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# ESG Investing Under ERISA

Bernard S. Sharfman†



## Introduction

The Department of Labor ("DOL"), through its administration of ERISA,[1] has a critical role to play in the regulation of private "employee pension benefit plans."[2] Most importantly, the DOL is tasked with en-

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1. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (Lexis, 2020).

2. *See id.* § 1002(2) ("[T]he terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.").

forcing the fiduciary duties of ERISA plan managers (trustees who retain investment and voting authority or "investment managers"[3] who receive such authority through delegation by the trustees). Under ERISA, plan managers owe the strictest duties of loyalty and care to their participants[4] and beneficiaries.[5] They are to be constantly guided by the fiduciary principles of acting *solely* in the interest of the participants and beneficiaries and for the *exclusive purpose* of providing financial benefits to them.[6]

It is important to recognize and accept that when we talk about Environmental, Social, and Governance ("ESG") investing under ERISA, it is the fiduciary duties of plan managers to which our discussion is directed. It is not the desires of those who advocate for an increased use of ESG investing. Given this understanding of fiduciary duty under ERISA, I strongly support the approach taken by the DOL in its recently proposed rule, *Financial Factors in Selecting Plan Investments*.[7] I agree with the DOL when it states that "ERISA requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value[8] of a particular investment or investment course of action,";[9] "plan assets may not be enlisted in pursuit of other social or environmental objectives,";[10] and "ERISA plan fiduciaries may not invest in ESG vehicles when they understand an underlying investment strategy of the vehicle is to subordinate return or increase risk for the purpose of non-pecuniary objectives."[11] I also find the proposed rule to be consistent with federal cases that have subsequently interpreted ERISA.

This Article is divided into four Parts. Each Part provides different observations and recommendations that I believe will enhance the pro-

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3. *See id.* § 1002(38).

4. *See id.* § 1002(7) ("The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.").

5. *See id.* § 1002(8) ("The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.").

6. *See infra*, Part III.

7. U.S. Dep't of Labor, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39,113 (June 30, 2020), https://www.govinfo.gov/content/pkg/FR-2020-06-30/pdf/2020-13705.pdf. The DOL takes a consistent approach to fiduciary duties in another recently proposed rule: U.S. Dep't of Labor, Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55,219 (Sept. 4, 2020), https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19472.pdf.

8. I suggest replacing "risk-adjusted economic value" with "risk-adjusted financial return." The latter is more precise. The former, a term that appears to be rarely used in finance, suggests the possibility that under ERISA, non-financial or third-party benefits may be recognized as part of the value generated by a particular investment.

9. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,113.

10. *Id.* at 39,116.

11. *Id.*

posed rule. Part I focuses on the specific legal issue that is addressed in the proposed rule. I believe that an understanding of this legal issue would be enhanced if the proposed rule adopted Schanzenbach and Sitkoff's approach of dividing ESG investing into two categories, (i) "collateral benefits ESG" and (ii) "risk-return ESG."[12] Collateral benefits ESG refers to investing decisions based on non-financial objectives (including moral or ethical reasons), or those that benefit third parties (non-beneficiaries or non-participants in a pension fund or stakeholders in a public company). Risk-return ESG refers to investing decisions that utilize ESG factors only as a means to enhance the manager's evaluation of the expected risk-adjusted returns of an investment without regard to collateral benefits. Because collateral benefits ESG comes into direct conflict with the fiduciary duties of a plan manager, it creates an issue that requires DOL scrutiny. Risk-return ESG, on the other hand, focuses only on using ESG factors as a means of optimizing the financial analysis of an investment and does not conflict with the fiduciary duties of ERISA plan managers. Therefore, I agree with the DOL that risk-return ESG does not create a fiduciary issue that needs to be addressed.

Part II focuses on identifying collateral benefits ESG. While collateral benefits ESG is defined in Part I of this paper, it is not always easily recognizable when presented to plan managers as an investment option. If the DOL does not want plan managers to violate their fiduciary duties unknowingly, the proposed rule should provide guidance on how to recognize collateral benefits ESG. For example, if "portfolio screening" based on non-financial (non-pecuniary) objectives is used in an investment approach or in an investment fund—such as a mutual fund or an Exchange Traded Fund ("ETF")—then collateral benefits ESG is most likely present.

For the purposes of identifying collateral benefits ESG, portfolio screening is defined as a process by which a plan manager reduces its universe of eligible investments based on non-financial (non-pecuniary) objectives.[13] If screening criteria based on non-pecuniary factors are used in the creation of an index, this should mean that investment funds that use

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12. 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, 382 (2020).

13. Letter from Bernard S. Sharfman to the Office of Regulations and Interpretations, Emp. Benefits Sec. Admin., *RE: Financial Factors in Selecting Plan Investments Proposed Regulation (RIN 1210-AB95)* 6 (July 22, 2020), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00147.pdf. This article shares much of the same textual language with this letter. Given that the reader has been provided this knowledge upfront, I do not believe it is necessary to continuously footnote quotes and cites from that comment letter. This article and underlying comment letter have, at their foundation, two recent law review articles. *See* Schanzenbach & Sitkoff, supra note 12, *and* Bernard S. Sharfman, *Now Is the Time to Designate Proxy Advisors as Fiduciaries under ERISA*, 25 STAN. J.L. BUS. & FIN. 1 (2020). The latter owes much to the former in its approach to fiduciary duties under ERISA.

such an index are engaging in collateral benefits ESG. For example, by screening out newly issued dual-class shares, investment funds that track some of the most familiar benchmark indexes, such as the S&P 500 index, are to be categorized as employing collateral benefits ESG and are therefore no longer eligible to be included in an ERISA plan's investment portfolio. Of course, this also means that an investment fund that uses such indexes can no longer serve as a Qualified Default Investment Alternative (QDIA) under the proposed rule. This result is probably a surprise to the DOL, plan managers, participants, and beneficiaries. Another indicator of collateral benefits ESG is a disclosure that the investment approach or investment fund is expected to yield a lower risk-adjusted return relative to an appropriate benchmark.

Part III focuses on the fiduciary duties of plan managers under ERISA. Here, I argue that collateral benefits ESG, in whatever form, is not compatible with ERISA. The combination of the "sole purpose rule" and the "common investor purpose" puts significant limits on how a plan manager can operate under ERISA. The only alternative for a plan manager that wants to be in compliance with its fiduciary duties is to have the sole focus of pursuing *the highest risk-adjusted return possible* for its participants and beneficiaries. If the pursuit of this maximization does not occur, the plan manager must be in breach of its fiduciary duties.

Part IV discusses the DOL's current plan of continuing with its "all things being equal" test or "tie-breaker" standard. This guidance, which essentially creates a safe harbor for collateral benefits ESG to enter the investment portfolio of an ERISA plan, should not be allowed to continue. Even if its occurrence is rare, the tiebreaker is a violation of ERISA because it introduces a non-pecuniary objective into a plan manager's investment decision-making process. As will be discussed, it should be clear that the combination of the "sole purpose rule" and the "common investor purpose" does not allow for non-pecuniary objectives to be considered in a plan manager's investment decision making, even in a tie-breaker situation. If the DOL decides to continue with the "tie-breaker" standard, it must do more than just acknowledge that the "test could invite fiduciaries to find ties without a proper analysis, in order to justify the use of non-pecuniary factors in making an investment decision."[14]

My recommendation is to start with the assumption that plan managers will try "to find ties without a proper analysis, in order to justify the use of non-pecuniary factors in making an investment decision."[15] This simply reflects the reality that when there is money to be made, opportunistic behavior will follow. If this assumption is accepted, the DOL must determine what procedures and documentation are required to minimize this opportunistic behavior. In sum, if the DOL does not take up-

14. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,117.
15. *Id.*

front steps to minimize opportunistic behavior, the DOL should not be surprised to be confronted with numerous claims that economically indistinguishable investments exist.

## I. Defining ESG Investing and the Issue at Hand

The proposed rule tackles the issue of whether some or all ESG investing violates the fiduciary duties of plan managers. To begin, it is important to define what is meant by ESG investing, both in general terms and in the context of ERISA. Unfortunately, that is not easily done. At its roots, ESG investing refers to the practice of avoiding investment in firms that make antisocial products[16]—such as investment portfolio securities that are involved in the production and distribution of tobacco, guns, and alcohol. This can be referred to as "ethical-factor investing."[17] Albert Feuer defines this term as "using ethics as a factor to determine whether to acquire, dispose of, or how to exercise ownership rights in an equity or debt interest in a business enterprise."[18]

The SEC Commissioner Hester Peirce has observed that ESG investing has evolved to target a multitude of non-pecuniary objectives:

> E, S, and G tend to travel in a pack these days, which makes it hard to establish reliable metrics for affixing scarlet letters. Governance [G] at least offers some concrete markers, such as whether there are different share classes with different voting rights, the ease of proxy access, or whether the CEO and Chairman of the Board roles are held by two people. Even with these examples, however, people do not agree on which way they cut, and they may not cut the same way at every company. In comparison to governance, the environmental and social categories tend to be much more nebulous. The environmental category [E] can include, for example, water usage, carbon footprint, emissions, what industry the company is in, and the quantity of packing materials the company uses. The social category [S] can include how well a company treats its workers, what a company's diversity policy looks like, its customer privacy practices, whether there is community opposition to any of its operations, and whether the company sells guns or tobacco. Not only is it difficult to define what should be included in ESG, but, once you do, it is difficult to figure out how to measure success or failure.[19]

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16. Schanzenbach & Sitkoff, *supra* note 12, at 392.

17. Albert Feuer, *Ethics, ESG, and ERISA: Ethical-Factor Investing of Savings and Retirement Benefits*, 47 TAX MGMT. COMPENSATION PLAN. J. 212, 212 (2019).

18. *Id.*

19. Hester M. Peirce, *Scarlet Letters: Remarks Before the American Enterprise Institute*, SEC Speech (June 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819.

*A. ESG and Stakeholders*

The benefitting of stakeholders seems to be the current concern of ESG investing. As stated by Peirce, "ESG stands for 'environmental, social, governance,' but the 'S' in ESG could just as well stand for 'stakeholder.'"[20] Elsewhere, I have noted that:

> In a public company, stakeholders represent an enormous number of entities and individuals, including shareholders, directors, managers, employees, independent contractors, consultants, consumers, creditors, vendors, distributors, communities affected by the company's operations, federal, state, and local governments, and society in general, when it is positively affected by the social value created by the company or negatively affected when the company generates third-party costs such as air or water pollution. The management of these relationships is complex and is usually placed in the hands of those who have the knowledge and expertise to manage them: the company's management team, up and down the line.[21]

In its broadest sense, stakeholders include all those who transact with the company internally and externally and all third parties who do not necessarily transact with the company but are both positively and negatively affected by its activities. Consider, for example, the stakeholders covered by ESG in the context of the environment. All those who are affected by the environmental policies of a company may be characterized as stakeholders. Of course, this may mean most people in this world, if not everyone in existence.

This broader understanding of ESG investing as being consistent with a stakeholder model is what Larry Fink, CEO of BlackRock, was discussing in his 2018 Letter to CEOs:

> We also see many governments failing to prepare for the future, on issues ranging from retirement and infrastructure to automation and worker retraining. As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges. Indeed, the public expectations of your company have never been greater. Society is demanding that companies, both public and private, serve a social purpose. To prosper over time, every company must not only deliver financial

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20. Hester M. Peirce, *My Beef with Stakeholders: Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance*, SEC Speech (Sept. 21, 2018), https://www.sec.gov/news/speech/speech-peirce-092118.

21. Bernard S. Sharfman, *Why BlackRock's Stakeholder Approach Won't Work*, REALCLEARMARKETS (May 18, 2020), https://www.realclearmarkets.com/articles/2020/05/18/why_blackrocks_stakeholder_approach_wont_work_491618.html. For a good explanation of why management needs to be in charge of stakeholder relationships, see Emily Winston, *Managerial Fixation and the Limitations of Shareholder Oversight*, 71 HASTINGS L.J. 699, 699 (2020) ("[W]hile corporate attention to non-shareholder stakeholders can improve firm value, shareholder oversight of these stakeholder relationships will not succeed in having this effect").

> performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate.[22]

### *B. The Issue: Collateral Benefits ESG*

Schanzenbach and Sitkoff refer to this type of ESG investing—"investing for moral or ethical reasons or to benefit a third party [non-participant or non-beneficiary]" by pension fund trustees, including ERISA plans managers—as "collateral benefits ESG."[23] I would expand this definition to include *all* non-financial objectives, not just investing for moral or ethical reasons or for the benefit of third parties. For example, focusing on the "G" in ESG, some ESG funds may exclude companies with dual-class shares, such as Alphabet, Facebook, Zoom, Snap, Nike, and Comcast, from their investment portfolios. Having such stocks in their portfolios, no matter how financially beneficial, may offend some investors who are strong advocates of shareholder democracy and/or empowerment.[24]

As will be discussed in Part II, collateral benefits ESG, at its worst, results in excluding those investments that would be expected to help maximize the expected risk-adjusted returns of an ERISA investment portfolio. At its best, it would underweight certain investments that may help maximize expected risk-adjusted returns. Because collateral benefits ESG necessarily means that other interests besides the financial interests of beneficiaries and participants are being considered in the investment decision-making process, I agree with the DOL that this creates a legal issue that must be addressed.

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22. Larry Fink, *Larry Fink's 2018 Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter.

23. Schanzenbach & Sitkoff, *supra* note 12, at 389-90.

24. Shareholder democracy and empowerment are two intertwined concepts. Shareholder democracy was a term coined in the 1940s that "carried the normative message that greater shareholder participation in corporate governance was both possible and desirable." Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1069 (2015). It is currently associated with the idea of "one share, one vote." *See* Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1390 (2006). Shareholder empowerment is essentially the leveraging of shareholder democracy by certain institutional investors. How this concept is to be understood in practice has been powerfully articulated by former Delaware Supreme Court Chief Justice Leo Strine:

> [T]here is only one set of agents who must be constrained—corporate managers—and the world will be made a better place when corporations become direct democracies subject to immediate influence on many levels from a stockholder majority comprised not of those whose money is ultimately at stake, but of the money manager agents who wield the end-users' money to buy and sell stocks for their benefit.

Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 451 (2014).

*C. Nonissue: Risk-Return ESG*

Schanzenbach and Sitkoff also identify a second type of ESG investing that is intended to improve the expected risk-adjusted returns of an investment portfolio. They call this "risk-return ESG."[25] In this type of ESG investing, ESG factors are to be incorporated into the investment analysis of a plan manager if those factors are purely used to enhance the manager's evaluation of the risk and/or return of the investment without regard to collateral benefits or the plan manager's own preferences—for example, the financial markets not properly taking into consideration the risk of a nuclear reactor meltdown when pricing the securities of a power company that is dependent on nuclear power.[26] The purpose of utilizing ESG factors in the context of risk-return ESG is "to take into account . . . financially material risks and opportunities that arise out of environmental, social and governance information; it is not about achieving particular environmental, social or governance goals."[27]

This type of evaluation takes into consideration the additional costs involved in utilizing ESG factors in the financial analysis. These costs include the additional research required to reasonably conclude that the market is not being efficient in properly reflecting ESG factors in the price of a company's stock or debt securities.[28] This may result in an ERISA plan's underweight or overweight position in these securities and therefore a lack of diversification. This is another cost—taking on additional risk above market risk (unsystematic risk)—that must be taken into consideration when using ESG factors. Such costs will require higher financial returns as compensation.[29]

Because risk-return ESG focuses only on using ESG factors as a means of optimizing the financial analysis of an investment, I agree with the DOL that this type of ESG investing does not create a legal issue that needs to be addressed in the proposed rule. Nevertheless, the DOL should be on the lookout for collateral benefits ESG being misrepresented as risk-return ESG.

25. Schanzenbach & Sitkoff, *supra* note 12, at 390.

26. *Id.* at 438.

27. Randy Bauslaugh & Hendrik Garz, *Pension Fund Investment: Managing Environmental, Social and Governance (ESG) Factor Integration*, MCCARTHY TÉTRAULT (May 1, 2019), https://www.mccarthy.ca/en/insights/articles/pension-fund-investment-managing-environmental-social-and-governance-esg-factor-integration.

28. *See* Schanzenbach & Sitkoff, *supra* note 12, at 437 ("Any active investment program, whether based on ESG factors or otherwise, can improve risk-adjusted returns only if those factors are not already reflected by market prices.").

29. Schanzenbach & Sitkoff, *supra* note 12, at 428.

## II. Identifying Collateral Benefits ESG

Even though Part I provides a definition of collateral benefits ESG, it may not be easily recognizable when presented to a plan manager as an investment option. If the DOL does not want a plan manager to violate its fiduciary duties unknowingly, the proposed rule should provide guidance on how to recognize collateral benefits ESG. For example, if "portfolio screening" is used in an investment approach or in an investment fund such as a mutual fund or an ETF, the plan manager is likely employing collateral benefits ESG. Portfolio screening is defined as *a process by which a plan manager reduces its universe of eligible investments based on non-financial (non-pecuniary) objectives*.[30] Portfolio screening may not be the only way to identify collateral benefits ESG, but it is probably the primary way as it is the method by which investment advisers create ESG index funds. As will be discussed below, portfolio screening leads to both (i) the potential exclusion or underweighting of big common stock winners necessary to earn portfolio returns over Treasuries and (ii) the potential increase in unsystematic risk entering the investment portfolio. Another indicator is whether the investment approach or investment fund yields lower expected risk-adjusted returns relative to an appropriate benchmark.

### *A. Portfolio Screening*

For an example of portfolio screening, consider the selection criteria utilized in the MSCI KLD 400 Social Index, the index used by BlackRock's iShares MSCI KLD 400 Social ETF, an ESG ETF with approximately $2 billion in assets as of July 7, 2020.[31]

> The MSCI KLD 400 Social Index is maintained in two stages. First, securities of companies involved in Nuclear Power, Tobacco, Alcohol, Gambling, Military Weapons, Civilian Firearms, GMOs and Adult Entertainment are excluded. Then additions are made from the list of eligible companies based on considerations of ESG performance, sector alignment and size representation. The MSCI KLD 400 Social Index is designed to maintain similar sector weights as the MSCI USA Index and targets a minimum of 200 large and mid-cap constituents. Companies that are not existing constituents of The MSCI KLD 400 Social Index must have an MSCI ESG Rating above "BB" and the MSCI ESG Controversies Score greater than 2 to be eligible. At each quarterly Index Review, constituents are deleted if they are deleted from the MSCI USA IMI Index, fail the exclusion screens, or if their ESG ratings or scores fall below minimum standards. Additions are made to restore the number of constituents to 400. All eligi-

30. *See* Sharfman, *supra* note 13, at 6.

31. BlackRock, iShares MSCI KLD 400 Social ETF (July 7, 2020), https://www.ishares.com/us/products/239667/ishares-msci-kld-400-social-etf.

> ble securities of each issuer are included in the index, so the index may have more than 400 securities. The selection universe for the MSCI KLD 400 Social Index are large, mid and small cap companies in the MSCI USA IMI Index.[32]

Investment funds that use this index will have significantly reduced investment opportunities in two primary ways. First, there is an up-front screen to exclude a large number of investments based on moral and ethical reasons. Second, another round of exclusions is based on an investment not having a minimum ESG rating or score. However, additions are made from the list of eligible companies based on considerations of ESG performance, sector alignment, and size representation. All qualified securities are included in the index. Even so, the result is a relatively small portfolio of roughly 400 stocks out of a universe of 2,344 stocks that make up the MSCI USA IMI Index.[33]

Some have argued that adding companies based on positive ESG attributes (inclusionary screen) needs to be distinguished from excluding investments based on moral and ethical grounds (exclusionary screen): "[A] key difference between ESG and its predecessor, 'socially conscious investing,' is that socially conscious managers implicitly admitted that their strategies might reduce their returns, while ESG investors do not. Socially conscious investors used *negative* screens to eliminate stocks that violated their *beliefs*. In contrast, ESG investors seek *positive* attributes, which they claim will make their companies better investments."[34] I disagree. The former is simply another type of portfolio screening, but this time, the screen is based on the requirement of having certain positive ESG attributes. If investments don't have them, they are *excluded* from or underweighted in the portfolio.

### *B. Lower Expected Risk-Adjusted Returns*

The use of portfolio screening will produce lower expected risk-adjusted returns relative to a well-constructed benchmark index. First, screening techniques based on non-financial factors lead to an increased probability that the big winners in the stock market will be excluded from

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32. MSCI, *MSCI KLD 400 Social Index (USD)* (June 30, 2020), https://www.msci.com/documents/10199/904492e6-527e-4d64-9904-c710bf1533c6. This index has, as its foundation, the MSCI USA Investable Market Index.

33. The MSCI USA Investable Market Index is "designed to measure the performance of the large, mid and small cap segments of the US market. With 2,344 constituents, the index covers approximately 99% of the free float-adjusted market capitalization in the US." *See* MSCI, *MSCI USA IMI (USD)* (June 30, 2020), https://www.msci.com/documents/10199/3c4c8412-5d81-4aa9-a9c8-4490f9f5e04a.

34. John Rekenthaler, *The Department of Labor Attempts to Throttle ESG Investing*, MORNINGSTAR (July 2, 2020), https://www.morningstar.com/articles/990580/the-department-of-labor-attempts-to-throttle-esg-investing (emphasis added).

or underweighted in an investment portfolio. Fund disclosures such as the following tell us why:

> The CREF Social Choice Account returned 13.88 percent for the year [2017] compared with the 14.34 percent return of its composite benchmark. . . . Because of its ESG criteria, the Account *did not invest in a number of stocks and bonds*. . . . [T]he net effect was that the Account underperformed its benchmark.[35]

Mitch Goldberg has also observed that one reason why BlackRock's iShares MSCI USA ESG Select Social Index Fund (another large ESG ETF) has significantly trailed the S&P 500 Index over a recent ten-year period is that the fund did not invest in Amazon.[36] In *Do Stocks Outperform Treasury Bills?*, Hendrik Bessembinder explains why it is critical to have as many big winners as possible in an investment fund's portfolio.[37] Bessembinder observes that there is a significant amount of positive skewness in the returns of individual public companies (common stock) that have made up the stock market from July 1926 to December 2016. He found that "in terms of lifetime dollar wealth creation" (defined as "accumulated December 2016 value in excess of the outcome that would have been obtained if the invested capital had earned one-month Treasury bill returns"),[38] "the best-performing 4% of listed companies explain the net gain for the entire US stock market since 1926, as other stocks collectively matched Treasury bills."[39] His results also showed that the sum of the individual contributions to lifetime dollar wealth creation provided by the top fifty companies represented almost forty percent of total lifetime dollar wealth creation.[40] Thus, the returns earned by a relatively small number of best-performing companies were critical to the stock market earning returns above short-term Treasuries.

The understanding that positive skewness exists in stock market returns means that investors are best served if those select few firms that are expected to be the best performers are given the maximum opportunity to show up in an investment fund's portfolio. When significant weeding occurs, like in the MSCI KLD 400 Social Index, there is a greater probability that Amazon, or another big winner, will be omitted from

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35. Bradford Cornell & Aswath Damodaran, *Valuing ESG: Doing Good or Sounding Good?* (Mar. 20, 2020) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3557432 (citing TIAA-CREF Annual Report, 2017, p. 34).

36. Mitch Goldberg, *ESG Index Funds Are Hot: That May Be a Risky Thing for Investors*, CNBC (Nov. 17, 2019), https://www.cnbc.com/2019/11/17/esg-index-funds-are-hot-that-may-be-a-risky-thing-for-investors.html.

37. *See* Hendrik Bessembinder, *Do Stocks Outperform Treasury Bills?*, 129 J. FIN. ECON. 440, 440–41 (2018).

38. *Id.* at 454 tbl.5.

39. *Id.* at 440.

40. *Id.* at 454 tbl.5.

an investment portfolio. If investment funds want to maximize risk-adjusted returns, weeding out a significant number of investments based on non-pecuniary factors is not the way to accomplish this objective. It is simply an additional constraint on the ability to maximize returns. As stated by prominent finance professors Bradford Cornell and Aswath Damodaran, "a constrained optimum can, at best, match an unconstrained one, and most of the time, the constraint will create a cost."[41]

The use of portfolio screening based on non-pecuniary factors may also result in the *overweighting* of certain industries. This lack of portfolio diversification adds extra unsystematic risk to the *ex-ante* risk-adjusted return calculation. This extra risk cannot be ignored when an ESG fund is being evaluated for its expected risk-adjusted return. Overweighting in certain sectors can also give the appearance that the performance of a portfolio of stocks, such as many ESG funds, are performing much better relative to their peers. As Vincent Deluard observed, ESG funds are currently overweighted in the healthcare and technology industries, the two best-performing sectors in the first part of 2020.[42] Goldberg explains that "there are two likely reasons why a fund could outperform its benchmark. Either by overweighting the outperforming sector or by lowering the expense ratio. In the case of the recent strong run for some ESG funds, it looks like the answer is an overweight to the technology sector."[43] The result of this recent overweighting in the healthcare and technology industries in ESG funds has led some to claim that ESG is an "equity vaccine" in times of declining share prices.[44] However, this is not correct. As stated by James Mackintosh:

> Even where an ESG index did beat the market, it had little to do with environmental, social or governance issues. Instead, it came down to luck;

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41. Cornell & Damodaran, *supra* note 35, at 19.

42. Vincent Deluard, *ESG Investors Are Winning Their Unintended War on People*, INTL FCSTONE FIN. INC. (May 2020), https://www-test.intlfcstone.com/globalassets/featured-insights/v_deluard_0520_06302020.pdf. While outside the scope of this article, Deluard makes a very insightful observation about the unintended consequences of ESG investing:

> [T]he single most salient characteristics of these [ESG] funds is that they favor machines and intangible assets over humans. The average company in the ESG basket has 20% fewer employees than the median Russell 3,000 company. This tilt explains their success in a year which has rewarded biotech firms and tech platforms and punished employee-heavy sectors, such as airlines, retailers, and cruise lines. Companies with no employees do not have strikes or labor disputes. There is no gender pay gap when production is completed by robots and algorithms. Financial networks have no carbon footprint.
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> Despite its noble goal, ESG investing unintendedly spreads the greatest illnesses of post-industrial economies: winner-take-all capitalism, monopolistic concentration, and the disappearance of jobs for normal people.

43. Goldberg, *supra* note 36.

44. Elizabeth Demers et al., *ESG Didn't Immunize Stocks Against the COVID-19 Market Crash* (Aug. 27, 2020) (unpublished manuscript), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675920.

> did they happen to pick the stocks that best rode out coronavirus lock-downs? It is better to be lucky than right; but having, as some did, less exposure to cruise liners or long-haul airlines because of their carbon footprint was luck, not a well-thought-out way to avoid the stocks hurt most by Covid-19. There are several reasons why Microsoft tends to score well on ESG, but its cloud services being in demand because everyone is working from home isn't among them.[45]

In a recent study, Elizabeth Demers, Philip Joos, Jurian Hendrikse, and Baruch Lev found that ESG did not serve as an equity vaccine during the COVID-19 market crash. They discovered that "ESG is insignificant in fully specified returns regressions for the first quarter of 2020 COVID crisis period, and it is negatively associated with returns during the market's 'recovery' period in the second quarter of 2020."[46] Moreover, ESG scores provide very little (1% in first quarter of 2020 and 3% in second quarter of 2020) in the way of explanatory power.[47] Instead, they found that "[i]ndustry affiliation, market-based measures of risk, and accounting-based variables that capture the firm's financial flexibility (liquidity and leverage) and their investments in internally-developed intangible assets together dominate the explanatory power of the COVID returns models."[48] Importantly, the use of an extensive menu of control variables, including those just mentioned and others, is what distinguishes their work from other research reports:

> Contrary to the findings of contemporaneous studies that do not include such a full set of controls . . . as well as to the widespread claims by fund managers [e.g., claims made by BlackRock, Inc.[49]], ESG data purveyors, and the financial press who seem to arrive at their conclusions on the basis of *simple pairwise correlations*, our results provide robust evidence that ESG is not significantly associated with stock market performance during the first quarter of 2020 once the full array of other expected determinants of returns have been controlled for.[50]

In sum, portfolio overweighting that results from the use of non-pecuniary factors is a risk factor, not an enhancement to the expected financial performance of a fund no matter how well the fund appears to perform in the short term.

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45. James Mackintosh, *ESG Investing in the Pandemic Shows Power of Luck*, WALL ST. J. (July 15, 2020), https://www-wsj-com.cdn.ampproject.org/c/s/www.wsj.com/amp/articles/esg-investing-in-the-pandemic-shows-power-of-luck-11594810802.

46. Demers et al., *supra* note 44, abstract.

47. *Id.* at 4, 17.

48. *Id.* abstract.

49. *Sustainable Investing: Resilience Amid Uncertainty*, BLACKROCK (2020), https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf.

50. Demers et al., *supra* note 44, at 3.

### *C. Why Investment Funds Using the S&P 500 Index Are Now Collateral Benefits ESG*

If portfolio screening as defined in this piece is used in the creation of an index, this means that those investment funds that use such an index are engaging in collateral benefits ESG. For example, by screening out newly issued dual-class shares, investment funds that track some of the most familiar benchmark indexes, such as the S&P 500 Index, are undertaking collateral benefits ESG and are therefore no longer eligible to be included in an ERISA plan's investment portfolio. Of course, this also means that an investment fund that uses such indexes can no longer serve as a QDIA under the proposed rule. This result is probably a surprise to the DOL, plan managers, participants, and beneficiaries.

The story of this result begins in 2017, when two leading index providers—S&P Dow Jones Indices and FTSE Russell—succumbed to pressures from the institutional investors that make up the shareholder empowerment movement and implemented changes to their indexes that limited the presence of dual-class shares. As I have previously observed, "the more public companies that utilize a dual-class share structure, the more controlled companies exist and the less power the movement has."[51] Therefore, a primary ESG objective of the shareholder empowerment movement—with a direct bulls-eye on the "G"—is to get rid of all publicly traded dual-class shares. Focusing on index exclusion was one way the movement thought it could achieve its objective.

As a result, the FTSE Russell now bars companies from inclusion in its benchmark indexes unless more than 5 percent of the voting rights are in the hands of public shareholders. The S&P Dow Jones Indices went even further, excluding all *new* dual-class share offerings from the S&P Composite 1500 and its components: the S&P 500, S&P MidCap 400, and S&P SmallCap 600. This means that dual-class shares issued by dual-class share companies such as Snap, Lyft, Pinterest, and Zoom, among many other possible big winners, are no longer eligible to be included in these indexes.

These limitations on the inclusion of dual-class shares make no financial sense and are harmful to investors. In the past, big stock market winners have been overrepresented by dual-class share companies such as Alphabet, Berkshire Hathaway, Facebook, Comcast, and Nike. This was confirmed in an MSCI research report that found "that unequal voting stocks in aggregate outperformed the market over the period from November 2007 to August 2017, and that excluding them from market indexes would have reduced the indexes' total returns by approximately 30

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51. Bernard Sharfman, *Dual-Class Shares and the Shareholder Empowerment Movement,* R STREET INST. BLOG (June 12, 2017), https://www.rstreet.org/2017/06/12/dual-class-shares-and-the-shareholder-empowerment-movement.

basis points per year over our sample period."[52] This should not be surprising. When a company is allowed by stock market participants to launch its IPO with a dual-class share structure—thereby providing insiders with an extraordinary amount of protection from outsider shareholder interference—it is a signal to the market that the company is expected to be one of those best performers. This expectation is based on what Goshen and Squire refer to as "idiosyncratic vision."[53] This vision has two parts:

> First, it reflects the parts of the entrepreneur's business idea that outsiders may be unable to observe or verify. This could be because the entrepreneur cannot persuade investors that she is the best person to continue running the firm or that her business plan will produce superior returns. Second, it reflects the above-market pecuniary return expected by the entrepreneur, which, if the business succeeds, will be shared on a pro rata basis between the entrepreneur and investors. Importantly, idiosyncratic vision need not concern an innovation or new invention: as long as the entrepreneur has a plan that she subjectively believes will result in above-market returns, she has idiosyncratic vision.[54]

These are companies that should be included in, not excluded from, an investment portfolio.

If the S&P Dow Jones Indices and FTSE Russell continue to maintain indexes that screen out certain dual-class shares, one would expect that the funds that utilize these indexes will, over time, yield returns that move toward Treasuries and away from the stock market as a whole. Most important for purposes of this piece, the funds that utilize these indexes must now be considered to be engaging in collateral benefits ESG. Therefore, they cannot serve as QDIAs.

## III. An ERISA Plan Manager's Fiduciary Duties and Collateral Benefits ESG

ERISA Section 3(21)(A) provides that a "person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets."[55] Fiduciaries include trustees[56] who retain management control over

52. Dimitris Melas, *Putting the Spotlight on Spotify: Why Have Stocks with Unequal Voting Rights Outperformed?*, MSCI (Apr. 3, 2018), https://www.msci.com/www/blog-posts/putting-the-spotlight-on/0898078592.

53. Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2016).

54. *Id.* at 567.

55. 29 U.S.C. § 1002(21)(A).

56. *See id.* § 1105(c)(3).

plan assets and investment managers[57] who are commonly delegated such authority by the trustees. These fiduciaries must go about their work under the guidance of very strict fiduciary duties of loyalty and care.[58] These duties are very similar to what is found under the common law of trusts.[59] As described below, consistent with what is found in the proposed rule, collateral benefits ESG is incompatible with these duties.

### *A. Duty of Loyalty (Solely in the Interest of Participants and Beneficiaries)*

Under ERISA's duty of loyalty, a plan fiduciary shall discharge his duties with respect to a plan "'solely in the interest of the participants and beneficiaries' and for the 'exclusive purpose' of benefitting them."[60] This "sole interest rule" is a codification of what is found in the common law of trusts.[61] It creates a very specific and narrow path for an ERISA plan manager when considering an investment strategy or providing mutual fund or ETF selections for self-directed individual accounts.

According to Schanzenbach and Sitkoff, "the trustee [ERISA plan manager] has a duty to the beneficiaries [and participants] not to be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust [ERISA plan]."[62] Moreover, a "trustee [ERISA plan manager] who is influenced by his own or a third party's interests is disloyal, because the trustee [ERISA plan manager] is no longer acting solely in the interest of the beneficiaries."[63] Therefore, collateral benefits ESG is in breach of the "sole interest rule" if it is intentionally designed to benefit, in any degree, the interests of stakeholders or any other third parties, including plan managers.

Regarding the latter, it must be recognized that an investment adviser that has been delegated the role of plan manager may be tempted to satisfy its own financial interests when it takes on an investment strategy or offers a selection of funds to self-directed individual accounts that utilize collateral benefits ESG. For example, mutual funds and ETFs that track the MSCI's KLD 400 Social Index[64] will typically charge significantly higher fees than funds and ETFs that track the more standardized and

57. *See id.* § 1102(c)(3).

58. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570–71 (1985).

59. Tibble v. Edison Int'l, 135 S. Ct. 1823, 1828 (2015) ("We have often noted that an ERISA fiduciary's duty is derived from the common law of trusts. In determining the contours of an ERISA fiduciary's duty, courts often must look to the law of trusts.").

60. *See* 29 U.S.C. § 1104(a)(1)(A)(i).

61. Schanzenbach & Sitkoff, *supra* note 12, at 403.

62. *Id.* at 400 (citing 3 RESTATEMENT (THIRD) OF TRUSTS § 78(1) cmt. f.).

63. *Id.* at 401.

64. BlackRock, *iShares MSCI KLD 400 Social ETF, Fact Sheet as of 09/30/20*, https://www.ishares.com/us/literature/fact-sheet/dsi-ishares-msci-kld-400-social-etf-fund-fact-sheet-en-us.pdf (identifying an expense ratio of 0.25%).

broadly based CRSP U.S. Total Market Index[65] or Fidelity U.S. Total Investable Market Index.[66] Therefore, the offering of ESG funds may be significantly more profitable for the investment adviser than lower-cost funds that use standardized indexes. As argued by Michal Barzuza, Quinn Curtis, and David Webber, an investment manager's strategy of increasing the offerings of ESG products may be motivated by a desire to attract the investment funds held by millennials and, at least while they are young, their perceived preference for less financial returns and more social activism.[67] Millennials will increasingly be the ones holding most of the wealth in the U.S., making it essential for investment advisers to start catering to their needs and gaining their loyalty now rather than later.[68]

In sum, it is not unreasonable to argue that the use of a collateral benefits ESG approach to investing, or an offering of a selection of funds to self-directed individual accounts that utilize collateral benefits ESG, if allowed, would lead to ERISA plan managers not acting *solely* in the interests of these parties. In these circumstances, the ERISA plan managers would be in breach of their duty of loyalty.

### *B. Duty of Loyalty (Pursuit of Financial Benefits)*

What the "sole interest rule" does not forbid is collateral benefits ESG for the purpose of achieving non-financial benefits that do not involve third parties—for example, excluding investments that participants and beneficiaries may find objectionable on moral or ethical grounds, such as excluding those investments involving alcohol, guns, or tobacco. However, even if the beneficiaries and participants approve of such an investment approach, it would still be forbidden by ERISA. Based on the U.S. Supreme Court's interpretation of the statutory language, "providing benefits to participants and their beneficiaries," a fiduciary's duty of loyalty requires an exclusive focus on the pursuit of *financial benefits*:

> Taken in context, §1104(a)(1)(B)'s reference to "an enterprise of a like character and with like aims" means an enterprise with what the immediately preceding provision calls the "exclusive purpose" to be pursued by all ERISA fiduciaries: "providing benefits to participants and their beneficiaries" while "defraying reasonable expenses of administering the plan." Read in the context of ERISA as a whole, the term "benefits" in the pro-

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65. Vanguard, *Vanguard Total Stock Market ETF*, https://investor.vanguard.com/etf/profile/fees/vti (identifying an expense ratio of 0.03% as of Oct. 18, 2020).

66. Fidelity, *Fidelity's ZERO℠ Total Market Index Fund*, https://fundresearch.fidelity.com/mutual-funds/fundfactsheet/31635T708 (identifying an expense ratio of 0.00% as of July 3, 2020).

67. Michal Barzuza, Quinn Curtis, & David Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 SO. CAL. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3439516.

68. *Id.*

> vision just quoted must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries.[69]

Moreover, "[t]he term does not cover nonpecuniary benefits."[70] Therefore, ERISA's fiduciary duties incorporate a mandatory "common investor purpose,"[71] which consists in the pursuit of financial benefits for the plan beneficiaries and does not allow for the pursuit of non-financial or non-monetary benefits even if participants and beneficiaries approve of them.

### *C. Duty of Loyalty (Summary)*

Two important implications can be drawn from an ERISA plan manager's fiduciary duty of loyalty. First, the "common investor purpose" excludes all possible non-wealth-maximizing objectives, including moral or ethical investing. Therefore, collateral benefits ESG, in whatever form, is not compatible with ERISA. This means that even if the ERISA plan documents state that other objectives could or must be pursued—such as cleaning up the environment, raising labor wages, excluding investments that involve alcohol, guns, or tobacco, making the workplace safer, providing better medical benefits for employees, or solving the numerous political problems that exist around the world, no matter how worthy—this would conflict with ERISA's fiduciary duty obligations and be void as a matter of public policy.[72]

Second, the combination of the "sole purpose rule" and the "common investor purpose" puts significant limits on how a plan manager can operate under ERISA. The only viable path to take for a plan manager that wants to be in compliance with its fiduciary duties is to have the sole focus of pursuing *the highest risk-adjusted return possible* for its participants and beneficiaries. If the pursuit of this maximization does not occur, then the plan manager must be in breach of its fiduciary duties—for example, if the plan manager uses portfolio screening.

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69. Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420-21 (2014).

70. *Id.* at 421.

71. This term is used in Sean J. Griffith's new article, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 983 (2020).

72. *See* Fifth Third Bancorp, 573 U.S. at 421 ("With irrelevant exceptions, 'any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility . . . for any . . . duty under this part shall be void as against public policy.'") (citing 29 U.S.C. § 1110(a)).

## IV. The Proposed "Tie-Breaker" Standard or "All Things Being Equal" Test

The DOL has stated its intention of continuing its "all things being equal" test or "tie-breaker" standard. That is, the DOL expects to keep in place its historical guidance of allowing a non-pecuniary objective to be used as a tiebreaker when comparing two investment funds that have "the same target risk return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition."[73] As the proposed rule goes on to say, "[e]ven then, moreover, those two alternatives would remain two different investments that may function differently in the overall context of the fund portfolio, and which going forward may perform differently based on external economic trends and developments."[74] Such expectations of identical investment parameters, cash flows, and financial interaction with a plan portfolio is the reason that the DOL believes that true ties will rarely occur.[75] However, because it does not have sufficient evidence to say that such ties will never occur, it believes that it must continue with this guidance.[76]

### *A. Eliminate the Tie-Breaker Standard*

This guidance, which essentially creates a safe harbor for collateral benefits ESG to enter the investment portfolio of an ERISA plan, should not be allowed to continue. Even if it were to occur only on rare occasions, the tiebreaker is a violation of ERISA because it brings into a plan manager's investment decision-making process the use of a non-pecuniary objective. As already discussed, it should be clear that the combination of the "sole purpose rule" and the "common investor purpose" does not allow for non-pecuniary objectives to be considered in a plan manager's investment decision, even in a tiebreaker situation.

It should be noted that the survival of this guidance over the decades is truly surprising. As the DOL stated in a 2008 Interpretive Bulletin, "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."[77] Schanzenbach and Sitkoff also note that "the tiebreaker is irreconcilable with the strict 'sole interest' or 'exclusive benefit' rule."[78] Edward Zelinsky states that the DOL's position "replaces ERISA's strong

73. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,117.

74. *Id.*

75. *Id.*

76. *Id.*

77. U.S. Dep't of Labor, Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61,734, at 61,735 (Oct. 17, 2008).

78. Schanzenbach & Sitkoff, *supra* note 12, at 408.

statutory standard of loyalty ('solely' and 'exclusive') with a weaker rule of nonsubordination."[79] If this weren't clear enough, Zelinsky explains that the DOL's position "flouts ERISA's statutory text."[80] In sum, any use of non-financial objectives in the investment decision-making process is beyond the scope of what ERISA provides and is an unambiguous breach of a plan manager's fiduciary duties.

### *B. If the "Tie-Breaker" Standard Is Allowed to Continue*

If the DOL decides to continue with the tiebreaker standard, it must do more than just acknowledge that the "test could invite fiduciaries to find ties without a proper analysis, in order to justify the use of non-pecuniary factors in making an investment decision."[81] As stated by Zelinsky when critiquing Interpretive Bulletin 2015-01, this type of guidance "implicitly propounds a naive theory of decisionmaking."[82] It assumes that plan managers utilize a two-step process in their investment approach.[83] First, it scours the universe of investment opportunities for those investments that can maximize the plan portfolio's risk-adjusted returns.[84] Then, when it runs across two viable investments with "economically indistinguishable" properties, it will have the option of breaking the tie by evaluating the alternatives based on non-pecuniary factors (objectives).[85]

My recommendation is to start with the assumption that plan managers will try "to find ties without a proper analysis, in order to justify the use of non-pecuniary factors in making an investment decision."[86] This simply reflects the reality that when there is money to be made, opportunistic behavior will follow. As Bradford Cornell and Aswath Damodaran have noted,

> In many circles ESG is being marketed as not only good for society, but good for companies and for investors. In our view, however, the hype regarding ESG has vastly outrun the reality of both what it is and what it can deliver. The potential to make money on ESG for consultants, bankers and investment managers has made them cheerleaders for the concept, with claims of the payoffs based on research that is ambiguous and inconclusive, if not outright inconsistent with some of the claims.[87]

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79. Edward A. Zelinsky, *The Continuing Battle Over Economically Targeted Investments: An Analysis of the Department of Labor's Interpretive Bulletin 2015-01*, 2016 CARDOZO L. REV.: DE NOVO 197, 202 (2016).

80. *Id.*

81. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,117.

82. Zelinsky, *supra* note 79, at 203.

83. *Id.*

84. *Id.*

85. *Id.*

86. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. at 39,117.

87. Cornell & Damodaran, *supra* note 35, at 22.

If my recommendation is accepted, the DOL must determine what procedures and documentation are required to minimize the potential for opportunistic behavior. At the very least, plan managers will need to document how they went about implementing the two-step approach as described above. Moreover, if the DOL does not take steps to minimize such opportunistic behavior, then it may end up having to spend a significant amount of its resources reviewing a large number of claims that economically indistinguishable investments exist.

On a more technical note, the preceding discussion on portfolio screening should provide value in the context of the "tie-breaker" standard. That is, if an investment manager tries to make the case that a particular ESG fund is economically indistinguishable, it will definitely have to jump over the first hurdle of clearly and unambiguously explaining how portfolio screening, if it is being applied, results in an expected risk-adjusted return for the ESG fund that is not inferior to the non-ESG fund. Without such an explanation, the ESG fund should not be considered an economically indistinguishable investment.

## Conclusion

Despite ERISA being clear in what it requires of its fiduciaries, many commentators will disagree with the analysis provided here and continue to be vigorously opposed to the rule. I view this as a clash between the personal desires of some commentators and what ERISA actually provides. Martin Lipton's recent commentary on the proposed rule is one example of this.[88] If these commentators truly want to implement their personal desires, they have but one option: to lobby to change the statutory law. But until then, as with the DOL's proposed rule, they must respect what the current law clearly and unambiguously provides. In sum, I strongly support the DOL's approach in the proposed rule and hope that my observations and recommendations will assist them in the process of its finalization.

88. Martin Lipton, *DOL Proposes New Rules Regulating ESG Investments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2020), https://corpgov.law.harvard.edu/2020/07/07/dol-proposes-new-rules-regulating-esg-investments.