options in their lineups without running afoul of their fiduciary duties.

Finally, Part IV will discuss the Proposed Rule and how, if adopted in its current proposed form, it would likely lower the burden, or even encourage, ERISA-regulated fiduciaries to include an ESG option in their retirement plan investment lineup.

I. A HISTORY OF ESG

A. *Defining ESG*

What is colloquially referred to today as “ESG investing” has a number of different names. Some people refer to this type of investing as values-based investing, or responsible investing, or sustainable investing. In the past it was referred to as “socially responsible investing.” These different names all have the same core strategy—to consider facts that traditionally were not part of a classic financial analysis process yet have broader relevance to the impact of a company on the environment. Many investors believe, and many studies have shown, that while these factors may not have been traditionally considered as part of the investment valuation process, they have significant financial relevance to the performance of the company. They may include how companies are responding to climate change, the size of their “carbon footprint”, how their health and safety policies work to protect their employees, how

³¹ See generally Bernard Sharfman, *ESG Investing Under ERISA*, 38 YALE J. REG. BULLETIN 112 (2020); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STANFORD L. REV. 381 (2020); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLORADO L. REV. 731 (2019).

they treat workers more generally, or whether their corporate culture builds trust and spurs innovation.³²

While evidence of values-based investing can be traced back as early as the 1700s,³³ this type of investing strategy took hold in the United States in the 1970s and 1980s in response to the Vietnam War and apartheid in South Africa. Back then, this type of values-based investing was coined “socially responsible investing”, or SRI.³⁴ Activists called for boycotts and divestment from companies doing business in South Africa, or from companies who did not promise to abide by certain nondiscrimination principles in their South African operations.³⁵

Values-based investment strategies and marketing has shifted since the 1970s. In addition to incorporating a company’s environmental and social impact into the valuation process, modern ESG investors also incorporate corporate governance structure into their investment strategies (the “G” in ESG.) In addition, these values-based funds now seek to allure investors through the superior investment returns, in addition to their ethical benefits, as the funds may have less exposure to long-term risks by avoiding certain ESG red flags.³⁶

The modern term “ESG” was first used in a 2005 research study titled, ‘Who Cares Wins,’³⁷ authored by twenty financial institutions from nine countries with total assets under managements of over \$6 trillion.³⁸ The report argued there was a direct connection between the way companies manage their environmental, social, and corporate governance issues and their overall management qualities.³⁹ In addition, the report argued that companies with high E, S, and G performance increase shareholder value, by “properly managing risks, anticipating regulatory action or accessing new markets, while at the same time contributing to the sustainable development of the societies in which they operate. Moreover, these issues can have a strong impact on reputation and brands, an increasingly important part of company value.”⁴⁰ The report recommended that investment analysts and financial institutions incorporate ESG factors into their research and investment processes to help better value companies and contribute towards more stable and sustainable financial markets.⁴¹

³² E. Napolitano & Benjamin Curry, *Environmental, Social and Governance: What is ESG Investing?*, FORBES: ADVISOR (Mar. 1, 2021), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=19865b3d1695>.

³³ The founder of the Methodist Church, John Wesley, warned his followers not to profit off of harmful business practices, such as alcohol, the slave trade, and the production of dangerous chemicals. Max Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 392 (2020).

³⁴ E. Napolitano & Benjamin Curry, *Environmental, Social and Governance: What is ESG Investing?*, FORBES: ADVISOR (Mar. 1, 2021), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=19865b3d1695>.

³⁵ Max Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 392 (2020).

³⁶ *Id.*

³⁷ UNITED NATIONS GLOBAL COMPACT, WHO CARES WINS (2004), available at

https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf.

³⁸ *Id.* at i.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at ii, v

B. ESG Investing

Individuals today have many different opportunities to invest in ESG. Research firms evaluate companies for their corporate governance structure and their environmental and social impact and give an ESG or green designation to companies meeting certain requirements. Additionally, investment companies offer ESG funds that invest in ESG-friendly companies, and individuals can buy into these funds just as they can buy into a mutual fund or exchange-traded fund (ETF).⁴² Individuals can either invest directly in ESG-friendly companies or in ESG-friendly investment vehicles like a mutual fund or an ETF.⁴³ They can invest their discretionary dollars in a taxable brokerage account, through brokers such as Fidelity or Robinhood, or they can allocate portions of a retirement account, like an IRA, towards those companies or funds. In theory, if an employer provided an ESG option, employees could also direct their 401(k) dollars into an ESG fund, much as employees can currently direct those funds into a suite of non-ESG investment options.

ESG funds and ESG managers use different types of portfolio construction tools and strategies to build fiscally and socially responsible investment products. Except for passive ESG indexes (discussed below), most ESG funds are actively managed funds that use ESG information as a part of their investment strategy. All actively managed funds use a specific strategy in their attempt to “beat the index,” or product risk-adjusted returns.⁴⁴ Some of those strategies might include being overweight in growth sectors or looking for a specific amount of leverage or debt to capital ratio. Active ESG funds use ESG metrics to attempt to come to a deeper understanding of a company’s value and beat a benchmark to produce outsized returns. Recent research by JP Morgan Chase concluded there is a significant value-add to considering ESG factors as part of active portfolio management and demonstrates “that the boost in alpha [returns] arises from ESG’s risk mitigant nature...[and] carr[ies] significantly lower credit risk relative to the ‘Pure Value’ [non ESG] strategy.”⁴⁵

A group of financial industry leaders working with the Investment Company Institute classified three different methods of ESG investing.⁴⁶ The first method of ESG investing is “ESG exclusionary,” which is the most similar to the passive screening tactics used in the past.⁴⁷ These types of funds simply eliminate companies based on a specific value. For example, Nuveen’s ESG Mid-Cap Growth ETF is a broad asset allocation fund that screens out fossil fuel companies, while still maintaining traditional broad market exposure.⁴⁸ Another example of an ESG friendly ETF that maintains broad exposure while screening out fossil fuels is State Street’s SPDR S&P 500 Fossil Fuel Free ETF, which mimics the S&P 500 but screens out fossil fuel

⁴² Jeff Reeves, *7 Socially Responsible ETFs to Buy Now*, U.S. NEWS (June 17, 2020), <https://money.usnews.com/investing/funds/slideshows/socially-responsible-etfs-to-buy-now>.

⁴³ Debbie Carlson, *How to Invest In Green Stocks*, U.S. NEWS (May 28, 2020), <https://money.usnews.com/investing/investing-101/articles/how-to-invest-in-green-stocks>.

⁴⁴ *Active Management*, CORPORATE FINANCIAL INSTITUTE, <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/active-management/>.

⁴⁵ SHIVAM GHOSH, J.P. MORGAN CHASE & CO., VIRTUE ISN’T THE ONLY REWARD 1 (15 March 2020). On file with the author, Courtesy J.P. Morgan Chase & Co., Copyright 2021.

⁴⁶ INVESTMENT COMPANY INSTITUTE, FUNDS USE OF ESG INTEGRATION AND SUSTAINABLE INVESTING STRATEGIES: AN INTRODUCTION 3 (2020), https://www.ici.org/pdf/20_ppr_esg_integration.pdf.

⁴⁷ *Id.* at 5

⁴⁸ Lara Crigger, *Dirtiest & Cleanest ESG Funds*, ETF.COM (June 30, 2020), <https://www.etf.com/sections/features-and-news/dirtiest-cleanest-esg-funds?nopaging=1>

companies.⁴⁹ Similar ESG funds and indexes exist where the manager just screens out tobacco companies.⁵⁰

Funds using ESG exclusionary strategies can be active or passive funds—fund managers can choose either to simply mimic an existing index, but exclude certain companies for “bad” ESG practices,⁵¹ or funds can be actively managed using a proprietary investment strategy, yet refuse to include certain companies with “bad” ESG practices.

The second and third type of ESG investing, called “ESG inclusionary” and “impact investing,” both take an active investment approach.⁵² Morningstar, a highly regarded independent investment research company, described this active approach to ESG investing as

a risk-management process, as companies that embrace sustainable practices are managing liabilities better than others, perhaps recognizing new opportunities, and may be better positioned to grow in the future. Environmental, social, and governance investing has evolved from funds that simply screened out undesirable companies like polluters or sellers of tobacco to strategies that apply a matrix of sophisticated screens to assess the best and worst players in every industry and actively seek to have a positive impact in many ways.⁵³

Both ESG inclusionary and impact investing strategies use ESG information to select which companies to include in a portfolio. A portfolio using an ESG inclusionary strategy might diversify its holding across sectors and choose to include companies with higher relative ESG scores as compared to peer companies in that same industry. A fund using the impact investing strategy would have its investment analysts pick high quality companies with high ESG scores in a specific value of interest, to build a “green” fund or a “gender diversity” fund. Both of these strategies use active investing rather than passive screening, as analysts are actively reviewing and investigating a company’s overall structure and value, and include high quality companies that also score well on the specific desired ESG metric. This is different from a passive screening strategy, where a fund will simply mimic another fund or index but screen out “bad” ESG companies.

One example of an ESG investment advisor that uses active asset management research to pick companies that are predicted to perform well overall *and* have a positive ESG global impact is the newly launched Humankind Investments. This investment advisor has an actively managed ESG ETF that, like many of the other actively managed ESG funds, uses the same sort of valuation tactics as other non-ESG funds, but simply weighs the ESG classifications higher than a non ESG fund might otherwise.

Humankind’s analysts use a variety of factors, including ESG and traditional financial metrics, to calculate a Humankind Value score, and invests in companies with high scores on this

⁴⁹ Max Chen, *Investors are Re-Evaluating the Future of Fossil Fuel, Energy*, ETF TRENDS: ESG CHANNEL (Dec. 11, 2020), <https://www.etftrends.com/esg-channel/investors-are-re-evaluating-the-future-of-fossil-fuel-energy/>.

⁵⁰ Joe McGrath, *MSCI Launches Tobacco Exclusion Indexes*, ESG CLARITY (Sept. 27, 2018), <https://esgclarity.com/msci-launches-tobacco-exclusion-indexes/>.

⁵¹ Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1935-1938.

⁵² INVESTMENT COMPANY INSTITUTE, FUNDS USE OF ESG INTEGRATION AND SUSTAINABLE INVESTING STRATEGIES: AN INTRODUCTION 6-7 (2020), https://www.ici.org/pdf/20_ppr_esg_integration.pdf.

⁵³ Russel Kinnel, *How Vanguard, Fidelity, and Others Embrace ESG Investing*, MORNINGSTAR (Jun. 2, 2020), <https://www.morningstar.com/articles/986785/how-vanguard-fidelity-and-others-embrace-esg-investing>.

metric. The founder, James Katz, explained the logic behind the process as reflective of his belief “that traditional investment analysis, with its typically narrow focus on standalone financial performance, fails to fully capture a company’s ability to remain sustainable and competitive in the long run.”⁵⁴ Humankind acknowledges they are not looking only to invest in companies that are perfect on all possible ESG factors and that they are just looking to include companies that add more positive impact on the world than negative.⁵⁵ This approach of looking at the overall ESG picture and the company's overall ESG global impact is a strategy that is common across active ESG investors.

C. ESG Performance

A persistent, but untrue, stereotype about ESG investing that has likely contributed to the Labor Department’s prior strict regulation on ESG investing, is that ESG investments have poor returns compared to non-ESG investments.⁵⁶ This claim may come from outdated understandings of what ESG investing looks like (pure screening mechanism versus an active process as detailed above) or from a political agenda seeking to discourage investment in sustainable or green businesses. No matter its generation or motivation, broad brushing ESG investing as irresponsible investing is simply untrue.

Scores of studies and years of research have shown no increased risk in investing in ESG versus traditional non-ESG funds, and, in fact, some recent studies and interviews with investment analysts have suggested there is *less* risk in investing in ESG versus non ESG funds. A 2020 Morningstar study showed there was no greater investment risk to investing in ESG, rather than non-ESG, on a global level.⁵⁷ A 2019 study found that a high ESG portfolio outperformed a comparable low ESG portfolio by 16 basis points per year.⁵⁸ A 2015 study examined over 2,000 studies of ESG performance and found that, in 90% of the studies, there was no negative relationship between concern for social factors and corporate financial

⁵⁴ Baley McCann, *Former Vanguard Analyst James Katz Launched Humankind Investments in 2019, and its ESG Etf Will Track a Proprietary ‘Equity Index’*, CITY WIRE (Feb. 24, 2021), <https://citywireusa.com/professional-buyer/news/former-vanguard-analysts-firm-launches-its-first-esg-etf/a1471387>.

⁵⁵ *Positive Impact Doesn’t Require Perfection*, HUMANKIND INVESTMENTS, https://www.humankind.co/article?_hstc=246760475.03ac9d2db8fdaac5096f8982b29c438b.1614198786313.1614198786313.1614198786313.1&_hssc=246760475.1.1614198786314&_hsfp=1895085607#3Cf2oVL59Ag0CbVTqHe7wx, last accessed April 16, 2021.

⁵⁶ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLORADO L. REV. 731, n. 7 (“See, e.g., Jon Hale, Does Sustainable Investing Help or Hurt Returns?, MORNINGSTAR (Dec. 7, 2017), <http://news.morningstar.com/articlenet/article.aspx?id=839607> [https://perma.cc/F5JL-RRMH] (describing the continuing “misimpression” that sustainable investing will hurt returns). A 2015 study found that “misperceptions of negative impact of investment performance” was considered a major challenge by 60 percent of respondents and a moderate challenge by 28 percent. ROBERT G. ECCLES & MIRTHA D. KASTRAPELI, *THE INVESTING ENLIGHTENMENT: HOW PRINCIPLE AND PRAGMATISM CAN CREATE SUSTAINABLE VALUE THROUGH ESG* (2017) (quoting UNPRI & CERULLI ASSOCIATES, *Evolving Product Trends: Strategic Beta and ESG/SRI, U.S. PROD. & STRATEGIES* 2016, 80 (2016)), http://www.statestreet.com/content/dam/statestreet/documents/Articles/The_Investing_Enlightenment.pdf [https://perma.cc/GB53-ZM8H].

⁵⁷ Madison Sargis & Patrick Wang, *How Does Investing in ESG Companies Affect Returns*, MORNINGSTAR (Feb. 19, 2020), <https://www.morningstar.com/insights/2020/02/19/esg-companies>.

⁵⁸ Guatum Dhingra & Christopher J. Olson, *ESG Investing: Can You Have Your Cake and Eat it Too?* CFA Institute, (Sept. 3, 2019), <https://blogs.cfainstitute.org/investor/2019/09/03/esg-investing-can-you-have-your-cake-and-eat-it-too/>.

performance.⁵⁹ And, a large majority of the studies found a stable and positive relationship between ESG factors and corporate financial performance.⁶⁰ This positive correlation between ESG scores and financial performance makes sense—the factors underlying high ESG ratings also help to drive value, by lowering risks of worker safety incidents, pollution spills, litigation, and other public relations disasters that can damage a company’s brand and valuation.⁶¹

Incorporating ESG analysis is now considered by the financial industry to be an important part of responsible portfolio construction.⁶² A recent research report from J.P. Morgan Chase tested this theory, tracking the performance of funds constrained to only the “top rated ESG issuers,” and found this type of ESG constraint “not only improves the ESG profile of a portfolio but also boosts alpha [return].”⁶³ The report concluded that “for an active manager following a Value-like strategy, ESG constraints can increase returns and improve risk adjusted performance.”⁶⁴

Unsurprisingly, many actively managed ESG funds outperform other types of actively managed funds. This outperformance makes sense when you understand the value-add of ESG factor analysis to an analyst’s understanding of a company’s ESG-related risk exposure. For example, Vanguard’s FTSE Social Index Fund saw outsized returns over one year (18.3%), three years (10%), and five years (14.4%).⁶⁵ This performance beat out 98% of non-ESG funds holding stock in large companies with similar growth and value characteristics.⁶⁶

It is not just the asset management industry that recognizes the long-term value of ESG factors—the insurance industry recognizes this as well. Global insurance and reinsurance broker Marsh has a Directors & Officers (D&O) liability insurance initiative offering preferred D&O insurance terms to clients with “superior” ESG frameworks, justifying the better terms by stating, “[a]s clients continue to invest in ESG initiatives, it is right that they be recognized as a *better risk* by underwriters.”⁶⁷

The anti-ESG advocates arguing that it is fiscally irresponsible to invest retirement plan assets in ESG funds are out-of-step with what the financial industry has determined is the best step for increased returns.

As mentioned above, one reason why this negative, yet untrue, perception of ESG investing continues to circulate even in highly educated circles is because of an outdated

⁵⁹ Gunnar Friede et al, *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5. J. Sustainable Finance & Investment 210, <https://www.tandfonline.com/doi/full/10.1080/20430795.2015.1118917>.

⁶⁰ *Id.*

⁶¹ SARA BERNOW ET AL., MCKINSEY & COMPANY, FROM ‘WHY’ TO ‘WHY NOT’: SUSTAINABLE INVESTING AS THE NEW NORMAL 3 (Oct. 2017), <https://www.mckinsey.com/~media/McKinsey/Industries/Private%20Equity%20and%20Principal%20Investors/Our%20Insights/From%20why%20to%20why%20not%20Sustainable%20investing%20as%20the%20new%20normal/From-why-to-why-not-Sustainable-investing-as-the-new-normal.ashx>.

⁶² SHIVAM GHOSH, J.P. MORGAN CHASE & CO., VIRTUE ISN’T THE ONLY REWARD 1 (15 March 2020). On file with the author, Courtesy J.P. Morgan Chase & Co., Copyright 2021.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 1.

⁶⁵ Nellie S. Huang, *6 Vanguard Funds That Are Socially Responsible*, KIPLINGER (April 26, 2017) <https://www.kiplinger.com/slideshow/investing/t041-s003-6-vanguard-funds-that-are-socially-responsible/index.html> (*emphasis added*).

⁶⁶ *Id.*

⁶⁷ Luke Gallin, *Marsh Clients to Receive Preferred D&O Coverage on ESG-Related Exposures*, REINSURANCE NEWS (Oct. 25, 2021), <https://www.reinsurancene.ws/marsh-clients-to-receive-preferred-do-coverage-on-esg-related-exposures/>.

understanding of what ESG investing entails. Critics point to some ESG investors' tendencies to screen out companies based on non-ESG friendly factors, such as companies that issue dual-class shares (a "no no" for ESG investors particularly concerned about governance issues.) Bernard S. Sharfman recently made the claim in the Yale Journal on Regulation Bulletin that ESG investing is irresponsible because it screens out companies with bad "G" ratings, like Alphabet or Zoom, making the fund inherently underperform the broader market.⁶⁸ The argument is that, if ESG funds are excluding companies with dual-class shares, they are inherently screening out some of the most successful and high performing equities from companies like Alphabet, Zoom, and Facebook, all of which issue multiple classes of shares.

This way of describing ESG investing is misleading for many reasons, mostly because it mis-characterizes what ESG investing actually is. As discussed above, much of ESG investing today does not use the automatic ESG exclusionary strategy criticized by some anti-ESG advocates. So, the criticism that ESG investing is inherently irresponsible because it screens out high performers doesn't even apply to a huge swath of the ESG market.

And, in many cases, using the ESG exclusionary strategy criticized by Sharfman and others actually produces the opposite of what critics claim it does. In many instances, excluding companies with "bad" ESG metrics can *cause* outperformance, as described above, rather than underperformance, exactly because the screened-out characteristics make those "bad" companies higher risk or poor investments. For example, many fossil-fuel exclusionary ESG funds have outperformed other non ESG indexes *because* they screen out these high-risk fossil fuel companies that have underperformed in the past years.⁶⁹

Evidence suggests that ESG funds, whether actively managed or exclusionary, specifically outperform in economic downturns,⁷⁰ as they are better insulated against downside risks. This type of outperformance makes sense because ESG factors align with many of the risks that may hurt a company during a downturn.⁷¹ But whether ESG funds only outperform in a down market, outperform in all markets, or simply provide similar returns to non-ESG investments,⁷² it's illogical to treat these types of investments any differently than other kinds of investments, given their similar, or in certain cases more favorable, returns to investors.

⁶⁸ Bernard S. Sharfman, *ESG Investing Under ERISA*, 38 YALE J. ON REGULATION BULLETIN 112,121-122 (2020).

⁶⁹ *Now You Can Compare Fossil Free Funds to Index Funds*, Fossil Free Funds (May 20, 2020), <https://fossilfreefunds.org/blog/2020/05/20/now-you-can-compare-fossil-free-funds-to-index-funds.html> ("Over the past 12 months, again the basic S&P 500 fund is lowest (+0.83), the Parnassus fund is next (+1.58), and the "fossil fuel reserves free" is outperforming (+1.99)."); Jeff Benjamin, *As Pandemic Rages On, ESG Funds Shine Brightly*, INVESTMENTNEWS (April 19, 2020), <https://www.investmentnews.com/as-pandemic-rages-on-esg-funds-shine-brightly-191673> ("Part of the strength of ESG strategies in the current downturn can be attributed to the fact that most ESG funds have limited exposure to the fossil fuel industries, which have suffered so far this year.")

⁷⁰ *Id.*

⁷¹ Tom Lauricella, Jess Liu, *Sustainable Funds Weather Downturns Better Than Peers*, MORNINGSTAR (Jun. 15, 2020), <https://www.morningstar.com/articles/988114/sustainable-funds-weather-downturns-better-than-peers> ("...evidence continues to build that ESG funds provide less downside risk than do their traditional peers. Investing in sustainable strategies has the potential to offer investors beneficial portfolio risk attributes and downside cushioning over short- and long-term time horizons. Add in the long-run benefits of investing in companies better poised to navigate risks poised by climate change or highlighted by the COVID-19 pandemic, and the ESG story is becoming more compelling.")

⁷² Russel Kinnel, *How Vanguard, Fidelity, and Others Embrace ESG Investing*, MORNINGSTAR (Jun 2, 2020), <https://www.morningstar.com/articles/986785/how-vanguard-fidelity-and-others-embrace-esg-investing> ("Will ESG Investing Improve My Performance? The answer is to be determined. When I've looked at the data, it always shows that ESG funds collectively have average performance. Or, to put it another way, an ESG focus doesn't help as much as its biggest cheerleaders say, nor does it hurt as much as its critics say. To me, that makes sense. A

D. Demand for ESG

ESG investing has become extremely popular, both among individual and institutional investors. ESG's popularity is due to two factors. The first, of course, is the nature of ESG as valued based. ESG's global value proposition speaks to all values-based investors, and specifically to millennials, who are overrepresented in the recent growth in demand for ESG investment products. Between 2015 and 2019, interest in sustainable investing jumped from 71% to 85% in the general population of investors, but from 84% to 95% in millennial investors.⁷³ A 2019 Ernst & Young report found that "demand for sustainable investments is being driven, in part, by millennials who prefer to investment in alignment with personal values."⁷⁴

The second factor leading to the increase in demand for ESG products, especially more recently, is the continued high performance of ESG funds, due to their inclusion of additional risk factors into the traditional financial analysis. Individual investors and analysts and managers at institutional investment shops are citing *performance* as their main driver of ESG investing.⁷⁵ ESG investing truly is both good for the planet and for our portfolios.

Individual investors, who are among the millennial population and the general investor population, are increasingly turning to sustainable investing as a way to align their investment decisions with their values, while making good returns in the process. A 2017 study from Nuveen showed that 4 out of 5 investors "want their investments to make a positive impact on society and on environmental sustainability."⁷⁶

These individual investors are not naive, nor are they subjugating returns to their values. A recent study on individual investors reported that a majority of investors cited *performance* as their main motivation for investing in these types of responsible investments.⁷⁷ 53% cited "better performance" and 46% cited "aligns with my values."⁷⁸ ESG investments offer investors a rare opportunity to marry their values with increased financial returns. Institutional investors are also recognizing the financial benefits of investing in ESG, and many even incorporate ESG analysis into their non-ESG funds.⁷⁹

Despite all of this institutional and individual investor interest in ESG investments, 401(k) plans are woefully behind when it comes to offering ESG options for their retirement investors. While one-third of all professional managed assets are invested in funds using ESG

sustainable focus ought to be a positive, but on the other hand, many low-ESG companies like tobacco or oil trade at very low valuations because of those liabilities. Perhaps that cheapness will be sufficient to compensate investors for taking on those risks. However, as I mentioned, ESG has evolved significantly in approach and in terms of the firms managing those strategies. So, even if the past data showed a more meaningful performance pattern, I'd be wary of projecting that into the future.")

⁷³ MSCI, SWIPE TO INVEST: THE STORY BEHIND MILLENNIALS AND ESG INVESTING 3 (March 2020),

<https://www.msci.com/documents/10199/07e7a7d3-59c3-4d0b-b0b5-029e8fd3974b#:~:text=%E2%80%9CDemand%20for%20sustainable%20investments%20is.management%20clients%20at%20Ernst%20%26%20Young.>

⁷⁴ *Id.*

⁷⁵ SHIVAM GHOSH, J.P. MORGAN CHASE & CO., VIRTUE ISN'T THE ONLY REWARD 1 (15 March 2020). On file with the author, Courtesy J.P. Morgan Chase & Co., Copyright 2021.

⁷⁶ Jon Hale, *3 Myths About Sustainable Funds*, MORNINGSTAR (Sept. 18, 2019),

[https://www.morningstar.com/articles/946453/3-myths-about-sustainable-funds.](https://www.morningstar.com/articles/946453/3-myths-about-sustainable-funds)

⁷⁷ *Performance Tops Investors Motives for Responsible Investing*, Nuveen (June 12, 2020),

[https://www.nuveen.com/en-us/insights/responsible-investing/fifth-annual-responsible-investing-survey.](https://www.nuveen.com/en-us/insights/responsible-investing/fifth-annual-responsible-investing-survey)

⁷⁸ *Id.*

⁷⁹ Leslie P. Norton, *401(k) Plan Managers Will Promote ESG Funds Despite Pushback*, BARRONS (Oct. 1, 2020), [https://www.barrons.com/articles/401-k-plan-managers-will-promote-esg-funds-despite-pushback-51601580478.](https://www.barrons.com/articles/401-k-plan-managers-will-promote-esg-funds-despite-pushback-51601580478)

strategies (a total of \$17 trillion),⁸⁰ and \$1.7 trillion are invested directly in ESG funds,⁸¹ these are almost exclusively held in non-ERISA regulated [definitionally non-401(k) accounts].⁸² Just 3% of employers offer an ESG option in their 401(k) lineup⁸³ and only 0.1% of overall 401(k) assets (less than \$9 billion) are currently invested in an ESG fund.

But this discrepancy between the percent of retirement assets invested in ESG and the percent of overall assets in ESG is *not* due to lack of investor interest. In fact, a 2021 US Retirement Survey conducted by Schroder's found that 69% of surveyed defined-contribution participants would or might increase their overall contribution rate *if* they were offered ESG options (only 31% said they would not.)⁸⁴ The discrepancy between retirement assets invested in ESG and overall assets invested in ESG is due to the high regulatory burden placed on fiduciaries of retirement plan funds. This article posits that, if that barrier were lowered, retirement plan assets would shift towards sustainable investments, increasing the overall total of assets invested in sustainable business.

This change would be good for the planet, since it rewards ESG-friendly options and incentivizes other companies to follow suit, and is good for retirement plan participants, since they can direct their assets towards funds they believe in, and trust they will have as good, if not better, returns down the line.

II. THE RETIREMENT CRISIS, AND WHAT ESG CAN DO ABOUT IT

The extent of the retirement crisis facing Americans is well-documented and well-known.⁸⁵ The typical (median) American worker has \$0 saved for retirement.⁸⁶ 40% of Americans have a retirement savings account, but the median amount saved is only \$40,000, while the recommended savings target is six times current income at age 50.⁸⁷ Americans are

⁸⁰ PARNASSUS INVESTMENTS, REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 1 (2020) <https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf>.

⁸¹ Simon Jessup & Elizabeth Howcroft, *Sustainable Fund Assets Hit Record 41.7 Trillion in 2020: Morningstar*, Reuters (Jan. 28, 2021), <https://www.reuters.com/article/us-global-funds-sustainable/sustainable-fund-assets-hit-record-1-7-trln-in-2020-morningstar-idUSKBN29X2NM>.

⁸² Greg Iacurci, *Climate Funds Hold Less than 1% of 401(k) Money: Here's Why*. CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/11/heres-why-401k-plans-lag-in-green-investment-options.html>.

⁸³ Ron Lieber, *How to Get Socially Conscious Funds Into Your 401K*, N.Y. Times (Oct. 13, 2021), <https://www.nytimes.com/2020/01/10/your-money/esg-funds-retirement-401k-plan.html> (“Just 2.9 percent of 401(k) plans have even a single fund dedicated to environmental, social and governance issues, according to the Plan Sponsor Council of America’s most recent member survey.”).

⁸⁴ Amanda Umpierrez, *Plans with ESG Options See Larger Contribution Rates*, PLANSPONSOR (May 13, 2021), <https://www.plansponsor.com/plans-esg-options-see-larger-contribution-rates/>.

⁸⁵ David A. Pratt, *Too Big to Fail? The U.S. Retirement System in 2019*, 27 ELDER L. J. 327, 328 (2020); David English, *Covid-19 and its Impact on America’s Retirement System*, 46 ACTEC L. J. 35, 35 (2020); Regina T. Jefferson, “*Let Them Eat Cake*”: *Examining United States Retirement Savings Policy Through the Lens of International Human Rights Principles*, 31 HARV. HUM. RTS. J. 63, 64-66 (2018); Chris Farrell, *Analysis: The Pandemic is Making America’s Retirement Crisis Worse. Here’s What You Can Do*, PBS (April 30, 2020), <https://www.pbs.org/newshour/economy/analysis-the-pandemic-is-making-americas-retirement-crisis-worse-heres-what-you-can-do>; Teresa Ghilarducci & Tony James, *America’s Retirement Savings Crisis is Now. Here’s How to Fix It*, CNN (Sept. 15, 2020), <https://www.cnn.com/2020/09/15/perspectives/retirement-savings-crisis/index.html>.

⁸⁶ U.S. SENATE JOINT ECONOMIC COMMITTEE, RETIREMENT INSECURITY 2, https://www.jec.senate.gov/public/_cache/files/0fddd609-a00d-44da-aba8-cd15357010d9/retirement-insecurity-jec.pdf.

⁸⁷ *Id.*

well-aware of their own retirement insecurity -- 65% are convinced they will have to work past the normal retirement age in order to afford to retire⁸⁸ and 51% predict they will be unable to maintain their current standard of living in retirement.⁸⁹

Congress has attempted to address this retirement crisis over the past two decades. with major retirement-specific legislation, like the Pension Protection Act⁹⁰ and the SECURE Act.⁹¹ Congress has also tried incremental changes to encourage more retirement savings, such as creating new forms of retirement accounts such as Roth IRAs or creating other tax-advantaged savings vehicles like health savings accounts.⁹² But the retirement crisis still persists.

More action is needed to encourage more people to save for retirement. Allowing employees to invest their retirement dollars in value-based investment vehicles may encourage additional retirement savings, especially for younger workers, as it would allow them to align their retirement savings with their personal values. This could be achieved by a simple regulatory change at the agency level and would not require the expensive and protracted wrangling and politicking that comes with large-scale Congressional action.

A. Millennial Retirement Insecurity

Retirement insecurity is especially heightened among millennials. 77% of millennials fear they'll either never retire or will have to work far past the normal retirement age, as compared to 36% of Gen Xers and 29% of baby boomers.⁹³ A research study by Aon Hewitt determined that millennials are at the highest risk of retirement insecurity compared to older generations and predicted that eight out of ten millennials will not be able to meet their financial needs in retirement without significant changes in their saving and investing behaviors.⁹⁴

Ninety-five percent of working millennials have insufficient retirement savings.⁹⁵ Two-thirds of working millennials, or 54.9 million young Americans, have no retirement savings at all.⁹⁶ Among those millennials who are saving for retirement, most are still vastly under saving. The median account balance in millennial retirement accounts is \$19,100.⁹⁷ Some financial professionals suggest this generation should save between \$1.8 to \$2.2. million for retirement, or

⁸⁸ *Id.*

⁸⁹ Anne Tergesen, *More Americans Face Retirement Insecurity*, WALL ST. J. (Jan. 19, 2021), <https://www.wsj.com/articles/more-americans-face-retirement-insecurity-11611064810>.

⁹⁰ Julia Kagan, *Pension Protection Act of 2006*, INVESTOPEDIA (Nov. 27, 2020), [https://www.investopedia.com/terms/p/pensionprotectionact2006.asp#:~:text=The%20Pension%20Protection%20Act%20sought.their%20401\(k\)%20plan](https://www.investopedia.com/terms/p/pensionprotectionact2006.asp#:~:text=The%20Pension%20Protection%20Act%20sought.their%20401(k)%20plan).

⁹¹ Daniel Kurt, *What Is the SECURE Act and How Could it Affect Your Retirement*, INVESTOPEDIA (Mar. 19, 2021), <https://www.investopedia.com/what-is-secure-act-how-affect-retirement-4692743>.

⁹² Taylor Tepper, *How to Fix America's Retirement Crisis: 10 Experts Weigh In*, FORBES: ADVISOR (Feb. 1, 2021), <https://www.forbes.com/advisor/retirement/how-to-fix-retirement-crisis/>.

⁹³ Tom Conway, *Why Retirement Insecurity is the New American Epidemic*, WORKPLACE FAIRNESS (Mar. 3, 2020), <https://www.workplacefairness.org/blog/2020/03/03/why-retirement-insecurity-is-the-new-american-epidemic/>.

⁹⁴ *Employment Alert: Young Workers Face Hard Times in Retirement*, 28 No. 1 EMP. ALERT 11 (Jan. 14, 2011), available at [https://www.westlaw.com/Document/I873fa4701d7c11e08b05fdf15589d8e8/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cbt1.0](https://www.westlaw.com/Document/I873fa4701d7c11e08b05fdf15589d8e8/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cbt1.0).

⁹⁵ JENNIFER ERIN BROWN, NATIONAL INSTITUTE ON RETIREMENT SECURITY, *MILLENNIALS AND RETIREMENT: ALREADY FALLING SHORT* 22 (Feb. 2018), <https://www.nirsonline.org/wp-content/uploads/2018/02/Millennials-Report-1.pdf>.

⁹⁶ *Id.* at 1.

⁹⁷ *Id.* at 14

between 15-22% of their annual income.⁹⁸ Yet currently, the 85% millennials who have retirement savings are saving less than 6%, with an average employee retirement savings rate of 5%.⁹⁹ This lack of savings is especially shocking given that 60% of surveyed millennial investors agreed with the statement ““I expect Social Security to go bankrupt before I retire” (as compared to 47% of overall workers.)¹⁰⁰

One of the main reasons millennials are woefully underprepared for their financial needs in retirement is because of the outsized impact the shift from defined-benefit to defined-contribution plans has had on this generation. Defined-benefit plans have all but disappeared, especially for millennial workers, and employers have replaced this retirement benefit with 401(k) type plans.¹⁰¹ 401(k) plans may be better from an employer-perspective, but from an employee perspective, they make retirement security much less secure. While many employers offer an employer match where they contribute towards the employee’s 401(k) type plan, this match is nothing like the defined benefit pension plans of the past.

In a defined benefit plan, the employer bears most of the market risk and has the burden of ensuring that the pension is adequately funded and manages to provide adequate retirement income for the employees. In a 401(k)-type plan, the employee bears that risk. Unlike with a traditional defined benefit pension plan, workers with 401(k) type plans do not have any guaranteed retirement savings—they bear the responsibility and risk of participating in the plan, contributing to the plan, and managing the plan.

The shift from employer-sponsored defined benefit plans (traditional pensions) to employer-sponsored defined contribution plans (401(k) like plans)¹⁰² shifts the burden of who is responsible for ensuring the employee’s retirement security. Traditional defined benefit pension plans are maintained by employers and contributed to by employers. Employees are not able to touch the retirement savings accruing in the pension plan until a specified retirement date. In a traditional defined benefit pension plan, employers hold the risk and liability for maintaining income for their employees in retirement. These plans guarantee employees a steady stream of income throughout retirement, typically determined based on average wages earned at a specified time prior to retirement. Traditional defined benefit pension plans are structured so that retirement benefits typically come close to replacing pre-retirement wages.¹⁰³

401(k) type plans, on the other hand, place the burden of savings and investing those savings on the employee. The most common type of investment option in a 401(k) plan is a mutual fund or similar type of fund that pools participants’ assets and is managed by a professional fund manager. The menu of investment options for employees is created by the employer, often with the help of plan service providers. There is usually a range of options (with an average of 14)¹⁰⁴ and employees can choose which option or options they would like to invest

⁹⁸ *Id.* at 15

⁹⁹ *Id.*

¹⁰⁰ *Generational Retirement Trends Study*, T. ROWE PRICE (2015), at slide 15, available at <https://www.slideshare.net/TRowePrice/generational-retirement-trends-study-2015/12-1212By-Worker-GenerationMajor-Reasons-for>.

¹⁰¹ This paper will use “401k-type plans” as synonymous with “defined contribution plans,” though there are of course other forms of defined-contributions plans, such as 403(b) plans, etc.

¹⁰² 401(k) plans are the most common and well-known type of defined contribution plan, so this paper will use 401(k) to be synonymous with defined-contribution plans.

¹⁰³ Thomas Olson, *401(k) Leakage: Crafting a Solution Consistent with the Shift to Employer-Managed Retirement Accounts*, 20 ELDER L. J. 449, 453 (2013).

¹⁰⁴ Ian Yres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and “Dominated Funds” in 401(k) Plans*, 124 YALE L. J. 1476, 1485 (2015).

part or all of their retirement plan assets in. Requiring employees to manage their retirement savings is less desirable than the professionally managed defined benefit plan structure for many reasons, including that Americans are on average financially illiterate and lack basic knowledge required to make investment decisions.¹⁰⁵

While the shift from traditional defined benefit pension plan to 401(k) type plans was detrimental to all employees, it has had a disproportionately detrimental impact on the newest generation of workers. These Millennial workers have found themselves on the losing end of two-tiered wage and benefit agreements, where companies continue pension benefits for older workers, while phasing them out for younger workers. Millennials almost exclusively have defined contribution plans instead of defined benefit plans.¹⁰⁶

Millennial workers are also disproportionately affected by the self-directed nature of a 401(k) plan versus the employer managed nature of a traditional defined benefit pension plan. Millennials have the lowest rates of participation in 401(k) type plans compared to older generations of workers. Studies from both 2011 and 2018 showed that only half of millennials eligible to participate in a defined contribution plan did so.¹⁰⁷ And even those millennials who are participating in their 401(k) type plans are not saving enough.

B. ESG As a Marginal Savings Nudge

Employers seeking to increase participation in and contribution to an employer-sponsored, participant directed retirement savings plan should consider offering an ESG option in their investment lineup as a way to nudge more employees to save more dollars in these types of accounts. This could be particularly impactful for millennial workers, who are particularly interested in values-based investing.

Studies have shown that millennials consider companies' global impact before buying their product or investing in their business, and that millennials seek to tailor their investments to their values.¹⁰⁸ The financial industry recognizes the importance of ESG considerations to millennials, and uses ESG as a strategy to attract millennial investors.¹⁰⁹ Employers should do

¹⁰⁵ Deepa Das Acevedo, *Addressing the Retirement Crisis with Shadow 401(k)s*, 92 NOTRE DAME L. R. online 38, 48-49 (2016); Jill E. Fisch & Tess Wilkson-Ryan et. al, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L.J. 633, 634 (2016).

¹⁰⁶ KATHERINE S. NEWMAN, DOWNHILL FROM HERE: RETIREMENT INSECURITY IN THE AGE OF INEQUALITY 9, https://books.google.com/books?hl=en&lr=&id=36hbDwAAQBAJ&oi=fnd&pg=PA1&dq=retirement+insecurity+america&ots=3bMR2jycG9&sig=HK33JttG1Uj2OZSmh1Hmp_kZsGQ#v=onepage&q=retirement%20insecurity%20america&f=false.

¹⁰⁷ *Employment Alert: Young Workers Face Hard Times in Retirement*, 28 No. 1 EMP. ALERT 11 (Jan. 14, 2011), available at [https://www.westlaw.com/Document/I873fa4701d7c11e08b05fd15589d8e8/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I873fa4701d7c11e08b05fd15589d8e8/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0); Press Release, National Institute on Retirement Security, New Research Finds 95 Percent of Millennials Not Saving Adequately for Retirement (Feb. 27, 2018), <https://www.nirsonline.org/2018/02/new-research-finds-95-percent-of-millennials-not-saving-adequately-for-retirement/>.

¹⁰⁸ MSCI, SWIPE TO INVEST: THE STORY BEHIND MILLENNIALS AND ESG INVESTING 1 (March 2020), <https://www.msci.com/documents/10199/07e7a7d3-59c3-4d0b-b0b5-029e8fd3974b#:~:text=%E2%80%9CDemand%20for%20sustainable%20investments%20is,management%20clients%20at%20Ernst%20%26%20Young>.

¹⁰⁹ Michal Barzuza, Quinn Curtis, & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 SO. CAL. L. REV. 1243, 1250 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439516.1250.

the same and entice more millennial employees to participate in and save more in their retirement plans by offering millennial-friendly ESG investment options.

To be clear, this is not a band aid that can solve all millennial economic woes. Offering an ESG option in the investment plan lineup will likely not encourage millennials who simply have no funds to invest to start investing in their 401(k). Millennials face record levels of student debt,¹¹⁰ and, in some cases, it makes financial sense to use income to pay down student debt before saving for retirement.¹¹¹ Millennials may also be saving for a down payment, or using their income on childcare, the costs of which have both increased at a record pace. For millennial workers who simply have no discretionary dollars to invest after paying or saving for basic necessities and financing existing debt, opting out of a 401(k) may be the most financially savvy decision. But that is not all millennials.

Many millennial workers do have discretionary dollars left after they meet their basic needs each month, and it is these millennials who may save more if offered an ESG option. Only 39% of millennial workers who are eligible but do not participate in their 401(k) plans stated they have trouble meeting monthly expenses. Many millennials who opt out or under utilize their 401(k)s are simply saving elsewhere, likely in retail investment apps popular among millennials, like Robinhood.¹¹² For example, 8% of millennials eligible for 401(k)s but not participating in the 401(k) stated they don't participate because they are saving through other vehicles.¹¹³ Additionally, 15% of millennials who are saving less than the maximum amount in their 401(k) stated they are under-saving in their 401(k) because they are using other investment vehicles.¹¹⁴ These investment-savvy but non- or under- 401(k) participating millennials are the ones who could be enticed to save more for retirement if the 401(k) investment lineup spoke more to their investment values.

Millennial behavior on individual investment platforms such as Robinhood underscore this interest and also the fact that Millennials will indeed invest if the opportunity is a good match for their values. Robinhood's investor base is overwhelmingly millennial, with the average investor age of 31. And what these millennial investors are chasing through Robinhood is the trend of investing in clean energy.¹¹⁵ But the disadvantage to using a Robinhood account to invest in sustainable companies is that in Robinhood investments are less tax-advantaged than 401(k) investments, and there is no potential employer match for Robinhood "contributions."¹¹⁶

If an employer offered a sustainable, environmentally friendly ESG fund within the tax-advantaged employer-sponsored retirement plan, especially if the company were matching

¹¹⁰ Millennials who are eligible but not contributing to a 401(k) have higher amounts of debt than millennials workers who are active in their 401(k) accounts. *Generational Retirement Trends Study*, T. ROWE PRICE (2015), at slide 55, available at <https://www.slideshare.net/TRowePrice/generational-retirement-trends-study-2015/12-1212By Worker GenerationMajor Reasons for>.

¹¹¹ Kevin Mercadante, *Should You Delay Retirement Contribution to Pay Off Debt?*, MONEY UNDER 30 (Nov. 11, 2020), <https://www.moneyunder30.com/should-you-delay-retirement-contributions-to-pay-off-debt>

¹¹² Sean Williams, *Robinhood Investors Are Head-Over-Heels in Love With This Trend*, THE MOTLEY FOOL (Jan. 26, 2021), <https://www.fool.com/investing/2021/01/26/robinhood-investors-head-over-heels-in-love-trend/>.

¹¹³ *Generational Retirement Trends Study*, T. ROWE PRICE (2015), at slide 58, available at <https://www.slideshare.net/TRowePrice/generational-retirement-trends-study-2015/12-1212By Worker GenerationMajor Reasons for>.

¹¹⁴ *Id.* at slide 12.

¹¹⁵ Sean Williams, *Robinhood Investors Are Head-Over-Hells in Love With This Trend*, THE MOTLEY FOOL (Jan. 26, 2021), <https://www.fool.com/investing/2021/01/26/robinhood-investors-head-over-heels-in-love-trend/>.

¹¹⁶ Jean Folger, *Minimize Taxes and Maximize Your Bottom Line*, INVESTOPEDIA (Dec. 10, 2020), <https://www.investopedia.com/articles/stocks/11/intro-tax-efficient-investing.asp>.

employee contributions, it seems likely to redirect millennial savings away from tax-inefficient platforms like Robinhood and towards tax-efficient savings vehicles like 401(k)s. Not only would this provision of an ESG fund offer better returns and less investment risk for retirement plan assets,¹¹⁷ but it would encourage greater millennial participation in and contribution to the plan in the first place.¹¹⁸

Allowing employees to invest their 401(k) funds in a well-selected ESG investment option is not the be-all-end-all solution to millennial retirement woes. But it could encourage millennial workers, *at the margin*, to increase their retirement savings, at very little or no cost. And with the enormous impact that compound interest has on the value of dollars invested early in one's career, that marginal early investments could have an outsized impact on millennial retirement security.

III. ERISA REGULATION OF ESG INVESTING

There is clear and overwhelming individual and institutional interest for ESG investing and including ESG funds in 401(k) lineups could have a marginal, yet significant, impact on increased economic security for millennials in retirement. The current regulatory framework for ESG investments, however, makes it difficult for Americans to invest their employer-sponsored retirement accounts in ESG funds.

Limiting ESG access for retirement plan assets not only keeps the trillions of dollars in 401(k) assets out of the sustainable market,¹¹⁹ but it also limits the extent to which many Americans can even access ESG. More than 20 percent of American households' only form of investment ownership is an employer-sponsored retirement account.¹²⁰ Lowering the regulatory barriers to investing retirement funds in ESG will increase access to and investment in ESGs and could simultaneously encourage increased retirement savings. The Proposed Rule, if adopted in something close to its current form, could align ESG regulation with investor demand for ESG investment options.

The next section of this paper will discuss the history of ERISA and case law related to values-based investing to support the case for modern forms of ESG investing with ERISA-regulated plan assets. I briefly overview the decades long regulatory ping-pong over ESG investing. I then discuss in detail the Trump-era ESG Rule and criticize its anti-ESG approach for running contrary to ERISA case law. The final section of this paper will discuss how the Proposed Rule's embrace of modern forms of ESG investing tracks much more closely to case law's treatment of values-based investing and argue for its adoption in its current form.

I highlight the soon-to-be defunct ESG Rule for three reasons. First, although the DOL issued their Proposed Rule in October 2021, it is only a proposal and is not yet current law --

¹¹⁷ Paul A. Davies et al, *Pulling in Opposite Directions: Investor Community, US Regulators Diverge on Regulation of ESG Disclosures*, LATHAM & WATKINS (July 21, 2020), <https://www.globalelr.com/2020/07/pulling-in-opposite-directions-investor-community-us-regulators-diverge-on-regulation-of-esg-disclosures/>.

¹¹⁸ While there would likely be a larger impact on millennial retirement savings, given their outsized interest in ESG investing, there would also likely be an overall increase in retirement savings if employers offered ESG options in their 401(k) lineups. See Amanda Umpierrez, *Plans with ESG Options See Larger Contribution Rates*, PLANSPONSOR (May 13, 2021), <https://www.plansponsor.com/plans-esg-options-see-larger-contribution-rates/>.

¹¹⁹ AMERICAN BENEFITS COUNCIL, 401(K) FAST FACTS (Jan. 2019), <https://www.americanbenefitscouncil.org/pub/e613e1b6-f57b-1368-c1fb-966598903769>.

¹²⁰ FINRA INVESTOR EDUCATION, SEC, A SNAPSHOT OF INVESTOR HOUSEHOLDS IN AMERICA 1 (Sept. 2015), <https://www.sec.gov/spotlight/fixed-income-advisory-committee/finra-investor-education-foundation-investor-households-fimsa-040918.pdf>.

individual litigants can sue under if they believe they suffered losses to their plan because of the fiduciaries' decision to include an ESG option. Second, it is yet unknown what comments may be submitted about the Proposed Rule, and what the final version will look like—will it be as different from the ESG Rule as it is in its current proposed form? Third, the ESG Rule provides context for why employers have been so reticent to offer ESG plans in their lineups. Even if the Proposed Rule is adopted in its current form, the consistent regulatory ping-pong over values-based investing with retirement plan assets may dissuade risk-averse employers from changing their offerings in reliance on the Proposed Rule—who can say what a future Republican Administration might roll back?

A. Background to ERISA

Most employer-sponsored retirement plans are regulated under the Employee Retirement Income Security Act of 1974 (ERISA). The provisions of ERISA that regulate retirement plans are administered by the U.S. Department of Labor.¹²¹ ERISA was passed as the culmination of decades of legislative and activist efforts to address the retirement savings crisis in the United States and a long history of mismanagement of pension funds.¹²²

One of the key turning points in the pension crisis that led to ERISA's adoption into law was the very public meltdown of the Studebaker automobile plant, which closed in 1963.¹²³ At the time the plant closed, it had over 10,000 employees enrolled in their pension plan.¹²⁴ Four thousand of those ended up receiving only 15 cents on each dollar they were owed, and 2,900 received nothing.¹²⁵ In the years following that plant closure and few more disastrous pension plan failures, NBC recorded and aired interviews of individuals who had lost their retirement savings and economic security due to mismanagement of their pension plans.¹²⁶ This exposure led to a public outcry, and the passing of ERISA.¹²⁷

When ERISA was first passed, its goal was simple—to ensure employees' economic security in retirement.¹²⁸ ERISA attempts to strike a balance between sufficient regulation to ensure retirement plan assets are secure, and not too much regulation that would dissuade employers from providing retirement plans to begin with. As such, ERISA does not mandate that all companies must provide specific benefit plans, such as retirement plans. But ERISA does mandate that *if* an employer provides certain types of benefit plans, the plans must comply with ERISA standards.¹²⁹

The employers who sponsor these plans, and any fiduciary providing investment services or management of these plans, are held to ERISA's strict fiduciary duties to serve the interest of plan participants. Plan participants can sue employer sponsors or fiduciaries for breach of

¹²¹ *History of EBSA and ERISA*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa>, last accessed April 14, 2021.

¹²² *Id.*

¹²³ Rebecca J. Miller et al, *ERISA: 40 Years Later*, JOURNAL OF ACCOUNTANCY (Sept. 1, 2014), <https://www.journalofaccountancy.com/issues/2014/sep/erisa-20149881.html>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, FAQs ABOUT RETIREMENT PLANS AND ERISA I, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>, last accessed April 19, 2021.

¹²⁹ *Id.*

fiduciary duty. The penalties for breach of fiduciary duty can be astronomical, and ERISA allows for fiduciaries to be held personally liable—so fiduciaries can be personally responsible for making beneficiaries whole for whatever they lost as a result of the fiduciary’s mismanagement.¹³⁰ As such, companies and fiduciaries take extreme precaution to avoid any hint of fiduciary breach when it comes to ERISA-regulated plans.

ERISA requires plan fiduciaries to prioritize the interests of plan participants and beneficiaries when making investment decisions for the plan.¹³¹ ERISA mandates specific fiduciary duties stemming from trust law and requiring fiduciaries to exercise the same standard of care and diligence that a prudent person would exercise under similar circumstances.¹³² This is called ERISA’s fiduciary duty of prudence. ERISA also mandates that fiduciaries must act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing financial benefits.¹³³ This requirement is also known as the fiduciary’s duty of loyalty.¹³⁴ In addition to the duties of prudence and loyalty, the ERISA-regulated fiduciary also has the duties to diversify the plan’s investments, follow the terms of a plan, and avoid conflicts of interest and statutorily prohibited transactions.¹³⁵

Some types of ERISA-regulated plans, including 401(k)s, can be set up so that the participants choose where to direct their plan assets from a suite of employer-provided investment options. When selecting investment options for a plan such as a 401(k), the plan fiduciaries have specific obligations. Fiduciaries must have a “prudent process” that they rely upon when selecting investments and service providers, must ensure that fees and other expenses are reasonable, must select investments that are both “prudent” and “adequately diversified”, and monitor the investment options and service providers to make sure they continue to be appropriate choices for the plan.¹³⁶

B. ERISA’s Fiduciary Duties and Fiduciaries’ Selection of Plan Investment Options

If an employer wants to offer an ESG investment option, such as one of the ESG choices detailed above, the employer and any other fiduciaries involved in the decision must tread carefully to avoid running afoul of ERISA’s regulations governing investment selection. Specifically, fiduciaries need to make sure they do not run afoul of ERISA’s duties of loyalty and prudence.

The duty of loyalty issue is whether the fiduciary is allowed to consider benefits that this type of investment option has on anyone other than the beneficiary—is it a violation of the duty of *exclusive* loyalty to the beneficiary if the plan not only benefits the beneficiary and his assets, but also benefits a third party, such as the fund manager, or the planet? Does that collateral

¹³⁰ *Id.* at 11

¹³¹ David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 NYU L. Rev. 2108, 2109 (2014), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-6-2106-Webber.pdf>.

¹³² 29 U.S.C. § 1104(a)(1) (2012).

¹³³ ERISA § 404(a)(1)(A); 29 CFR § 2550.404a-1; Kevin Long, *What It Means To Be an ERISA Fiduciary*, EMPLOYEE BENEFITS LAW GROUP (June 29, 2015), <https://www.employeebenefitslawgroup.com/what-it-means-to-be-an-erisa-fiduciary/>.

¹³⁴ *Id.*

¹³⁵ William J. Swartzwelder, *Employment Law-- The Split over the Shift: The Burden of Proving Causation in Claims for Breach of Fiduciary Duty under ERISA*, 41 U. ARK. LITTLE ROCK L. REV. 141, 145 (2018).

¹³⁶ U.S. DEP’T OF LABOR, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, FAQs ABOUT RETIREMENT PLANS AND ERISA 12, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>, last accessed April 19, 2021

benefit mean that the fiduciary selecting an ESG option for inclusion in the lineup has violated ERISA’s duty of loyalty? This is a procedural question—regardless of how positive the financial performance of the ESG option is, does the fact that it also inherently benefits a third party make it strictly off-limits for an ERISA-regulated plan?

The second issue is that of the duty of prudence. This issue gets to the investment research process the fiduciary engaged in when choosing the investment choice, as well as the substantive quality of the specific investment option included in the plan. Is it prudent, or financially sound, to include an option in the lineup that only invests in companies that have positive ESG impact? Presumably, this issue will depend upon what research the fiduciary undertook when choosing the specific option, and how good of a financial investment the specific ESG option is.

1. ERISA’ Duty of Loyalty and ESG Investing

The first fiduciary duty that comes up when discussing inclusion of ESG funds in a plan’s lineup, and the one specifically targeted by the Trump ESG rule as discussed below,¹³⁷ is the fiduciary duty of loyalty. ERISA’s fiduciary duty of loyalty requires plan fiduciaries to act in the best interest of their beneficiaries’ plan assets, from an economic perspective. Fiduciaries cannot consider the larger scope of “best interest”, like making a different investment decision that might be better for the beneficiaries’ work environment.

This narrow scope of “best interest” is dubbed “fund-first” by David Webber in his article “The Use and Abuse of Labor’s Capital,” where he criticizes this narrow focus.¹³⁸ Webber summarizes this understanding of the duty of loyalty as follows: “Under this same view, trustees might similarly breach their fiduciary duties by negotiating to protect their participants’ jobs at some cost to return on investment, even if it would improve the investment’s net economic benefit to fund participants and beneficiaries.”¹³⁹

This article does not seek to criticize this fund-first approach to the duty of loyalty, no matter how many good points David Webber brings up in his astute critique. This article simply seeks to clarify that, under the duty of loyalty, a fiduciary has a duty to make investment decisions that are in the sole interest of the beneficiaries’ assets in the plan. If the fiduciary takes other considerations into mind and makes a slightly worse economic decision that has slightly

¹³⁷ James Marasciullo & Gretchen Harders, *DOL’s Final Rule on Investment Duties of ERISA Fiduciaries and its Impact on Retirement Plan ESG Investing*, NATL. L. REV. (Jan. 8, 2021), <https://www.natlawreview.com/article/dol-s-final-rule-investment-duties-erisa-fiduciaries-and-its-impact-retirement-plan> (“The Final Rule clarifies that ERISA’s duty of loyalty, which requires a fiduciary to act solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits and defraying expenses, applies to the evaluation of investments and investment courses of action. The Final Rule therefore states that the duty of loyalty forbids ERISA fiduciaries from sacrificing investment returns or taking additional risks to promote non-pecuniary goals. Thus, ERISA fiduciaries may not select ESG investments to promote any goal other than ensuring financial benefits for plan participants.”)

¹³⁸ David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 NYU L. Rev. 2108, 2110-11 (2014), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-89-6-2106-Webber.pdf>. (“Under the ascendant view of ERISA and state fiduciary duties, consideration of the impact of a fund’s investments on the jobs of fund participants is worse than irrelevant; it is considered to be a breach of the duty of loyalty and the exclusive purpose rule. This is because the dominant interpretation of the fiduciary duties of public pension trustee requires them to prioritize the investment impact on the fund alone, and not its impact on the funds’ participants and beneficiaries, like Thorne. Even in the extreme case, in which an investment by a public pension fund in a company that competes with public employees is the proximate cause of the employees’ loss of employment, the employees’ lost compensation or benefits is irrelevant to the fiduciary analysis.”)

¹³⁹ *Id.* at 2112.

more extrinsic favorable impacts, like on the beneficiary's job security, or on global warming, that subjugation of the plan assets to that collateral benefit would be a violation of the fiduciary's duty of loyalty.

But what if the consideration of collateral benefits does NOT cause the plan or its participants to lose money? What if we had a win-win scenario, like that offered by many prudent ESG investment options, where a fund's consideration of ESG factors actually led to similar or increased economic benefits for the beneficiaries' assets?¹⁴⁰ Would it be a violation of the duty of loyalty if, in addition to being in the best interest of the beneficiary's assets, a fiduciary's investment decision also had a positive impact on a third party, say, the planet?¹⁴¹

ERISA case laws answers this question clearly—no. It is not a violation of the duty of loyalty to make a decision that is both in the *best* interest of the beneficiaries' assets *and* provides a collateral benefit to a third party. To establish a breach of fiduciary duty of loyalty, the fiduciary would have needed to value someone else's benefits *over* the benefits to the participant's assets.¹⁴² The district court in *Donovan v. Walton* clarified this point when it wrote that ERISA's duty of loyalty "does not prohibit a party other than a plan's participants and beneficiaries from benefitting in some measure from a prudent transaction with the plan. Furthermore, by adopting the 'exclusive purpose' standard, Congress did not intend to make illegal the fact of life that most often a transaction benefits both parties involved."¹⁴³

From a court's perspective, it doesn't matter who the third party is—it could even be a decision that benefits the actual fiduciary, as was the case in *Metzler v. Graham*.¹⁴⁴ It's not much of a logical jump to assume that it could also be a decision that happens to benefit the planet. As long as it is in the best interest of the beneficiaries' portfolio, precedent would suggest it doesn't violate the duty of loyalty if it also happens to help the planet. The fiduciary can make an investment decision that is good for the planet, as long as it's the *best* one for the portfolio.

In his article criticizing ESG investing and arguing for exclusion of ESG funds from retirement plans, Bernard Sharfman claimed that investing in ESG plans would inherently violate ERISA's duty of loyalty because of the collateral benefits it would have on society.¹⁴⁵ He argued that if a fund strategy pursued non-financial goals, such as cleaning up the environment, or excluding investments in guns or tobacco, that collateral benefit would violate the sole benefit rule and make the fiduciary liable for breach of his duty of loyalty.

¹⁴⁰ See SHIVAM GHOSH, J.P. MORGAN CHASE & CO., VIRTUE ISN'T THE ONLY REWARD 3 (15 March 2020). On file with the author, Courtesy J.P. Morgan Chase & Co., Copyright 2021. ("...constraining the investment universe to only the top rated ESG issuers not only improves the ESG profile of a portfolio but also boosts alpha. Our results seem to suggest that ESG integration into active mandates should be a 'why-not?' proposition for fund managers given the ethical and financial rewards.")

¹⁴¹ *Id.* ("...constraining the investment universe to only the top rated ESG issuers not only improves the ESG profile of a portfolio but also boosts alpha. Our results seem to suggest that ESG integration into active mandates should be a 'why-not?' proposition for fund managers given the ethical and financial rewards.")

¹⁴² *Tibble v. Edison*, No. 2:07-cv-05359, 2010 WL 2757153, at *24 n.19 (C.D. Cal. Jul. 8, 2010), *aff'd*, 711 F.3d 1061 (9th Cir.), *aff'd en banc*, 729 F.3d 1110 (9th Cir. 2013); *rev'd on other grounds*, 135 S. Ct. 1823 (2015), *aff'd on remand*, 2016 WL 1445220 (9th Cir. April 13, 2016). The Fourth Circuit held that a fiduciary breached its duty where it acted out of "fear of liability, not out of concern for its employees' best interests." *Tatum v. RJR Pension Invest. Comm.*, 761 F.3d 346, 361 (4th Cir. 2014), petition for cert. denied, 135 S.Ct. 2887 (2015).

¹⁴³ *Donovan v. Walton*, 609 F. Supp. 1221, 1245 (S.D. Fla. 1985).

¹⁴⁴ *Metzler v. Graham*, 112 F.3d 207 (5th Cir. 1997) (plan administrator did not breach his fiduciary duty when he caused the plan to purchase land adjacent to his own, thus increasing the value of his land, because there was no evidence the plan administrator placed his own interests above that of the plan's and it actually increased the value of the plan's assets).

¹⁴⁵ Bernard Sharfman, *ESG Investing Under ERISA*, 38 YALE J. ON REG. BULLETIN 112, 129 (2020).

This argument fails to recognize that a fiduciary can do both. If a fiduciary chooses an actively managed fund that pursues the highest risk-adjusted return possible by including ESG factors in the investment and screening out “bad” ESG companies because of their inherent volatility and risk, that fiduciary would not be breaching his duty of loyalty. That fiduciary would be following the portfolio management advice that the finance industry is shouting from the rooftops: fiscally responsible investing requires analysts to consider the risks posed by certain ESG factors and exclude “bad” ESG companies from funds if they pose too big of a risk to the funds’ return.

Trust law professor Susan N. Gary emphasized that prudent selection of an ESG fund would not violate a fiduciary’s duty of trust, because “growing evidence suggests that ESG information may improve returns, especially when a longer time horizon is considered.”¹⁴⁶ As such, she argued in a 2019 article that, “[a]s long as a strategy does not involve sacrificing financial returns, then even if the duty of loyalty is defined as the duty to act solely in the financial interests of the beneficiaries, the duty of loyalty is not compromised by a direction to invest using a strategy that incorporates ESG criteria.”¹⁴⁷

This way of thinking about ESG investing as permissible within the duty of loyalty is consistent with the public policy and purpose of ERISA. Congress drafted ERISA to encourage employers to establish retirement savings plans.¹⁴⁸ ERISA preempts state legislation and offers some protection to employers because Congress recognized that too much liability, or too much confusion about which law prevails, will dissuade companies from offering retirement plans.¹⁴⁹ Uncertainty and increased liability raise compliance costs, and higher compliance costs of benefit plans will necessarily translate to fewer benefit plans.

Here too, if there is too much liability risk surrounding offering ESG, as under the Trump-era rule, employers simply won’t offer it. We see that playing out right now, with only 3% of employers offering an ESG option,¹⁵⁰ even as supply of and demand for these high-quality investment options is exploding.¹⁵¹

¹⁴⁶ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLORADO L. REV. 731, 788 (2019).

¹⁴⁷ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLORADO L. REV. 731, 799 (2019).

¹⁴⁸ *ERISA: What You Need to Know*, BLR.COM, <https://www.blr.com/compensation/retirementplanning/erisa>, last accessed April 19, 2021.

¹⁴⁹ VANESSA SCOTT, AMERICAN HEALTH POLICY INSTITUTE, *THE NEED TO STRENGTHEN ERISA PREEMPTION 1* (2017), https://www.americanhealthpolicy.org/Content/documents/resources/The_Need_to_Strengthen_ERISA_Preemption.pdf.

¹⁵⁰ Ron Lieber, *How to Get Socially Conscious Funds Into Your 401K*, N.Y. Times (Oct. 13, 2021), <https://www.nytimes.com/2020/01/10/your-money/esg-funds-retirement-401k-plan.html> (“Just 2.9 percent of 401(k) plans have even a single fund dedicated to environmental, social and governance issues, according to the Plan Sponsor Council of America’s most recent member survey.”).

¹⁵¹ Simon Jessup & Elizabeth Howcroft, *Sustainable Fund Assets Hit Record 41.7 Trillion in 2020: Morningstar*, Reuters (Jan. 28, 2021), <https://www.reuters.com/article/us-global-funds-sustainable/sustainable-fund-assets-hit-record-1-7-trln-in-2020-morningstar-idUSKBN29X2NM>; PARNASSUS INVESTMENTS, *REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 1* (2020) <https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf>.

2. ERISA's Duty of Prudence and ESG

The second fiduciary duty that is potentially at play in fiduciary's wariness towards ESG is the duty of prudence. ERISA's fiduciary duty of prudence requires a fiduciary to investigate and consider the relevant facts and circumstances of the investment choice. The duty does not require a fiduciary to be prescient, or predict the actual outcome of an individual investment decision.¹⁵² The duty of prudence does require that the fiduciary determine that a particular investment is reasonably designed, and take into consideration the risk of loss and opportunity for gain, including factors such as the diversification of the plan, the liquidity of the plan, and the projected return of the plan.¹⁵³ This duty basically asks the question, "did the fiduciary do his or her due diligence?"

This duty looks more at the decision-making process, and less at the actual performance of the selected investment. The duty of prudence depends on industry norms and requires the fiduciary to do the research and consider the factors that a prudent investor would.¹⁵⁴

Courts have found a breach of the fiduciary duty of prudence when the fiduciary did not engage in adequate process. For example, in *Katsaros v. Cody*, the Second Circuit found there was a fiduciary breach of the duty of prudence because the pension fund made a \$2 million loan to a bank simply relying on a short presentation by the bank and without obtaining an independent professional appraisal or analysis of the bank or collateral. There, the fiduciary breached his duty of prudence because he did not do enough work to determine that the loan was a safe one that would reasonably be repaid to the pension fund.¹⁵⁵

Another example of a court finding a fiduciary breached his duty of prudence for lack of due diligence in the process is *Zanditon v. Feinstein*, where the fiduciary merely relied upon a co-trustee's advice when selecting a plan and did not independently investigate the plan's merits. Here, he breached his fiduciary duty because he did not do his due diligence in researching the plan prior to investing in it.¹⁵⁶ Similarly, the Seventh Circuit found a fiduciary breached his duty of prudence when he agreed to a fee schedule after only discussing it for ten minutes and not giving it adequate study.¹⁵⁷

In order for this failure of process to cause a breach of the duty of prudence, there must be a causal link between the failure to investigate and the harm suffered by the plan.¹⁵⁸ Additionally, if a fiduciary does not engage in the proper research process, but makes a decision that another "hypothetical prudent fiduciary" would have also made, that lack of research up front also does not rise to the level of breach of a fiduciary's duty of prudence.¹⁵⁹

Given courts' interpretations of a fiduciary's duty of prudence, and the clear impact of ESG factors on a fund's performance, it seems there is an easy way for fiduciaries to avoid liability under their duty of prudence when selecting an ESG fund for the plan lineup. The fiduciary simply needs to engage in the same sort of research process he engages in when choosing any sort of fund for the lineup. This process should include asking fund managers about

¹⁵² *How is Prudence Defined Under ERISA?*, PLIANCED, <https://www.plianced.com/compliance-wiki/how-is-prudence-defined-under-erisa/>, last accessed April 19, 2021.

¹⁵³ *Id.*

¹⁵⁴ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 UNIV. OF COLORADO L. REV. 731, 733 (2019).

¹⁵⁵ *Katsaros v. Cody*, 744 F.2d 270 (2d Cir. 1984).

¹⁵⁶ *Zanditon v. Feinstein*, 849 F.2d 692 (1st Cir. 1988).

¹⁵⁷ *Brock v. Robbins*, 830 F.2d 640 (7th Cir. 1987).

¹⁵⁸ *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995).

¹⁵⁹ *Roth v. Sawyer-Cleator Lumber Co.*, 16 F.3d 915, 919 (8th Cir.1994).

their strategy, their level of research, their expertise, their performance against a benchmark, their fees, etc. As long as other prudent investors are making similar choices (and millions of individual Americans and dozens of institutional investors are choosing to invest in ESG funds), then a fiduciary need not worry about a beneficiary-instigated or Department of Labor-instigated lawsuit for including a climate-friendly investment plan in the lineup.

Trust law professor Susan N. Gary argues that ESG investing does not violate the duty of prudence for these same reasons. In her article entitled “Best Interests in the Long Term: Fiduciary Duties and ESG Integration,” she argues that the fluid nature of the duty of prudence, which changes with industry norms, means that as the financial industry has moved to adopt ESG investment practices, the duty of prudence now allows, or even requires, a prudent fiduciary to consider those factors as well.¹⁶⁰ Her article cited to a United Nations report issued in conjunction with the British law firm Freshfield Buckhaus Deringer, which analyzed fiduciary duties applicable to investment decision-making and “concluded that integrating ESG considerations into investment analysis was ‘clearly permissible’ and ‘arguably required.’”¹⁶¹

The duty of prudence requires that fiduciaries take the factors into consideration that a prudent investor would—and prudent investors are starting to consider ESG factors *even in non-ESG funds*. These are important factors that contribute to performance and impact a company’s bottom line. Including ESG factors are absolutely part of the process of doing due diligence on a company’s valuation and exposure to risk. As cited above, the chief operating and compliance officer at a benefits firm explained that ESG considerations are simply “a new way of thinking about the extra layer of qualitative due diligence.”¹⁶² Additionally, a white paper released by the investment management firm Neurberger Merman stated that, “investors now expect that any robust investment process should integrate material ESG considerations, and they are increasingly seeking to define, measure and enhance the total impact of their investment.”¹⁶³

Institutional investors are investing in ESG because it is a good financial strategy. It would seem ludicrous for regulators to presume consideration of ESG factors to be imprudent, when the financial industry is explicitly stating it is imprudent NOT to consider those factors. But as I will now discuss, the Trump-era ESG Rule does just that.

C. Regulatory Ping-Pong over Values-Based Investing with ERISA Plan Assets

The Department of Labor serves as the primary regulator of ERISA, yet its guidance over the past 30 years on ESG investing with ERISA-regulated plan assets has been anything but helpful. The guidance has resembled more of a ping-pong match than anything else, with each presidential administration looking to leave its mark on this niche area of employment law.¹⁶⁴ The general trend is that Democratic administrations issue regulations interpreting ERISA’s duties of loyalty and prudence as embracing values-based investing, while Republican

¹⁶⁰ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 UNIV. OF COLORADO L. REV. 731, 790-792 (2019).

¹⁶¹ Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 UNIV. OF COLORADO L. REV. 731, 797 (2019).

¹⁶² Emile Hallez, *ESG Could Thrive in 401(k) Plans, Despite DOL Rule*, INVESTMENTNEWS (Sept. 14, 2020) <https://www.investmentnews.com/esg-future-401k-dol-rule-197100>.

¹⁶³ JOSEPH V. AMATO & INGRID S. DYOTT, NEUBERGER BERMAN, *ESG INVESTING: AN ACTIVE APPROACH TO LONG-TERM VALUE CREATION 1* (Jan. 2019) https://www.nb.com/documents/public/global/t0349_0119_wp_esg_investing_an_active_approach.pdf.

¹⁶⁴ White paper at 11

administrations interpret those same duties as limiting values-based investing. The recent back-and-forth between the Trump DOL and Biden DOL mirrors that decades long trend.

The DOL initially sought to guide fiduciary consideration of ESG-type factors through interpretive bulletins rather than regulatory rules.¹⁶⁵ Under the Clinton administration, the DOL stated that investment selected for “economic benefits they create apart from their investment return” should be subject to the same standards as any other investment.¹⁶⁶ But the Bush-era DOL walked back this interpretative bulletin in 2008, issuing its own interpretive bulletin stating that “ERISA’s plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan.”¹⁶⁷ This interpretive bulletin introduced the idea of using these collateral benefits as a tiebreaker, acknowledging that in the case of two economically indistinguishable options, a fiduciary could break the tie by considering these collateral benefits.

Neither of these interpretive bulletins referred directly to “ESG” or “values-based investing” (instead they used the term “ETI”, for “economically targeted investments”), but they mark the first match in the ping-pong match over what factors are appropriate for a fiduciary to consider when making investment decisions.

The match continued with the Obama DOL, the first to use the term “ESG” in its interpretive bulletin on this topic.¹⁶⁸ The Obama-era DOL’s interpretive bulletin mirrored the Clinton guidance, stating that fiduciaries need not treat investments that consider ESG factors to be “inherently suspect or in need of special scrutiny.”¹⁶⁹ This bulletin encouraged fiduciary consideration of ESG factors, stating that “[e]nvironmental, 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.”¹⁷⁰

D. Trump’s anti-ESG Rule

While the ESG Rule was not issued in its final form nor published until late 2020, the Trump Labor Department made it clear early that they would continue the ping-pong match and take a critical eye to ESG investing of retirement plan assets. A Field-Assistance Bulletin issued in 2018 warned that “fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment.”¹⁷¹ The Department reiterated this lukewarm stance on ESG when

¹⁶⁵ Interpretive bulletins seek to guide interpretation of current law and are not binding, whereas substantive rules (often referred to as “regulations”) bind the public and have the force of law. *Researching Environmental Law: Regulations and Interpretive Rules*, LOYOLA COLLEGE OF LAW, (Jun. 8, 2021), <https://libguides.law.loyno.edu/environmental/regulations>.

¹⁶⁶ Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 29 C.F.R. § 2509.94-1 (1994)

¹⁶⁷ Supplemental Guidance Relating to Fiduciary Responsibility in Considering Economically Targeted Investments, 29 C.F.R. § 2509.08-1 (2008).

¹⁶⁸ Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 C.F.R. § 65135 (2015).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Elizabeth Goldberg & Julie Stapel, *Don’t Call it ESG: The DOL’s New Financial Facts Regulations and Their Impact on ESG Investing and ERISA Fiduciary Duties More Broadly*, VIMEO (Dec. 17, 2020), at 7:45, <https://vimeo.com/492216884/dd4468700c>.

issuing the ESG rule in 2020, warning that “private employer-sponsored retirement plans are not for furthering social goals or policy objectives but rather to provide for retirement security of workers.”¹⁷² The final rule did not explicitly *ban* ESG investments in retirement plan lineups. Instead, it laid out a complex process that fiduciaries needed to follow to ensure they did not violate their fiduciary duties by offering an ESG fund.¹⁷³

The rule colloquially known as “the ESG Rule” doesn’t even use the term ESG in the text of the rule (although it is all over the preamble.) Instead, the Labor Department’s rule regulates the use of ESG funds by ERISA regulated fiduciaries through an opaque word— “pecuniary.” The rule lays out the types of factors that are permissible for fiduciaries to consider when choosing plan investments, namely “pecuniary” factors, and those that are impossible for fiduciaries to consider, namely “non-pecuniary” factors. The rule defines “pecuniary” as “a factor that a fiduciary prudently determined is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives.”¹⁷⁴

The regulation sets forth two exceptions to the pecuniary factors requirement. First, a fiduciary can choose plans that “promote, seek, or support non-pecuniary goals” as long as the investment choice can be justified solely on the basis of pecuniary factors.¹⁷⁵ The second exception is that a fiduciary can choose a plan based on non-pecuniary factors, as long as they can pass the “tie breaker test.”¹⁷⁶

In the first exception, a fiduciary who wants to include a plan that considered non-pecuniary (maybe ESG) factors can do so, as long as the fiduciary justifies the inclusion of this plan based solely on pecuniary (materially relevant economic) factors.

Of course, an employer who wanted to include an ESG option in their lineup could do this. *The premise of this entire paper* is that many ESG funds do rely on ESG as a clearly *pecuniary*, or economically relevant factor. But the fact that the rule requires fiduciaries to document this pecuniary benefit upfront,¹⁷⁷ rather than simply presuming that ESG considerations are pecuniary, and therefore economically relevant to the investment, is the *crux of the problem* with this regulation. It presumes that ESG factors are not pecuniary, or economically relevant, and therefore requires the fiduciaries to carry the burden of proving that they are, up front, before any beneficiary even complains about potential losses down the line.

In the case where a fiduciary either concedes that ESG factors are not pecuniary or does not want to go through the steps of proving they are pecuniary, the rule sets out another avenue a

¹⁷² Paul A. Davies et al, *Pulling in Opposite Directions: Investor Community, US Regulatory Diverge on Regulation of ESG Disclosures*, LATHAM & WATKINS (July 21, 2020), <https://www.globalelr.com/2020/07/pulling-in-opposite-directions-investor-community-us-regulators-diverge-on-regulation-of-esg-disclosures>.

¹⁷³ Craig Bitman et al, *DOL Finalizes ‘Financial Factors’ ERISA Regulation*, MORGAN LEWIS: LAWFLASH (Nov. 17, 2020), <https://www.morganlewis.com/pubs/2020/11/dol-finalizes-financial-factors-erisa-regulation>.

¹⁷⁴ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2509.

¹⁷⁵ Craig Bitman et al, *DOL Finalizes ‘Financial Factors’ ERISA Regulation*, MORGAN LEWIS: LAWFLASH (Nov. 17, 2020), <https://www.morganlewis.com/pubs/2020/11/dol-finalizes-financial-factors-erisa-regulation> (“a fiduciary may consider investment funds that promote, seek, or support non-pecuniary goals... The DOL emphasized that this is a limited exception, which applies only if the alternatives can be justified solely on the basis of pecuniary factors.”)

¹⁷⁶ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2509 § d(2); *see also* Financial Factors in Selecting Plan Investments, 85 FR 72846, 72864 (Nov. 13, 2020)..

¹⁷⁷ Elizabeth Goldberg & Julie Stapel, *Don’t Call it ESG: The DOL’s New Financial Facts Regulations and Their Impact on ESG Investing and ERISA Fiduciary Duties More Broadly*, VIMEO (Dec. 17, 2020), at 27:45, <https://vimeo.com/492216884/dd4468700c>.

fiduciary can take to include an ESG investment in the lineup. The rule allows fiduciaries to use an exception known as the “tie breaker” exception, which traditionally was used when there was a tie between two exact investment options, so you can use non-pecuniary factors to “break the tie.”¹⁷⁸ Here, fiduciaries are allowed to consider non-pecuniary factors, such as some ESG factors but only if the fiduciary again follows a lengthy documentation process upfront, justifying the consideration of these socially desirable but non-pecuniary factors.¹⁷⁹

Requiring that documentation process upfront raises the same issue and question as the first exception—why are fiduciaries required to document the necessity or inherent value-add of looking to ESG factors when considering the value of an investment option? Why is there a higher burden upfront on funds using an ESG investing strategy versus any other type of proprietary active management strategy?

This placement of the burden of proof on the plan fiduciary upfront is directly counter to the placement of the burden for any other type of investment, where plan sponsors can choose to include any non-ESG fund in the plan, and only need to justify their fulfillment of the duties of loyalty and prudence down the line, *if they get sued*.¹⁸⁰ Mandating that a fiduciary has the burden of proving that including an ESG fund is not a violation of the duty of loyalty is a clear double standard for ESG plans, and it denies American investors the opportunity to avail themselves of one of the hottest and fastest growing investment vehicles in the industry.

To reiterate, the Trump ESG Rule does not ban ESG options in retirement plans. The rule explicitly states in the preamble, “nothing in the final rule precludes a fiduciary from looking

¹⁷⁸ Craig Bitman et al, *DOL Finalizes ‘Financial Factors’ ERISA Regulation*, MORGAN LEWIS: LAWFLASH (Nov. 17, 2020), <https://www.morganlewis.com/pubs/2020/11/dol-finalizes-financial-factors-erisa-regulation> (“The first exception is an updated formulation of the so-called “tie-breaker” rule first specifically stated in 1995 guidance—the concept that, all other things being equal based on risk and return considerations, a fiduciary is permitted to take into account non-financial considerations. Recognizing that all other things are rarely ever equal, the new formulation in the final rule (revised in response to comments) permits a fiduciary to apply non-pecuniary factors, and to make an investment decision based on such non-pecuniary factors, when the fiduciary is “unable to distinguish [among investment alternatives] on the basis of pecuniary factors alone.”)

¹⁷⁹ *Id.* (“To rely on this exception, the fiduciary is required to document why pecuniary factors were not sufficient, how the selected investment compares to the other comparable investments with regard to the prudence factors enumerated in the regulation, and how the chosen non-pecuniary factors are consistent with the interests of the plan participants and beneficiaries in their retirement income or financial benefits under the plan.”)

¹⁸⁰ In addition, in an ERISA litigation suit, the burden of proving a fiduciary breached or did not breach his duty is almost never on the plan sponsor or the fiduciary! (William J. Swartzwelder, *Employment Law-- The Split over the Shift: The Burden of Proving Causation in Claims for Breach of Fiduciary Duty under ERISA*, 41 U. ARK. LITTLE ROCK L. REV. 141, 142 (2018) (“...a plan participant demonstrates the first two elements [that the allegedly breaching party is a fiduciary and that this fiduciary breaches a duty ERISA imposes on him]”); Michael W. Stockham & Mackenzie S. Wallace, *Fiduciary Duty Litigation and Burden Shifting*, ABA SECTION OF LITIGATION: TRIAL EVIDENCE COMM. at 2 (Mar. 4, 2014) (“Generally, plaintiffs have the burden of proving each element: (1) existence of a fiduciary duty, (2) breach of that fiduciary duty, and (3) damages directly stemming from that breach. Arizona, Arkansas, California, Colorado, New York, Oklahoma, Pennsylvania, and Washington have jury charge instructions that clearly set out that it is the plaintiff’s burden to prove breach of fiduciary duty. The majority of states place the burden of proving each element of a breach of fiduciary duty on the plaintiff.”) (citations omitted.)) The burden of proving that the fiduciary breached his duty is on the plan participant, or plaintiff—the fiduciary almost never needs to prove it was not a violation of fiduciary duty (with a few rare, fact-specific exceptions. (*Id.* at 2-4 (reviewing the few fact-specific incidences where the burden of proof of breach shifts to the fiduciary, including if the defendant-fiduciary profited or benefited from the transaction or in certain cases where the fiduciary is a director or officer of the company)). Mandating that a fiduciary has the burden of proving that including an ESG fund is not a violation of the duty of loyalty is a clear double standard for ESG plans, and it denies American investors the opportunity to avail themselves of one of the hottest and fastest growing investment vehicles in the industry

into certain types of investment alternatives in light of participant demand for those types of investments....”¹⁸¹ It does, however, caution fiduciaries against ESG funds, warning fiduciaries that they should not “too hastily conclud[e] that ESG funds may be selected based on pecuniary factors or [under the “tie-breaker” rule] are not distinguishable based on pecuniary factors.”¹⁸² This regulation sets up walls of red tape, increasing the cost, burden, and litigation risk of offering an ESG option.

The Department of Labor’s lukewarm stance on ESG investing of ERISA-regulated plan assets is one of the main reasons for, if not *the* main reason for, the lack of access to ESG investing in retirement plan lineups. According to the most recent Plan Sponsor Council of America’s member survey, only 3% of 401(k) plans offer an ESG fund in their investment lineup.¹⁸³ The reason why that percentage is so low is because of the enormous burden fiduciaries face when seeking to include those funds in their plans, and the inherent risk of litigation to plans that offer them. The rule raises compliance costs and raises litigation risk for employers seeking to provide ESG options in their lineup, and it is understandable, given the enormous cost of ERISA litigation, why most employers chose to avoid the risk altogether.

As a result of the ESG Rule’s requirement that fiduciaries either justify ESG factors as pecuniary upfront, or go through the steps of the tie breaker, there are high compliance costs, and as a result, few employers offer ESG options in their lineups. Employers and their fiduciaries may feel the need to hire third party investment managers or plan consultants¹⁸⁴ to help them navigate the process of justifying including an ESG option, or to shield or offset liability in a potential ERISA suit down the line.¹⁸⁵ Other companies who cannot afford to hire these types of third-party advisors may simply choose not to include an ESG option.

This high burden and large compliance costs explain the massive discrepancy between non-retirement assets invested in funds using ESG investment strategies (1/3 of all professional managed assets)¹⁸⁶ versus retirement assets invested in ESG (less than 0.1% of 401(k) assets.)¹⁸⁷ It is not that employees don’t *want* to invest in ESG, it’s that employees *do not have access* to ESG.

This scarcity may be dissuading certain employees from participating in and contributing to their retirement plans. This negative impact on retirement savings behavior goes directly against the purpose of ERISA and the intent behind its strict regulation of plan fiduciaries.

¹⁸¹ Financial Factors in Selecting Plan Investments, 85 FR 72846, 72864 (Nov. 13, 2020).

¹⁸² Craig Bitman et al, *DOL Finalizes ‘Financial Factors’ ERISA Regulation*, MORGAN LEWIS: LAWFLASH (Nov. 17, 2020), <https://www.morganlewis.com/pubs/2020/11/dol-finalizes-financial-factors-erisa-regulation>.

¹⁸³ Ron Lieber, *How to Get Socially Conscious Funds Into Your 401K*, N.Y. Times (Oct. 13, 2021), <https://www.nytimes.com/2020/01/10/your-money/esg-funds-retirement-401k-plan.html> (“Just 2.9 percent of 401(k) plans have even a single fund dedicated to environmental, social and governance issues, according to the Plan Sponsor Council of America’s most recent member survey.”).

¹⁸⁴ Elizabeth Goldberg & Julie Stapel, *Don’t Call it ESG: The DOL’s New Financial Facts Regulations and Their Impact on ESG Investing and ERISA Fiduciary Duties More Broadly*, VIMEO (Dec. 17, 2020), at 30:20, <https://vimeo.com/492216884/dd4468700c>.

¹⁸⁵ Emile Hallez, *ESG Could Thrive in 401(k) Plans, Despite DOL Rule*, INVESTMENTNEWS (Sept. 14, 2020), <https://www.investmentnews.com/esg-future-401k-dol-rule-197100> (“One strategy that retirement plan advisers will likely be taking is to use a third-party fiduciary to evaluate ESG funds for plan menus, which could potentially shield advisers from some liability...”).

¹⁸⁶ PARNASSUS INVESTMENTS, REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 1 (2020), <https://www.ussif.org/files/Trends%20Report%202020%20Executive%20Summary.pdf>.

¹⁸⁷ Greg Iacurci, *Climate Funds Hold Less than 1% of 401(k) Money. Here’s Why*. CNBC (Dec. 14, 2020), <https://www.cnbc.com/2020/12/11/heres-why-401k-plans-lag-in-green-investment-options.html>.

IV. THE PROPOSED RULE: GOOD LAW AND GOOD POLICY

The Proposed Rule brings the volley back where it began, and where this paper argues it belongs. The Proposed Rule, as explained in more detail below, recognizes modern ESG investing as another form of active asset management that, in many ways aligns with better long-term investment performance.

The Proposed Rule would treat ESG factors as any other factors that may or not have a material financial impact on an investment. It would require that fiduciaries of 401(k) plans analyze an ESG fund in the same manner they analyze any other funds when deciding whether it should be included in a 401(k)-plan lineup. The Proposed Rule encourages, or in some circumstances, requires fiduciaries to consider ESG factors that have a material impact on an investment's financial performance. This understanding of ESG investing naturally leads to the conclusion that ESG investing, a.k.a. managing risks associated with E, S, and G factors, is not at odds with ERISA's fiduciary duties.

This Proposed Rule is both good law, as it aligns with ERISA's purpose and fiduciary duties as outlined above, and good policy, since it will likely lead to multiple positive outcomes for employee retirement saving and for a more ESG-conscious corporate world. The Proposed Rule encourages employers can carry out ERISA's goal of secure retirement for American workers through offering an ESG option in retirement plan lineups.

A. The Proposed Rule is Good Law

The Proposed Rule¹⁸⁸ makes three substantive changes from the former ESG Rule that could encourage widespread inclusion of ESG funds in 401(k) plan lineups.¹⁸⁹ While each change may, at first glance, look like a small semantic change, they all have the potential to make enormous shifts in encouraging fiduciaries to embrace ESG investing.

1. Change #1: ESG is Often an Integral Part of Investment Analysis

The first change in the Proposed Rule creates a de facto recognition of ESG factors as material to an investment's risk/return analysis.¹⁹⁰ The Proposed Rule does this by amending a preexisting set of rules known as the "duty of prudence safe harbor." The duty of prudence safe harbor sets out a roadmap that fiduciaries can follow if they want to ensure they are complying with duty of prudence requirements. The requirements of this safe harbor are not all required—but the safe harbor states that if they are all complied with, the fiduciary can sleep soundly knowing he or she is in compliance with the duty of prudence. The Proposed Rule adds an guideline to the safe harbor, stating that a fiduciary's "appropriate investment consideration"

¹⁸⁸ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550).

¹⁸⁹ The Proposed Rule made an additional two changes (for a total of five changes), to regulations of qualified default investment alternatives (QDIAs) and of proxy voting on ESG-related issues. But for the purposes of this article, the three biggest changes are the ones discussed in more detail below. For a discussion of all five changes, see Lance Dial, Elizabeth Goldberg, Rachel Mann, et. al, *ERISA Fiduciaries: DOL Proposed Rule Signals More Ease for ESG Investing*, Morgan Lewis: Lawflash (Oct. 21, 2021), <https://www.morganlewis.com/pubs/2021/10/erisa-fiduciaries-dol-proposed-rule-signals-more-ease-for-esg-investing>.

¹⁹⁰ *Id.*

includes consideration of “project return[s] of the portfolio relative to the funding object is of the plan, which may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”¹⁹¹ This language does not overtly state that E, S, and G factors are presumptively material, nor does it require all fiduciaries to consider certain E, S, or G factors. But it does suggest that in certain cases (yet undefined), E, S, or G factors are relevant to the projected return of an investment, and fiduciaries making use of this safe harbor should make sure to keep certain ESG factors in mind.

In case the Proposed Rule wasn’t clear enough in its endorsement of ESG investing, the amended safe harbor then lists specific examples of factors that “depending on the facts and circumstances, [are] material to the risk-return analysis”, all of which are E, S, or G related, including specific examples of climate change factors (“a corporation’s exposure to the real and potential economic effects of climate change”), governance factors (“such as those involving board composition, executive compensation, and transparency...”), and workforce practices (“including the corporation’s progress on workforce diversity, including, and other drivers or employee hiring, promotion, and retention...”).¹⁹²

This addition of ESG considerations to the duty of prudence safe harbor accords with the long-standing principles of ERISA’s duty of prudence. As discussed above, the fiduciary duty of prudence requires a fiduciary to do the same sort of due diligence as a prudent investor.¹⁹³ As trust law professor Susan Gary discussed, this is a fluid duty that evolves with industry norms. The investment community has adopted the understanding that a company’s performance on certain ESG factors does translate to the bottom line. It is, therefore, obvious that a fiduciary should, in certain circumstances, be required to consider those ESG factors that are material to an investment’s risk/return analysis.

2. Change #2: Pecuniary” Becomes “Risk/Return”

The second change in the Proposed Rule is to the regulation’s interpretation of the fiduciary duty of loyalty. In the former ESG Rule, the DOL stated the position that an investment would only meet the duty of loyalty requirements if it was “pecuniary.”¹⁹⁴ The Proposed Rule removes the word “pecuniary” and instead states that this duty requires a fiduciary’s evaluation must be “based on risk and return factors that the fiduciary prudently determines are material to investment value...”¹⁹⁵

Interestingly, the former ESG Rule’s definition of “pecuniary” was very similar to the Proposed Rule’s new duty of loyalty standard (the former ESG Rule defined pecuniary as a factor “expected to have a material effect on the risk and/or return of an investment.”)¹⁹⁶ But the real change here is that the Proposed Rule cross-references the list of ESG factors from the safe harbor as examples of factors that may be material. This cross-reference, combined with a preamble that is much more friendly towards ESG, seems to shift the presumption from “ESG

¹⁹¹ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57302 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550.404a-1(b)(II)(C)).

¹⁹² *Id.*

¹⁹³ Section III(B)(2).

¹⁹⁴ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2550.404a-1(c) (2020).

¹⁹⁵ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57303 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550.404a-1(c)(2)).

¹⁹⁶ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2550.404a-1(f)(3) (2020).

investing likely violates ERISA” to “ESG investing is likely allowed under ERISA.” As a result, fiduciaries will likely determine there is less audit and litigation risk to considering ESG factors under the Proposed Rule than there was under the former ESG Rule.¹⁹⁷

To be clear, this linguistic change in the duty of loyalty interpretation does not fully embrace any and all forms of ESG investing—it is a surgical approach embracing those ESG factors that are material, recognizing what investors and insurers have long known to be true. Only those ESG factors that impact a company or investment’s financial return are presumed allowed under this duty of loyalty standard.

Shifting the presumption to presume that consideration of ESG factors is appropriate under the duty of loyalty accords with ERISA case law on this topic. As discussed above, the duty of loyalty mandates that fiduciaries must make investment decisions with the best financial interests of the plan participant in mind.¹⁹⁸ Given the industry-wide acceptance of the relationship between certain ESG factors and financial investment outcomes, it makes sense that the duty of loyalty would presumptively allow consideration of ESG factors that are prudently determined to be material to an investment’s value

3. Change #3: Non-material ESG Factors as Tie-Breakers

The third change has the effect of broadening the type of ESG factors appropriate for consideration. This change is affected through changing the language of and procedures for the “tie-breaker standard”, which allows for fiduciaries to consider the “collateral benefits” of an investment decision, in addition to the financial benefits. Under the former ESG Rule, a fiduciary could only consider such “collateral benefits” if the two competing investment decisions were so similar that a fiduciary was “unable to distinguish on the basis of pecuniary factors alone.”¹⁹⁹ If a fiduciary made that determination, he or she would then need to copiously document the rationale behind considering the “collateral benefit”. As discussed above, this documentation requirement served as a gatekeeping function, creating sufficient red tape to deter fiduciaries from ever using the tie breaker.

The Proposed Rule changes the standard from “economically indistinguishable” to “equally service the financial interest on the plan over the investment horizon.”²⁰⁰ This is likely a lower standard (“equal” is likely easier to prove than “indistinguishable”) and will likely encourage fiduciaries to use the tie-breaker in more situations.²⁰¹ Once a fiduciary can use the tie-breaker, the Proposed Rule offers little guidance in terms of what “collateral benefits” can be considered, but they certainly do not need to be financially material. The only guidance provided

¹⁹⁷ Lance Dial, Elizabeth Goldberg, Rachel Mann, et. al, *ERISA Fiduciaries: DOL Proposed Rule Signals More Ease for ESG Investing*, Morgan Lewis: Lawflash (Oct. 21, 2021), <https://www.morganlewis.com/pubs/2021/10/erisa-fiduciaries-dol-proposed-rule-signals-more-ease-for-esg-investing>.

¹⁹⁸ Section III(B)(1).

¹⁹⁹ Financial Factors in Selecting Plan Investments, 29 C.F.R. 2550.404a-1(c)(2) (2020).

²⁰⁰ Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272, 57303 (Oct. 14, 2021) (to be codified at 29 C.F.R. pt. 2550.404a-1(c)(3)).

²⁰¹ Lance Dial, Elizabeth Goldberg, Rachel Mann, et. al, *ERISA Fiduciaries: DOL Proposed Rule Signals More Ease for ESG Investing*, Morgan Lewis: Lawflash (Oct. 21, 2021), <https://www.morganlewis.com/pubs/2021/10/erisa-fiduciaries-dol-proposed-rule-signals-more-ease-for-esg-investing>.

is the long-held fiduciary duty of loyalty, that the benefits must not sacrifice investment return or take on additional risk to promote other benefits or goals.

This change to the tie-breaker standard also aligns with ERISA case law's understanding of ERISA's duty of loyalty. ERISA case law is excruciatingly clear that a fiduciary must be singularly motivated by the financial best interest of the plan and its participants or beneficiaries. But ERISA case law also makes clear that if there are collateral benefits to an otherwise financially sound investment, it is not forbidden to choose an otherwise financially sound investment choice simply because there are collateral benefits. In other words, if both competing investment options serve the best financial interest of the plan, there is no liability for breach of the duty of loyalty if the fiduciary collaterally considered a benefit to a third-party (or, as discussed above, even to himself.)²⁰²

B. The Proposed Rule is Good Policy

As outlined above, the Proposed Rule is good law-- it conforms with decades-long case law interpretation of ERISA's fiduciary duties of prudence and loyalty. It is also good policy. As discussed above, adoption of a rule that lowers the litigation risks and regulatory burdens of ESG investing with plan assets will encourage more fiduciaries to offer ESG-type funds in their 401(k) lineups, as a natural response to consumer demand. If more 401(k) plans offer ESG-friendly investment options, it is likely that employees will participate and contribute more. By offering employees a popular and in-demand investment option, employers can encourage more tax-advantaged retirement savings, while simultaneously increasing investment in sustainable companies. A new ESG rule supporting ESG options in 401(k) plans would be good for employee retirement savings and good for the planet.

CONCLUSION

The Department of Labor's recent anti-ESG ESG Rule stands in the way of consumer demand for access to sustainable investments. It is the number one, if not only, barrier to Americans investing their retirement assets in greener, cleaner investment options that align with their values.

This article argues that adopting the Proposed Rule, shifting the presumption from ESG as suspect to ESG as prudent, will have significant impacts on retirement savings and sustainable investments *at the margin*. But saving and investing *at the margin* still matters. Given the nature of compound interest, if a 28-year-old millennial employee ends up saving an additional \$100/month, pre-tax, because of a desirable investment option in her retirement account, that additional savings will compound to an additional **\$399,447.78** at retirement, if she retires at 65 and we assume an annual return of 10%. Marginal regulatory changes with marginal impacts on retirement savings behavior have outsized impacts on retirement security.

²⁰² Section III(B)(1).