



January 28, 2025

The Honorable Mark T. Uyeda  
Acting Chairman  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

The Honorable Vince Micone  
Acting Secretary  
U.S. Department of Labor  
200 Constitution Ave NW  
Washington, DC 20210

Dear Acting Secretary Micone, and Chairman Uyeda,

We, the undersigned state financial officers, write to express serious concerns regarding breaches of fiduciary duties by activist investment managers and plan administrators. The ongoing misuse of American retirement plan assets to advance Environmental, Social, and Governance (“ESG”) and Diversity, Equity, and Inclusion (“DEI”) goals, violates ERISA and securities laws by elevating political agendas to the same level as financial interests. We, therefore, urge the Securities and Exchange Commission (“SEC”) and Department of Labor (“DOL”) to take immediate action to protect retirement plans for millions of Americans.

There is an indisputable trend, among large asset managers, to prioritize political and social agendas over the financial security of hardworking Americans. Retirement security should not be jeopardized in order to facilitate corporate virtue signaling and activist-driven initiatives. In fact, the duty of loyalty requires a fiduciary to act “solely in the interest of participants and beneficiaries.”<sup>1</sup> Therefore, a fiduciary that incorporates *any motive besides*

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<sup>1</sup> 29 U.S.C. Section 1104(a)(1).

***the beneficiaries' best financial interest***, is encumbered by “mixed motives”<sup>2</sup> and has breached its fiduciary duty of loyalty. This is because a “fiduciary cannot contend that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one.”<sup>3</sup> By its very nature, “[a]cting with mixed motives triggers an irrebuttable presumption of wrongdoing, full stop.”<sup>4</sup>

The notion that ESG pursuits introduce mixed motives which run headlong into fiduciary duties is nothing new. Myriad attorney general opinions, state legislation, and congressional committee hearings have affirmed this truth.<sup>5</sup> On January 10, 2025, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas found that American Airlines violated its fiduciary duty by continuing to invest its 401(k) plan assets with BlackRock even though it knew that BlackRock prioritized ESG goals over the beneficiaries' interests.<sup>6</sup>

The court's findings were unequivocally clear:

- “By focusing on non-pecuniary interests, ESG investments often underperform traditional investments by approximately 10%.”
- “BlackRock publicly vowed to support more shareholder proposals on climate change, even at major energy companies that make money from the production of fossil fuels.”
- “It does not make any rational economic sense for a shareholder (or an investment manager on behalf of shareholders) to encourage an energy company like Exxon to act in a manner that directly undermines the company's profits.”
- “[BlackRock's CEO, Larry] Fink continued to signal robust ESG commitments, including his desire to use proxy voting to push BlackRock's agenda onto companies through open letters to CEOs that BlackRock subsequently publicized.”
- “[Fink] threatened that companies must ... ‘contribute to society ... or risk losing the support of the world's largest asset manager.’”
- “Defendants breached their fiduciary duty by failing to ... act solely in the retirement plan's best financial interests by allowing ... BlackRock's ESG interests to influence management of the plan.”
- “BlackRock's investment strategy during the Class Period was focused on ESG investing. Such a pursuit of non-pecuniary interests, in whole or in part, was an end itself rather than as a means to some financial end. This was a major red flag that Defendants wholly ignored.”

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<sup>2</sup> Max M. 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, 401 (2020) (citing in part 3 RESTATEMENT (THIRD) OF TRUSTS § 78(1)-(2) cmt. b).

<sup>3</sup> *NLRB v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 330 (1981).

<sup>4</sup> 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, 401 (2020).

<sup>5</sup> See, e.g., Indiana Attorney General Official Opinion No. 2022-3 (Sept. 1, 2022), <https://www.in.gov/attorneygeneral/files/Official-Opinion-2022-3.pdf>; K.S.A. 75-42a01; House Judiciary Committee, *New Report | Sustainability Shakedown: How a Climate Cartel of Money Managers Colluded to Take Over the Board of America's Largest Energy Company* (Dec. 13, 2024), <https://judiciary.house.gov/media/press-releases/new-report-sustainability-shakedown-how-climate-cartel-money-managers-colluded>.

<sup>6</sup> *Spence v. American Airlines*, No. 4:23-cv-552, Slip Op. at 3 (N.D. Tex. Jan. 10, 2025).

The court also took issue with the long-term risk claim that ESG advocates often use:

Absent a cognizable basis for claiming that certain ESG considerations capture material financial risks, slapping the label “financial interest” serves as mere pretext. BlackRock regularly employed rhetorical devices—such as the “long-term” modifier — to discuss some amorphous and unsupported financial benefit of an ESG factor in order to shift attention away from its non-pecuniary goals ... Just because BlackRock says it is “financial” or “material” does not automatically mean that it is. Using such labels is clever pretext, particularly when dealing with an unproven and nebulous issue like climate change.<sup>7</sup>

Judge O’Connor’s opinion reaffirms the fundamental principle that fiduciaries must act solely in the *financial* interests of plan members. Allowing ESG activism to influence investment decisions subverts this duty and compromises the financial security of American families.

### **Requested Action**

We, therefore, request SEC and DOL take decisive action to uphold fiduciary duty laws and protect retirement plans from activist corrosion. Specifically, we call on your agencies to:

1. **Issue Comprehensive Guidance:** Reaffirm the Supreme Court’s holding in *Fifth Third Bancorp v. Dudenhoeffer* that plan fiduciaries, under ERISA, must discharge their duties solely in the “*financial*” interests of plan beneficiaries. 573 U.S. 409, 421 (2014). Guidance should explicitly state that:
  - Investment decisions or proxy voting cannot be motivated, in part or in whole, by the goal of achieving within a portfolio ESG or DEI objectives, such as reducing greenhouse gas emissions or establishing board quotas. Those motivations are inconsistent with fiduciary duties, which require financial return as the only permitted goal.
  - Fiduciaries engaging in such practices may be held liable under ERISA and other applicable laws.
2. **Initiate Rulemaking:** Initiate formal rulemaking to reinforce and codify fiduciary obligations, ensuring that retirement funds serve their intended purpose of maximizing financial security for beneficiaries. Rulemaking should address:
  - Prohibitions on the use of plan assets to advance political or social agendas.
  - Enhanced disclosure requirements for asset managers regarding the financial impacts and legal liability of ESG and DEI initiatives.
  - Make clear that usage of long-term modifiers as discussed in *Spence v. American Airlines* are not likely to be considered a fiduciary duty.
3. **Increase Oversight and Enforcement:** Establish robust mechanisms to monitor the ESG and DEI activities of fiduciaries and asset managers, including heightened scrutiny of proxy voting activities. Implement thorough and decisive enforcement actions against those who deviate from established fiduciary duties.

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<sup>7</sup> *Id.*

Fiduciaries must act solely in the “financial”<sup>8</sup> interests of beneficiaries. Allowing ESG activism to dictate investment decisions is inconsistent with ERISA’s mandate to act solely in the financial interests of beneficiaries. Your leadership is urgently needed to reaffirm this fundamental principle and ensure retirement funds are protected from corrosive ESG and DEI-driven investing.

Thank you for your commitment to protecting the financial futures of millions of Americans. We stand ready to support your efforts in this critical endeavor.

Sincerely,



Alabama Auditor Andrew Sorrell



Alaska Commissioner of Revenue Adam Crum



Arizona Treasurer Kimberly Yee



Idaho Treasurer Julie Ellsworth



Indiana Comptroller Elise Nieshalla



Iowa Treasurer Roby Smith



Kansas Treasurer Steven Johnson



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Kentucky Treasurer Mark Metcalf



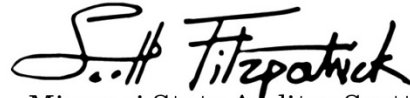
Louisiana Treasurer John Fleming

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<sup>8</sup> *Dudenhoeffer*, 573 U.S. at 421.



Mississippi Treasurer David McRae



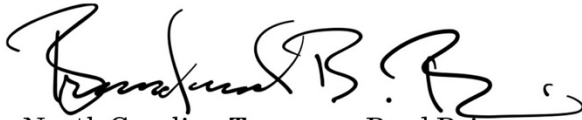
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Nebraska Auditor Mike Foley



Nebraska Treasurer Tom Briese



North Carolina Treasurer Brad Briner



Oklahoma Auditor & Inspector Cindy Byrd



Oklahoma Treasurer Todd Russ



South Carolina Treasurer Curtis Loftis



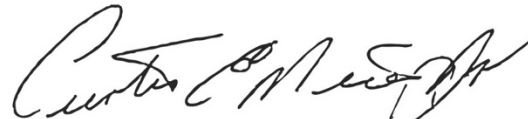
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Utah Treasurer Marlo Oaks



Wyoming Auditor Kristi Racines



Wyoming Treasurer Curt Meier