ANOTHER MAJOR QUESTION: THE DEPARTMENT OF LABOR SHOULD RETIRE THE TIEBREAKER RULE AND REEMPLOY PECUNIARY LANGUAGE IN ERISA

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ABSTRACT

The Employee Retirement Income Security Act of 1974 ("ERISA") soon turns 50. Instead of celebrating with cake, retirees and future retirees alike get to witness a new chapter in the debate over the consideration of Environmental, Social, or Governance ("ESG") factors in investing with plan assets. As employees cross the bridge into retirement, they look to their 401(k)s and pension plans for peace of mind, for it is ERISA that has been working silently in the background establishing minimum standards, practices, and fiduciary duties to protect participants. In recent years, the U.S. Department of Labor ("DOL") has passed three regulations—two in 2020 and one in 2022—through notice of proposed rulemaking ("NPRM") procedures that purport to address whether ESG factors may be considered by ERISA plan fiduciaries when managing plan assets. ERISA's fiduciary duties have historically been viewed as narrowing the scope of considerations a plan's fiduciary may incorporate into his decision-making process, but the DOL's 2022 regulation expanded the pool of factors to include non-pecuniary considerations in both making investment decisions and exercising shareholder rights. The 2022 Rule also expanded the application of the tiebreaker rule.

Ultimately, while moral, social, or political merits of businesses weighing ESG factors are a matter of significant interest, this Note argues that the consideration of ESG and socially responsible investment ("SRI") factors, for its non-pecuniary benefits to ERISA plan participants or its collateral benefits to third parties, is inconsistent with ERISA's duty of

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loyalty—the sole interest and exclusive benefits rules—and duty of prudence. Such policy change risks sacrificing plan diversification and incurring additional administrative fees for plan participants. This Note further evaluates the merits of a major questions doctrine challenge to the DOL's creation of the 1994 tiebreaker rule and incorporation of non-pecuniary factors into the plan fiduciary's decision-making process.

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INTRODUCTION

Three recognizable numbers and a letter—the 401(k)—have all but become a staple of American employment benefits.[1] While we work, defined benefits plans, like pensions, and defined contribution plans, like the 401(k), are operating in the background to (hopefully) provide a comfortable retirement when social security checks do not stretch as far as they need, and personal savings accounts are taxed by inflation.[2]

These staples of American retirement are a product of the Employee Retirement Income Security Act of 1974 ("ERISA"), which was passed to protect "the interests of participants in employee benefit plans and their beneficiaries."[3] ERISA plans are offered through a private employer; money is contributed by the employee and is held, invested, and managed by the plan's fiduciaries, for the benefit of the employee (participant).[4] To protect participants' retirement interests, ERISA imported and strengthened trust law's fiduciary duties to govern a plan fiduciary's

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1. *2023 401(k) Participant Study* 5, CHARLES SCHWAB (Aug. 2023), https://content.schwab.com/web/retail/public/about-schwab/schwab_2023_401k_participant_survey_findings.pdf [https://perma.cc/4Q7L-J3PR] (88% of people say a 401(k) is a "must have" when searching for a new job).

2. *Id.* at 6 (surveying respondents who estimate that 40% of their retirement income will come from their 401(k)); *see also* Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 20–21 (2011) (discussing the differences between a defined contribution plan and a defined benefits plan).

3. 29 U.S.C. § 1001(b).

4. *See id.*

conduct—namely the sole interest rule, exclusive benefits rule, and duty of prudence.[5]

Questions have emerged as to the extent non-pecuniary factors may be considered by plan fiduciaries and how these fiduciaries should invest if two investments offer identical risk-return profiles.[6] Currently, 42% of institutional investors state that they consider Environmental, Social, and Governance ("ESG") factors when making investment decisions, and 12% of respondents state that they consider doing so in the future.[7] In recent years, $8.4 trillion of assets under management were invested using ESG strategies[8] out of the 13,248 open-end funds with approximately $30 trillion in assets.[9] Additionally, there are 645 ESG focused registered investment companies, including 444 mutual funds and 177 Exchange-Traded Funds ("ETFs").[10] Despite ESG scoring being "largely opaque" and unregulated,[11] commentators "are remarkably stable across providers."[12]

Supporters of ESG investing argue that such considerations are financially material to investment returns and correlate to above market returns,[13] while others advocate for the associated non-financial benefits

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5. *See id.*

6. *See infra* Part II.

7. Amy Whyte, *More Institutions Than Ever Are Considering ESG. Will They Follow Through?*, INSTITUTIONAL INV. (Oct. 6, 2020), https://www.institutionalinvestor.com/article/2bsx99jnq7snsu39eyr5s/portfolio/more-institutions-than-ever-are-considering-esg-will-they-follow-through [https://perma.cc/A7H6-39R5].

8. U.S. Sustainable Investment Forum, *Sustainable Investing Basics* (2022) https://www.ussif.org/sribasics [https://archive.ph/Jcv1C].

9. Proposed Rule, Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. 36654, 36698 (2022).

10. U.S. Sustainable Investment Forum, *supra* note 8.

11. Ryan Clements, *Why Comparability Is a Greater Problem than Greenwashing in ESG ETFs*, 13 WM. & MARY BUS. L. REV. 441, 445 (2022) (describing ESG ETFs as "tremendous[ly] subjective, using an unregulated, non-standardized universe of available names, metrics, and methodologies").

12. Quinn Curtis et al., *Do ESG Mutual Funds Deliver on their Promises?,* 120 MICH. L. REV. 393, 400 (2021).

13. Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information: Evidence from a Global Survey* 12 (Harv. Bus. Sch. Working Paper, Paper No. 17–079, Feb. 2017). Of the 33% of respondents who consider ESG factors when making investment decisions 63% do so because such factors are financially material to returns. *Id.* at 12, 34. Investments in impact funds, which are widely regarded as assets

of investing in socially responsible companies.[14] Opponents of ESG investing do not argue for restricting the right of individuals to personally pursue socially responsible investments ("SRIs"); rather, they argue that consideration of third parties, grander social policy, or non-financial benefits falls outside of a strict reading of ERISA.[15]

In 2022, the U.S. Department of Labor ("DOL") took a new stance on this issue when it published a final rule titled, *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights* ("2022 Rule"),[16] which took effect in early 2023, that removed language from ERISA's fiduciary duties regulation which expressly limited consideration of non-pecuniary factors in investment decisions.[17] This Note argues that this subtle change codifies a persistent interpretation in friction with ERISA's ironclad fiduciary duties because ERISA gave plan fiduciaries a statutory single mandate—maximize participant wealth and income while minimizing relevant risks. Further, this Note argues that fiduciaries should hesitate before considering an investment's collateral benefits to participants and third parties because consideration of ESG factors for their moral and societal benefits is incompatible with ERISA's text, purpose, and history.

This Note proceeds in three parts. Part I explains the development of ERISA, Congress's history of voting on social investing amendments, the statute's strict fiduciary duties, and the Major Question Doctrine. Part II describes four contested provisions of the 2022 Rule, namely the inclusion of pecuniary and ESG language, changes to the tiebreaker rule, qualified default investment alternatives (QDIA), and the exercise of shareholder rights. This part also applies the major questions doctrine and explains why this regulation addresses a question reserved for Congress. Part III explains why the new rule is not compatible with ERISA's fiduciary duties.

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which will not beat the market, are largely made for reasons other than financial return. Brad M. Barber, Adair Morse & Ayako Yasuda, *Impact Investing,* 139 J. FIN. ECON. 162, 163–85 (2021).

14. *See infra* Part II.A.

15. *See generally* 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 (2020).

16. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (to be codified at 29 C.F.R. § 2550).

17. *Id.* at 73827–28 (describing changes made in the 2022 Rule).

I. BACKGROUND

Employment-based retirement plans have solidified themselves as a load-bearing leg in the United States' "three-legged stool" of retirement savings.[18] Unlike social security, employment-based retirement plans are voluntary, not universal, and payments are not guaranteed.[19] Their popularity reflects the individualistic and consumer approach to personal wealth in American culture, despite the risks of uncertain returns.[20] Professor Edward Zelinsky credits America's embrace of defined contribution plans, like the 401(k), to the structure's alignment, "with some of the strongest-held values of American culture, namely, personal autonomy, private property, and self-support."[21]

A. ERISA & ESG'S HISTORY, AND TRADITION

1. ERISA's Text

ERISA is a development and codification of trust law.[22] In an ordinary trust, the property owner or "settlor of the trust, conveys property for the benefit of one or more beneficiaries to a third party, who serves as

18. Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 5 (2011). The other two legs are Social Security and personal savings. *Id.*

19. *Id.* at 17.

20. Susan J. Stabile, *Is It Time to Admit the Failure of an Employer Based Pension System?*, 11 LEWIS & CLARK L. REV. 305, 309 (2007) (arguing the plans are "consistent with [America's] individualist/consumer approach"). As of 2022, 66% of private employees had access to a defined contribution plan, like a 401(k), whereas only 15% of private workers had access to a defined benefits plan, like a pension. David Zook, *How Do Retirement Plans for Private Industry and State and Local Government Workers Compare?*, BUREAU OF LAB. STAT. (Jan. 10, 2023), https://www.bls.gov/opub/btn/volume-12/how-do-retirement-plans-for-private-industry-and-state-and-local-government-workers-compare.htm [https://archive.is/Hn9Bu].

21. Moore, *supra* note 18, at 22 (citing Edward A. Zelinsky, THE ORIGINS OF THE OWNERSHIP SOCIETY: HOW THE DEFINED CONTRIBUTION PARADIGM CHANGED AMERICA 97 (2007)).

22. *See, e.g.*, 29 U.S.C. § 1103 (establishing that "all assets of an employee benefit plan shall be held in trust by one or more trustees"); *see also* Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 85 (1995) ("ERISA follows standard trust law principles . . . .").

trustee. The trustee holds for the benefit of *each beneficiary*."[23] Trust law imposes a strict duty of loyalty and prudence on the trustee and fiduciaries "in investing and administration" of trust assets.[24] Trust law's duty of loyalty limits discretion by isolating a specific motive with which fiduciaries must invest while the duty of prudence narrows the pool of eligible investment opportunities.[25] Judge Easterbrook and Prof. Fischel argue these high standards are a necessary deterrent against subordination of the beneficiary's interests in the absence of strict monitoring by passive retirement plan investors.[26]

ERISA serves a dual purpose: to maximize the wealth of participants at the time of retirement[27] and set them up to maximize their post-retirement income.[28] While Professor Paul Rose's description of "participant wealth maximization" ("PWM") is largely accurate, the terminology should be understood to capture the need to minimize risk and to maximize both wealth and income beyond the age of 65.[29] ERISA lays out PWM as the mandatory common investor purpose for plan participants in the form of "benefits."[30] Within PWM, participants and fiduciaries may reasonably disagree on how to maximize the plan's value.[31] Ordinarily, because fiduciaries are bound by PWM, participants

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23. John H. Langbein & Daniel R. Fischel, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1113 (emphasis added).

24. *Id.* at 1114.

25. *Cf. id.* at 1114–15.

26. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L. J. 698, 700–03 (1982) ("The fiduciary principle is an alternative to direct monitoring. It replaces prior supervision with deterrence, much as the criminal law uses penalties for bank robbery rather than pat-down searches of everyone entering banks.").

27. Paul Rose, *Public Wealth Maximization: A New Framework for Fiduciary Duties in Public Funds*, 3 U. ILL. L. REV. 891, 893 (2018) ("[A] strict reading of [ERISA's fiduciary] dut[ies] would require them to disregard worker and societal interests and focus solely on maximizing the value of the fund.").

28. Fifth Third Bancorp v. Dudenhoeffer ("Fifth Third Bancorp"), 573 U.S. 409, 421 (2014) (stating that ERISA's "benefits" includes "retirement income").

29. Rose, *supra* note 27, at 893. "A strict fiduciary duty to act in the interests of the fund would obligate a private investor to ignore such [socially harmful] externalities [because the cost is absorbed by the government], so long as they do not negatively affect the returns of the fund's investments." *Id.* at 895; *see also* Blankenship v. Boyle, 329 F. Supp. 1089, 1096 (D.D.C. 1971) (The common law requires fiduciaries "to maximize the trust income by prudent investment . . . .").

30. 29 U.S.C. § 1104(a)(1)(A).

31. Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs*, 48 IA J. CORP. L. 497, 513 (2023). It is hard to fathom anyone contributing to their 401(k) in the hopes that it decreases in value.

can rest easy knowing that while the means differ, the ends remain consistent.[32] The law permits a degree of discretion to fiduciaries achieving these ends, focusing on whether their *ex ante* motives and due diligence were solely and exclusively PWM rather than the financial return *ex post*.[33]

ERISA did not evolve in a vacuum; the 1974 statute was influenced by three separate retirement plan statutes.[34] Congress drew on ERISA's predecessors in an effort to "assure greater financial stability of employee benefit plans," by preventing the subordination of participant interests to those of the fiduciary or third parties.[35] Congress did not condone "creative uses of plan assets," such as SRI.[36] In fact, Congress specifically rejected three proposals from labor groups that would permit ERISA trustees to invest in "high social priority projects," allow "social investments" that "reduce[] expenses typically incurred during retirement," and allow funds to be invested in "socially useful projects."[37]

32. Edward A. Zelinsky, *Is Bitcoin Prudent? Is Art Diversified? Offering Alternative Investments to 401(k) Participants*, 54 CONN. L. REV. 509, 519–20 (2022) [hereinafter *Is Bitcoin Prudent*] (discussing the importance of the fiduciary's ex ante motive).

33. *Id.* ("Courts have . . . characterized a plan trustee's ERISA-based duty of prudence as an obligation about process ex ante, not a guarantee of results ex post."); *see also* Brotherston v. Putnam Invs., LLC, 907 F.3d 17, 40 (1st Cir. 2018) ("[I]n reviewing ERISA duty of loyalty claims, [courts] have asked whether the fiduciary's 'operative motive was to further its own interests.'").

34. *Langbein & Fischel*, *supra* note 23, at 1107–09 (citing Labor Management Relations (Taft-Hartley) Act, § 302(c)(5), 29 U.S.C. § 186(c)(5) (1982 & Supp 1988); Revenue Act of 1921, ch. 136, § 219(f), Pub. L. No. 42-98, 42 Stat. 227, 247 (1921); and trust common law). Frequent corruption and self-dealing clashes under union managed pensions worried lawmakers and motivated reforms that would later become ERISA. *Id.* at 1110–12. In one such clash, trustees of a miners' union pension fund deposited pension cash in interest-free accounts of union-owned banks and invested in energy companies to widen the union's influence. Withers v. Teachers' Ret. Sys. of N.Y., 447 F. Supp. 1248, 1255–56 (S.D.N.Y. 1978) (citing Blankenship v. Boyle, 329 F. Supp. 1089 (D.C. 1971)). The court acknowledged that the trustees' plan would incidentally provide better employment opportunities for union members, but that trustees breached their "strict common-law fiduciary responsibilities" by focusing on collateral benefits for the union instead of retirement income of participants. *Id.*

35. James D. Hutchinson & Charles G. Cole, *Legal Standards Governing Investment of Pension Assets for Social and Political Goals*, 128 U. PENN. L. REV. 1340, 1365 (1980).

36. *Id.*

37. *Id.* at 1343, 1365–66.

2. ESG

ESG is far from a new trend.[38] Christian values had a strong influence over early SRI, now ESG.[39] The earliest example of SRI dates back to 1758 where Quakers forbade members from investing in the slave trade.[40] In the 18th Century, socially responsible investors would screen out investments in "antisocial products."[41] The oldest SRI fund and second oldest mutual fund, Pioneer Investments, was founded to screen-out "sin-vestments," such as alcohol, tobacco, and gambling.[42] SRI made a resurgence in the 1980s as divestment from South Africa's apartheid state grew in popularity.[43]

SRI was rebranded as ESG in the late 1990s and early 2000s and proponents asserted that, by incorporating governance factors, "ESG investing could improve risk-adjusted returns" while pursuing a social mission.[44] SRI managers were, on the other hand, not shy about the risk to return their strategies posed.[45] SRI utilized negative screening to exclude investments "that violate their beliefs . . . [whereas] ESG

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38. *See generally* Maia Gez et al., *ESG Disclosure Trends in SEC Filings*, HARV. L. SCH. F. ON CORP. GOV. (July 16, 2022), https://corpgov.law.harvard.edu/2022/07/16/esg-disclosure-trends-in-sec-filings/ [https://perma.cc/XP84-CP4H] (describing the uptick in ESG references in SEC filings).

39. *Is Bitcoin Prudent*, *supra* note 32, at 535.

40. Susan N. Gary, *Conflicts and Opportunities for Pension Fiduciaries in the ESG Environment*, 74 OKLA. L. REV. 607, 618 (2022).

41. Bernard S. Sharfman, *Now Is the Time to Designate Proxy Advisors as Fiduciaries Under ERISA*, 25 STAN. J. L. BUS. & FIN. 1, 16 (2020) [hereinafter *Now Is the Time*].

42. Jadah Riley, *Giant Firm Finds Proof Is in the Principles*, FIN. ADVISOR (Sept. 6, 2018), https://www.fa-mag.com/news/the-proof-is-in-the-principles-40685.html [https://perma.cc/KLR4-PUUV]; *Is Bitcoin Prudent*, *supra* note 32, at 535 (explaining that early Christian investment funds, such as Guidestone Funds, screen out companies who did not align with their moral or ethical values, such as companies in the alcohol, tobacco, gambling, pornography, or abortion business).

43. Schanzenbach & Sitkoff, *supra* note 15, at 388.

44. *Id.* Professor John Langbein and Judge Richard Posner recognized that "[t]here [was] no consensus about which social principles . . . are consistent or inconsistent" with SRI, although SRI often follows trends in liberal activism. John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 83–84 (1980) (predicting the pendulum may one day swing the other way). Langbein and Posner described these designations as an arbitrary "litmus of activist thinking." *Id.*

45. Bernard S. Sharfman, *ESG Investing Under ERISA*, 38 YALE J. ON REG. BULL. 112, 121 (2020) [hereinafter *ESG Investing*].

investors seek positive attributes" that overlap with financial return.[46] Negative and positive screening, proxy voting,[47] and engagement with company management are common ESG investment strategies.[48]

E, S, and G are more recognizable together than apart.[49] To set parameters for a more fruitful discussion, Governance (G) is often described as a set of factors that include whether a company has different classes of shares with differing voting rights, proxy access, and officer independence.[50] Environmental (E) factors include, but are not limited to, "water usage, carbon footprint, emissions, what industry the company is in, and the quantity of packing materials the company uses."[51] Social (S) factors include labor practices, DEI initiatives, privacy policies, community relations, and the company's industry.[52] Peirce colloquially dubbed S factors as a stand-in for "stakeholder."[53] Sharfman defines "non-investor stakeholders" as any internal or external third parties who either transact with the company or who "are both positively and negatively impacted by its activities."[54] This definition can encompass "directors, managers, employees, independent contractors, consultants, consumers, creditors, vendors, distributors, communities affected by the company's operations" at all levels of government and society.[55]

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46. *Id.* (emphasis omitted); *see also* Gary, *supra* note 40, at 619 ("SRI strategies developed as investors turned to best-in-class positive strategies focusing on which companies or sectors to include rather than on which companies or sectors to exclude.").

47. Clements, *supra* note 11, at 479–80.

48. Curtis, *supra* note 12, at 405. Critics, such as Bernard Sharfman, argue the difference in strategies between SRI and ESG are a difference in form, not in function. *See generally ESG Investing*, *supra* note 45.

49. *Now Is the Time*, *supra* note 41, at 16 ("E, S, and G tend to travel in a pack these days. . . .").

50. Commissioner Hester M. Peirce, *Scarlet Letters: Remarks Before the American Enterprise Institute*, SEC (June 18, 2019), https://www.sec.gov/news/speech/speech-peirce-061819 [https://perma.cc/3ZP5-RPEF] ("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.").

51. *Id.*

52. *Id.*

53. *Id.*

54. *Now it the Time*, *supra* note 41, at 17.

55. *ESG Investing*, *supra* note 45, at 117.

B. FIDUCIARY DUTIES

ERISA codified un-waivable fiduciary duties[56] derived from the common law of trusts.[57] Under ERISA, plan assets are "held in trust" by a trustee with the exclusive authority to manage the plan's assets unless plan documents provide otherwise.[58] ERISA's fiduciary duties impose "a more exacting standard . . . than trust law generally provides."[59]

A fiduciary is any person "with respect to a plan to the extent [] 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."[60] Investment advisors and investment companies are statutorily exempt from ERISA duties provided they do not exercise discretionary control over the plan.[61]

ERISA's fiduciary duties "act as substitutes for monitoring" that would be impractical to implement considering high cost of monitoring and unsophistication of the average participant.[62] The burden of monitoring rises in tandem with the degree of discretion held by the fiduciary as there are more opportunities to abuse the fiduciary's control.[63] Trust law's strict guidelines are a bulwark against improper

56. 29 U.S.C. § 1104(a)(1)(D) ("[A] fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents . . . are consistent with the provisions [of this subchapter]."). While plan documents can modify an ERISA plan at the periphery, "trust documents cannot excuse trustees from their [fiduciary] duties under ERISA." Fifth Third Bancorp, 573 U.S. 409, 422 (2014); *see also* Hutchinson & Cole, *supra* note 35, at 1372 ("Senate and House committee reports explained that one reason for establishing federal fiduciary standards is to negate the tendency of the common law to permit deviations from fiduciary standards when authorized by the trust instrument.").

57. Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transport, Inc., 472 U.S. 559, 570 (1985) (explaining that 29 U.S.C. § 1104(a)(1) imposes "strict standards of trustee conduct . . . derived from the common law of trusts — most prominently, a standard of loyalty and a standard of care"); *see also* Schanzenbach & Sitkoff, *supra* note 15, at 418 ("Another important difference from ERISA is that under ordinary trust law a beneficiary may authorize conduct by a trustee that would otherwise constitute a breach of trust via advance consent or subsequent release or ratification.").

58. 29 U.S.C. § 1103(a).

59. Rose, *supra* note 27, at 897.

60. 29 U.S.C. § 1002(21)(A).

61. *See generally Now Is the Time*, *supra* note 41, at 12–13 (citing Chamber of Com. of the U.S. v. U.S. Dep't of Lab., 885 F.3d 360, 379 (5th Cir. 2018)).

62. John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L. J. 929, 957 n.140 (2005).

63. Johnson v. Allsteel, Inc., 259 F.3d 885, 888 (7th Cir. 2000).

temptations for those managing plan assets so that the beneficiary need not stringently monitor the trustee's every move.[64]

Section 1104(a), the source of ERISA's core fiduciary duties, states that a fiduciary "shall discharge his duties with respect to a plan *solely in the interest of the participants* . . . and *for the exclusive purpose of providing benefits to participants* . . . defraying reasonable expenses of administering the plan."[65] Further, it requires that the fiduciary act "with the care, skill, prudence, and diligence . . . that a *prudent man*" would use in like circumstances.[66] Fiduciaries also must avoid excessive recordkeeping fees and seek to provide cheaper, identical alternatives to offered investments.[67] An investment that outperforms the market may nonetheless be imprudent if transaction costs exceed its outperformance. These standards are "conjunctive; each must be satisfied by a proposed course of action," whether that be investing, monitoring investments, or exercising shareholder rights.[68] Subordination of participant interests in an otherwise lucrative investment can substantiate a breach as liability does not turn on returns.[69] The specific requirements of each fiduciary duty set forth by Section 1104(a) will be discussed below.

1. Duty of Loyalty

ERISA's duty of loyalty can be understood in two complimentary prongs: the sole interest rule and the exclusive benefits rule.[70] The sole interest rule is the means in which the fiduciary frames his investment mindset, and the exclusive benefit rule establishes his goal. Under the sole interest rule, the fiduciary is barred from considering any motives other

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64. *See* RESTATEMENT (THIRD) OF Trusts TRS. § 78(1)–(2) cmt. b (2007).

65. 29 U.S.C. § 1104(a)(1)(A) (emphasis added). Reference to "plan participants" should be understood in this Note to include plan beneficiaries.

66. *Id.* § 1104(a)(1)(B) (emphasis added).

67. Hughes v. Nw. Univ., 142 S. Ct. 737, 741 (2022).

68. Hutchinson & Cole, *supra* note 35, at 1353; *see also* 44 Fed. Reg. 37222, n.2 (1979) (explaining that an early Section 1104 regulation proposal on the duty of prudence removed a reference to the "solely in the interest . . . to avoid suggesting that satisfaction of the 'prudence' rule with respect to an investment or investment course of action necessarily implies satisfaction of that additional requirement").

69. Brotherston v. Putnam Invs., LLC, 907 F.3d 17, 31 (1st Cir. 2018).

70. Hutchinson & Cole, *supra* note 35, at 1369 (arguing that the latter "cannot be read simply as a reiteration of the duty of loyalty" because the two rules are complimentary).

than the interests of plan participants, reducing the necessity to monitor.[71] Permissible participant interests are then defined under the exclusive benefits rule.[72]

The sole interest rule finds its origins in ordinary trust law, in which "the trustee has a duty . . . not to be influenced by the interest of any third person or by [any other] motives."[73] Even "acting with *mixed* motives triggers an irrebuttable presumption of wrongdoing"[74] because the subordination of the participant's interest to any extent for any other party is enough to show the trustee was "no longer acting solely in the interest of the [participants]."[75] Therefore, fiduciaries violate the statute when they act with an improper motive, not when the investment performs poorly.[76]

The exclusive benefits rule dictates what each fiduciary must strive to achieve for plan participants.[77] If the sole interest rule is the fiduciary's mindset, the exclusive benefits rule prescribes their ultimate goal: to bestow these seemingly unspecified "benefits" to plan participants.[78] The Supreme Court held in *Fifth Third Bancorp* that "'benefits' . . . must be understood to refer to . . . financial benefits (such as retirement income)."[79]

The sole interest rule, in contrast to the exclusive benefits rule, does not necessarily prohibit the fiduciary from pursuing collateral benefits to third parties or non-financial goals of the participants.[80] The sole interest rule only instructs fiduciaries to solely pursue participants' interests.[81] The exclusive benefits rule complements the sole interest rule by telling

71. *Id.* at 1359–69.

72. 29 U.S.C. § 1104(a)(1)(A).

73. Schanzenbach & Sitkoff, *supra* note 15, at 400; *see also* RESTATEMENT (SECOND) OF TRS. § 170(1) ("The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.").

74. Halperin v. Richards, 7 F.4th 534, 546 (7th Cir. 2021).

75. Schanzenbach & Sitkoff, *supra* note 15, at 401.

76. *Id.*

77. *Id.* at 425.

78. *Id.*

79. 573 U.S. 409, 472 (2014). This case demonstrates why SWM paints an incomplete picture of ERISA's goals and why scholars should frame their commentary around PWM.

80. Dana M. Muir, *Matching Preferences and Access: Sustainable Investing in 401(k) Plans*, 57 IND. L. REV. 53, 78 (2023) (arguing in the context of the tiebreaker rule, that "ERISA's 'solely in the interest of' language even requires a decision be made on factors that benefit the plan or participants").

81. *See infra* Part I.B.1.i.

fiduciaries that loyalty to the participants means exclusively pursuing their financial interests.[82] A pension for coal miners acts in its participants' interest by promoting businesses that employ union coal miners, but doing so is not exclusively in their financial interests in the same way as a higher investment yield.[83] Despite the statute's seemly bright line rule through the use of "sole" and "exclusive," incidental third party benefits do not necessarily "violate the statute" provided the motive for each investment decision was solely the participant's financial interests.[84]

2. *Duty of Prudence*

ERISA appropriated ordinary trust law's prudent man standard, which is a "conservative, asset-by-asset analysis that limit[s] financial risk" and accepts lower risk in favor of relatively lower, stable returns.[85] Trust law, and ERISA, requires the fiduciary to seek "the highest return consistent with the preferred level of portfolio risk," not necessarily the highest available return if the degree of risk is beyond what is acceptable.[86] To weigh risk, prudence requires the fiduciary to consider "diversification, liquidity, current return relative to anticipated cash-flow requirements, and projected portfolio return" in line with the plan's objectives.[87] The duty of prudence also extends to "the selection of an investment manager or advisor, the formulation of investment guidelines, the voting of shares held by the plan, and the ongoing monitoring of the plan's investment activity" as well as the assembly of an investment menu.[88]

82. *Dudenhoeffer*, 572 U.S. at 472.
83. *Id.*; *see also supra* note 34 and accompanying text.
84. Hutchinson & Cole, *supra* note 35, at 1360.
85. 29 U.S.C § 1104(a); *see also* Gary, *supra* note 40, at 613.
86. Langbein & Posner, *supra* note 44, at 103.
87. Hutchinson & Cole, *supra* note 35, at 1356; *see also Is Bitcoin Prudent*, *supra* note 32, at 523 (encouraging fiduciaries to ask themselves whether an investment is "cautious? Conservative? Generally accepted? Have professional defined benefit trustees widely embraced this investment category? Is a fund internally diversified or not? Is a particular investment category novel, or does it have an established track record? Does a particular investment pursue the participant's interests or a third party's welfare?").
88. Hutchinson & Cole, *supra* note 35, at 1353.

ERISA's *ex ante* approach extends to the duty of prudence.[89] ERISA's objective standard of care can be broken down into the duty to conduct an "investigation into the investment opportunity and the duty to invest accordingly."[90] Evaluation of prudence in an investment decision is not dependent on whether an investment goes up or down; it is based on what the fiduciary knew or should have known at the time of the investment.[91]

In *Tibble v. Edison International*, the Supreme Court extended ERISA's duty of prudence into a "continuing duty to monitor trust investments *and remove imprudent ones*."[92] In the context of a plan's investment menus, where participants select investments from a curated selection to customize their retirement plan on the basis of their personal risk-return tolerance, the fiduciary is not liable for the participant's imprudent selection.[93] However, a fiduciary is liable for providing an imprudent menu and failing to remove once prudent investments that have soured.[94]

ERISA's mandate incorporates modern portfolio theory, which assesses "the role that the investment plays within the *entire portfolio*."[95] Therefore, fiduciaries are not bound to a particular investment or strategy, and a fiduciary's investment decisions are evaluated by the decision's effect on the risk *and* return of the *portfolio as a whole*, not whether the decision impacts the positive or negative return of each investment.[96]

To satisfy the duty of prudence, ERISA also requires fiduciaries to look to investment industry norms.[97] Modern portfolio theory uses

89. *Is Bitcoin Prudent*, *supra* note 32 at 519–20.

90. Fink v. Nat'l Sav. & Tr. Co., 772 F.2d 951, 957 (D.C. Cir. 1985) (J. Scalia, dissenting) (explaining "the faithful discharge of the first [does not] satisfy the second, nor does breach of the first constitute breach of the second").

91. *Id.* Evaluating a fiduciary's investigation into an investment decision "involves consideration of what facts would have come to his attention if he had fully complied with his duty to investigate and evaluate." *Id.*

92. Tibble v. Edison Int'l, 575 U.S. 523, 528–29 (2015) (emphasis added).

93. Hughes v. Nw. Univ., 595 U.S. 170, 143 (2022) (rejecting a categorical rule that would shield a fiduciary from liability for constructing a menu containing imprudent investments even if some of the menu's options were objectively prudent).

94. *Id.*

95. Hutchinson & Cole, *supra* note 35, at 1356 ("[An] important change wrought by ERISA in the prudence rule was a shift to a whole portfolio approach. Under the common law, the trustee could not defend his actions by showing that losses with respect to a particular investment were offset by gains on other investments or investment income.").

96. Schanzenbach & Sitkoff, *supra* note 15, at 427.

97. Gary, *supra* note 40, at 613.

diversification as a "means" to profit.[98] ERISA statutorily "requires diversification" of plan investments.[99] Investing strategies that sacrifice diversification risk being imprudent. And fiduciaries are required to furnish participants with a benefits statement explaining "the importance . . . of a well-balanced and diversified investment portfolio."[100]

C. THE 2022 RULE

1. Pre-2022 Rule Development: the 2020 Rules

Every administration's DOL, starting in 1994, has issued interpretive materials on ERISA's fiduciary duties as to the extent plan fiduciaries may consider economically targeted investments ("ETI") (later ESG) factors in their investment decisions.[101] All administrations have endorsed what Professors Max Schanzenbach and Robert Sitkoff call "risk-return ESG investing," in which fiduciaries use "ESG factors as metrics for assessing expected risk and return with the aim of improved return with less risk" in both investing decisions and the exercise of shareholder rights "on the theory that those factors can identify market mispricing and therefore profit opportunities."[102]

On the other end of the spectrum, Schanzenbach and Sitkoff identified "collateral benefits ESG" where "investor[s] eschew[] firms or industries identified as unethical or falling below a certain ESG threshold."[103] Just like risk-return ESG investing, collateral benefits ESG

98. Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 CASE W. RES. 1295, 1301–02 (2021). Professor Chaffee points out that index funds have been widely accepted because the vehicle takes advantage of modern portfolio theory, which gives investors "the ability to diversify their portfolios through a single investment device." *Id.* at 1303.

99. Stegemann v. Gannett Co., 970 F.3d 465, 478 (4th Cir. 2020) ("[A] single fund on a menu . . . can be scrutinized for imprudence for want of diversification."); *see also* 29 C.F.R. § 2550.404c-1(b)(3)(i)(B)(1) (2021) (explaining that a participant must be offered "at least three investment alternatives . . . [e]ach of which is diversified").

100. 29 U.S.C. § 1025(a)(2)(B).

101. See *infra* Part I.C.1 (describing interpretive bulletins and rules from 1994 (Clinton), 2008 (Bush), 2015 & 2016 (Obama), 2020 (Trump), and 2022 (Biden)).

102. Schanzenbach & Sitkoff, *supra* note 15, at 398.

103. *Id.*; *see also* Langbein & Posner, *supra* note 41, at 73 ("[SRI is] excluding the securities of certain otherwise attractive companies from an investor's portfolio because the companies are judged to be socially irresponsible, and including the securities of certain otherwise unattractive companies because they are judged to be behaving in a socially laudable way.").

can be implemented through investment screening, the exercise of shareholder rights, and engagement with management.[104] However, consideration of ESG factors under a collateral benefits lens are driven by personal, social, moral, and ethical considerations rather than purely financial motivations.[105]

In 1994, the DOL incorporated ESG's predecessor, ETI, into its interpretation of Section 1104.[106] ETIs are investments "selected for the economic benefits they create *apart from their investment return*."[107] The DOL stated that ERISA did not preclude investing in an otherwise prudent ETI, notwithstanding its potential economic benefit to third parties.[108] However, the DOL recognized ERISA did preclude fiduciaries "from subordinating the interests of participants . . . in their retirement income to unrelated objectives."[109]

The DOL also introduced the "tiebreaker rule" in 1994 (IB-94).[110] Under the tiebreaker rule, a fiduciary deciding between multiple investments, with the same financial return, risk profile, and all else equal, may consider collateral benefits not related to financial performance.[111]

However, the DOL scaled back the tiebreaker rule's permissive rhetoric in 2008 through two interpretive bulletins ("IBs"); these interpretive bulletins clarified that fiduciaries may not consider non-economic factors "*except in very limited circumstances*" and to ignore "objectives, considerations, and economic effects unrelated to the plan's economic interests."[112] The 2008 IB's more restrictive tone treated ETIs

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104. Schanzenbach & Sitkoff, *supra* note 15, at 398.

105. *Id.*

106. *See generally* Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32606 (June 23, 1994).

107. *Id.* at 32607 (emphasis added).

108. *Id.*; *see also* Interpretive Bulletins Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 38860, 38863–64 (July 29, 1994) (stating that voting proxies and "monitor[ing] or influenc[ing] the management of a corporation" are also subject to ERISA's fiduciary duties).

109. Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32606, 32607 (June 23, 1994).

110. *See generally* Interpretive Bulletin Relating to the Employee Retirement Income Security Act of 1974, 59 Fed. Reg. 32606 (June 23, 1994).

111. Schanzenbach & Sitkoff, *supra* note 15, at 408.

112. Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734, 61735 (Oct. 17, 2008) (emphasis added) (IB-08-01); *see also* Interpretive Bulletin Relating to Exercise of Shareholder Rights, 73 Fed. Reg. 61731, 61734 (Oct. 17, 2008) (IB-08-02) ("Plan fiduciaries risk violating the exclusive

as the exception, not the rule, requiring the fiduciary to conclude that the two "alternative options *are truly equal*" before considering other factors.[113]

To address concerns that the 2008 IB dissuaded fiduciaries from considering ESG factors,[114] the 2016 IB (IB-16) states that fiduciaries who gave "appropriate consideration" to economic factors could consider collateral benefits without violating their fiduciary duties in tiebreaker situations.[115] The DOL again endorsed consideration of collateral benefit investing, stating that "thoughtful engagement" in the context of exercising shareholder rights permitted fiduciaries to "incorporate ESG issues into ownership policies and practices."[116] But the main difference between these interpretive bulletins "is rhetorical."[117] IB-94-1, IB-15-01, and IB-16 encourage ETI and ESG considerations whereas IB 08-01 takes a more subdued approach.[118]

Executive Order 13868 instructed the DOL to promulgate two regulations through a NPRM to "promote long-term growth and maximize return on ERISA plan assets" and "reduce regulatory uncertainties that currently make energy infrastructure projects expensive and that discourage new investment."[119] The rules, *Financial Factors in Selecting Plan Investments*[120] and *Fiduciary Duties Regarding Proxy*

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purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory, or public policy issues through the proxy process."). "[T]he fiduciary has an obligation to refrain from voting" if he determines that the cost is likely to exceed the economic benefits. *Id.*

113. Interpretive Bulletin Relating to Investing in Economically Targeted Investments, 73 Fed. Reg. 61734, 61735 (Oct. 17, 2008) .

114. Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 80 Fed. Reg. 65135, 65136 (Oct. 26, 2015) (IB-15-01).

115. *Id.* at 65137 ("Fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social, or other such factors.").

116. Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, Including Proxy Voting Policies or Guidelines, 81 Fed. Reg. 95879, 95882–83 (Dec. 29, 2016).

117. Edward A. Zelensky, *The Continuing Battle over Economically Targeted Investments: An Analysis of DOL's Interpretive Bulletin 2015-01*, 2016 CARDOZO L. REV. DE NOVO 197, 201–02 (2016) [hereinafter *The Continuing Battle*].

118. *See id.* at 165–66.

119. Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 15, 2019).

120. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72851 (Nov. 13, 2020) (formerly codified in 29 C.F.R. § 2550).

Voting and Shareholder Rights[121] (collectively the "2020 Rules"), unlike the prior interpretive bulletins, carried the force of law.[122]

2. *The 2022 Rule*

Two years later, the DOL published the 2022 Rule,[123] which reversed four of the 2020 Rules' key provisions in response to a perceived "chilling effect" from the 2020 Rules' language.[124] The four reversals will be discussed in turn.

a. Pecuniary/Non-pecuniary Language

First, the 2022 Rule removed the 2020 Rules' pecuniary and non-pecuniary language. The 2020 Rules limited fiduciaries to evaluating investment opportunities solely on "pecuniary factors" and prohibited the use of plan assets to "promote non-pecuniary benefits or goals."[125] Under the 2020 Rules, investment considerations, like ESG, are pecuniary if, and only if, a fiduciary determines that they relate to material economic risks or are relevant to an investment's economic performance "under generally accepted investment theories."[126]

Conversely, the 2022 Rule expanded what a fiduciary can consider. The 2022 Rule explicitly permits the consideration of financially relevant ESG factors by name while removing the limitation on considering non-

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121. Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658 (Dec. 16, 2020) (formerly codified at 29 C.F.R. § 2550).

122. In response to the 2020 Rules, President Biden signed Executive Order 13990, authorizing all departments to revise the prior administration's regulations in order to "advance environmental justice" and "confront the climate crisis." Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021). Unlike the Trump administration's parallel order, the Biden administration did not call for ERISA reforms by name. *See id.*

123. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (to be codified at 29 C.F.R. § 2550).

124. *See generally id.*

125. *See generally* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846 (Nov. 13, 2020) (formerly codified at 29 C.F.R. § 2550). A pecuniary factor is any "factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons." *Id.* at 72884.

126. *Id.* at 72848; *see also Is Bitcoin Prudent*, *supra* note 32, at 520 (quoting 29 C.F.R. § 2550.404c-5I(4)(i) (2021)).

pecuniary factors present in the 2020 Rules.[127] The 2022 Rule's preamble also provides a non-exclusive list of factors—including ESG factors—that a fiduciary can consider in their risk-return analysis, such as "exposure to the physical and transitional risks of climate change," board composition, a company's "progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention."[128]

b. The Evolving Tiebreaker Rule

Second, the 2022 Rule loosened the application of the tiebreaker rule. The 2020 Rules incorporate a restrictive tiebreaker rhetoric where fiduciaries can only consider non-pecuniary factors when the "fiduciary is *unable to distinguish* [investments] on the basis of pecuniary factors alone."[129] Under the 2020 Rules, fiduciaries that invoked the tiebreaker rule were required to document why pecuniary factors alone were insufficient, compare the two investment opportunities, and most importantly, explain "how the chosen non-pecuniary factor[s]. . . are consistent with the [financial] interests of participants."[130]

The 2022 Rule retained the tiebreaker rule with looser language, stating that a fiduciary may base an investment decision on collateral benefits if the fiduciary concludes that two or more investment opportunities "*equally serve* the financial interests of the plan *over the appropriate time horizon*."[131] The 2022 Rule also removed the 2020 Rules' documentation requirements.[132]

c. QDIA's Participant Preferences

Third, the 2022 Rule changed the requirements for qualified default investment plans ("QDIA"). The QDIA is the default investment

127. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73826 (Dec. 1, 2022) (to be codified at 29 C.F.R. § 2550).

128. *See id.* at 73859.

129. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72851 (Nov. 13, 2020) (formerly codified at 29 C.F.R. § 2550) (emphasis added).

130. *See id.* at 72846.

131. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73860 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550) (emphasis added).

132. *See id.* at 73837.

available to plan participants when they enroll in a plan that offers an investment menu.[133] If a plan participant enrolls in his employer's retirement plan, yet opts not to browse through the assembled menu, his assets will be invested in the plan's QDIA.[134] Under the 2020 Rules, a plan's QDIA "investment objectives or . . . strategies [cannot] include, consider, or indicate the use of one or more non-pecuniary factors."[135] While the 2020 Rules do not prohibit a fiduciary from including investments that consider non-pecuniary factors, the 2020 Rules states that such funds cannot be the plan's default where the most passive investors put their money.[136]

Conversely, the 2022 Rule first permits fiduciaries to designate a fund that considers non-pecuniary factors as the QDIA.[137] Second, it states that a fiduciary does not breach its duty of loyalty solely for considering "participants' preferences."[138] While the 2020 Rules "accept[] the notion that the interests of plan participants may include more than financial interests,"[139] and only categorically prohibited investments that consider non-pecuniary factors in the QDIA, the 2022 Rule explicitly permits consideration of non-pecuniary participant preferences when selecting a QDIA.[140]

d. The Exercise of Shareholders Rights

Finally, the 2022 Rule removes two safe harbors for fiduciaries exercising shareholder rights. Fiduciaries are usually obligated to vote in accordance with participant's economic interests, maintain a record of

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133. *See id.*

134. Rosemary Carlson, *Qualified Default Investment Alternative*, SMART ASSET (Nov. 10, 2021), https://smartasset.com/retirement/qdia [https://perma.cc/G9QW-5FZX].

135. *See* Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72851 (Nov. 13, 2020) (formerly codified at 29 C.F.R. § 2550).

136. *See id.* at 72864.

137. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73828–29 (Dec. 1, 2022) (to be codified at 29 C.F.R. § 2550).

138. *See id.* at 73842.

139. Gary, *supra* note 40, at 634. "A fund can be included as a QDIA if financially material ESG factors are considered as part of a risk-return analysis, but the fiduciary must document both the selection and the monitoring of the fund and compare the fund with similar 'conventional' funds." *Id.* at 635.

140. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73842 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550).

proxy activities, and monitor outside proxy advisors.[141] However, the 2020 Rules created safe harbors where fiduciaries are not required to vote in every proxy.[142] Under the first safe harbor, fiduciaries could limit their voting activities to matters related to the issuer's business activities that materially affect the investment's value; under the second, fiduciaries could refrain from voting on proposals when the plan's holding of that issuer made up a small portion of their portfolio.[143]

The 2022 Rule removed the 2020 Rules' two safe harbors and added a cross reference to the subsection which permits consideration of ESG factors when making investment decisions, incorporating those considerations into the exercise of shareholder rights.[144] It further limited the breadth of the subsection by replacing the "non-pecuniary" language with "other objectives," removing the proxy voting recordkeeping requirement, and removing the duty to monitor proxy advisors.[145]

D. MAJOR QUESTIONS DOCTRINE

The major questions doctrine has been described as a clear statement rule which requires "explicit and specific congressional authorization for certain [impactful] agency policies."[146] The doctrine is levied against the

141. *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, 81668 (Dec. 16, 2020) (formerly codified at 29 C.F.R. § 2550).

142. *See id.*

143. *See id.* at 81673, 81691.

144. *See generally* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550).

145. *Compare* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 81658, 81694 (Dec. 16, 2020) (formerly codified at 29 C.F.R. § 2550) (paragraph (d)(2)(ii)(C) of the 2020 Rule uses the language: "any other objective, or promote benefits or goals unrelated to those financial interests of the plan's participants and beneficiaries) *with* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73848 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550) (paragraph (d)(2)(ii)(C) of the 2022 Rule, instead, uses the language: "any other objective"). The SEC, on the other hand, would find the lack of "written policies," an available description of its proxy voting features, or a record of its voting record a fraudulent, deceptive, and manipulative act. *See* Proxy Voting by Investment Advisers, 68 Fed. Reg. 6585, 6586 (Feb. 7, 2003) (codified at 17 C.F.R. § 275).

146. *See* Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023). However, despite its recent adoption by the Supreme Court many scholars have criticized the major questions doctrine as a substantive canon

executive branch when it usurps consequential decisions reserved to Congress, not delegated to the agency.[147] In other words, when agencies promulgate unheralded and transformative rules that have significant ramifications on the political and economic status quo, courts have "reason to hesitate before concluding that Congress meant to confer such authority" from vague statutes.[148] Instead, when presented with a major problem, courts require a clear statement delegating such power to the agency.[149]

Leading up to the doctrine's formal adoption, the Supreme Court has rejected agency rules that concerned issues of "vast economic and political significance" derived from an underlying statute that did not explicitly grant such discretion.[150] In *West Virgina*, the Court adopted a two-pronged analysis to apply when the doctrine is triggered, which asks, "whether the agency action (a) is 'unheralded' and (b) represents a 'transformative' change in the agency's authority."[151] However, in *Nebraska v. Biden*, the Court effectively applied a four-pronged approach, first analyzing the history of the agency's assertion of this type of power, then addressing the breadth of the regulation, its economic significance,

of interpretation for allowing "systemic departure from plausible readings of statutes on the basis of judicial values and preferences that are at best weakly tethered to higher sources of law." Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IA L. REV. 465, 472 (2024).

147. *See* West Virginia v. EPA, 597 U.S. 697, 746 (2022) (Gorsuch, J., concurring) ("[T]he agency seeks to resolve for itself the sort of question normally reserved for Congress.").

148. *Id.* at 2608 (Roberts, C.J.). Rather than seeking to "stretch[] the words to their fullest," Justice Barrett explains in her concurrence in *Biden v. Nebraska* that the doctrine "grows out of these same commonsense principles of communication" of what judges would expect when Congress delegates expansive decision making power to executive agencies. 143 S. Ct. 2355, 2380 (2023). Matters of "enormous importance" are likely not authorized by a subtle device within the statutory cake. *See id.* at 2382. Justice Barrett recommends approaching these significant economic and political questions with a rebuttable "measure of skepticism." *See id.* at 2381.

149. Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023).

150. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

151. *See* Natasha Brunstein & Donald Goodson, *Unheralded and Transformative: The Test for Major Questions After West Virginia*, 47 WM. & MARY ENV'T. L. & POL'Y REV. 47, 47 (2022). The "Court did not even attempt to articulate a test for the [major questions] doctrine" until *West Virginia*. *See id.* at 52; *see also* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (describing the FCC's expansion of authority as a "fundamental revision of the statute.").

and finally, the political significance such as whether the issue was actively contested by the public.[152]

A question remains as to whether the four prongs are conjunctive and triggered by regulations that are historical deviations of large breadth.[153] Alternatively, the doctrine could be triggered whenever regulations present issues of vast economic and political significance, where courts *then* must examine whether the history and breadth are in-line with the statutory text.[154]

II. FRICTION BETWEEN THE 2022 RULE AND ERISA FIDUCIARY DUTIES, AND APPLICATION OF THE MAJOR QUESTIONS DOCTRINE

Part II describes the four contested provisions of the 2022 Rule, namely the inclusion of pecuniary and ESG language, alterations to the tiebreaker rule, changes to QDIAs, and the exercise of shareholder rights. This part also applies the major questions doctrine and outlines why this regulation addresses a question reserved for Congress.

152. *See Biden*, 143 S. Ct. at 2372. First, the Secretary of Education "ha[d] never previously claimed powers of this magnitude." *Id.* Second, "the Secretary would enjoy virtually unlimited power to rewrite the Education Act." *Id.* at 2373. Third, the Court found that the economic impact would be over $430 billion. *Id.* Lastly, the Court noted that the proposal at issue was comparable to policies "considered by Congress." *Id.* These factors were not present in all cases leading up to the current iteration. Brunstein & Goodson, *supra* note 151, at 71:

> [C]osts of the agency rule played no role in *MCI* or *Gonzales*; they were only alluded to in *Brown & Williamson*; they were referenced in *UARG*, but as a measure of the relative change resulting from the rule; and they were highlighted in *Alabama Realtors*, but as absolute metrics of the economic impact of the agency's action.

153. *See, e.g.*, Brunstein & Goodson, *supra* note 151, at 50 (arguing that economic and political significance is neither a threshold for applying the major questions doctrine, nor part of the test entirely).

154. *Id.* (emphasis added).

A. FRICTION BETWEEN THE 2022 RULE AND ERISA FIDUCIARY DUTIES

1. Removal of Pecuniary/Non-Pecuniary Language

The 2022 Rule expands what a fiduciary can consider and explicitly permits the consideration of financially relevant ESG factors by name while removing the limitation on considering non-pecuniary factors present in the 2020 Rules.[155] The 2022 Rule's preamble also provides a non-exclusive list of factors—including ESG factors—that a fiduciary can consider in their risk-return analysis.[156]

a. Duty of Loyalty

Since ERISA's duty of loyalty incorporates a duty to maximize participant wealth and income for retirement—similar to that of a corporate fiduciary—fiduciaries must solely and exclusively consider the pecuniary effects of investment decisions.[157] As Nobel Laureate Milton Friedman explained in 1970, a "business as a whole cannot be said to have [social] responsibilities;" a corporate executive's responsibility is the pursuit of the shareholder's goals.[158] As a default, that goal is understood as maximizing shareholder value.[159]

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155. *See* Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73826 (Dec. 1, 2022) (to be codified at 29 C.F.R. § 2550).

156. *See id.* at 73859.

157. Rose, *supra* note 27, at 893 (the strict interpretation of ERISA advocated for in this Note "would require [fiduciaries] to disregard worker and societal interests and focus solely on maximizing the value of the fund").

158. Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970) https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://archive.is/f1Nxh]; *see also* Dodge v. Ford Motor Co., 170 N.W. 669, 684 (1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders.").

159. Edward B. Rock, *Easterbrook and Fischel on Corporate Purpose*, 1 U. CHI. BUS. L. REV. 397, 401 (2022):

> The role of corporate law . . . is to adopt a background term that prevails unless varied by contract . . . . The [default] expectation is that the residual risk-bearers have contracted for a promise to

ERISA, for its part, requires the incorporation of risk minimization into that analysis.[160] If goals among individual shareholders differ from SWM, shareholders may contract around the default rule.[161] However, fiduciaries may not "surprise" shareholders with a sudden shift away from SWM.[162] If there are only a handful of shareholders, switching gears is less of an issue as shareholders will be more likely to reach a consensus on corporate purpose.[163] When shareholders are numerous, independent, and diverse, SWM is the only common interest fiduciaries can assume, even if SWM is not every shareholder's sole priority.[164]

While many investors would be happy to support social progress, "people hold diverse views on ESG issues," so it is difficult to represent all participants in a single, unified plan policy.[165] Corporate fiduciaries can assume shareholders are buying into the traditional purpose of a

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> maximize long-run profits of the firm, which in turn maximizes the value of their stock.

160. Schanzenbach & Sitkoff, *supra* note 15, at 425 (arguing that ERISA's duty of prudence "codifies risk management principles rooted in modern portfolio theory").

161. Rock, *Easterbrook and Fischel*, 1 U. CHI. BUS. L. REV. 397, 401 (2022).

162. *Id.* ("[E]quity investors holding a residual claim to profits, which the other participants promise to maximize—that is a binding promise.").

163. Sean Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 1009–10 (2020) (describing a common investor purpose as a necessity because of the difficulty in getting agreement on anything else).

164. *Id.* (describing the common investor purpose to maximize returns); Friedman, *supra* note 158:

> It may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government . . . . There is a strong temptation to rationalize these actions as an exercise of 'social responsibility.' In the present climate of opinion, with its widespread aversion to 'capitalism,' 'profits,' the 'soulless corporation' and so on, this is one way for a corporation to generate goodwill as a by-product of expenditures that are entirely justified in its own self-interest.

See also Sanjai Bhagat, *Stakeholders, Shareholders, and Purpose of the Corporation*, 17 J.L. ECON. & POL'Y 708, 717 (2022) ("[S]takeholderism [incorrectly] assumes that shareholder value maximization will have an adverse impact on the other stakeholders.").

165. Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L. J. 129, 154 (2021).

corporation—maximizing returns—in part because alternative programs exist to make the dollar do social good.[166] Those truly energized by an issue will engage in activism on their own accord.[167] Assuming SWM as the investor's common purpose restricts fiduciaries to a single, clear, and measurable goal that removes some subjectivity in evaluating performance.[168] Proponents of Friedman's position argued that sole social purpose of a company has always been to provide "goods and services for its customers."[169]

Although treating other stakeholders fairly and equitably may facilitate the firm's short and long term financial goals by encouraging stakeholders to transact with the company, its employees, suppliers, customers, and society at large are not the priority of a company's fiduciaries.[170] Likewise, many investors believe "companies should act in socially responsible ways, even if social responsibility cannot be captured on an income statement," and that some ESG policies are the best avenue to promote a company's long term financial interests.[171] Investors often believe socially responsible initiatives will result in increased return and reduced risk.[172] This has led to sustainable mutual funds seeing large investment inflows whereas the lowest rated funds have experienced large

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166. *See* Sanjai Bhagat & Glenn Hubbard, *Rule of Law, and Purpose of the Corporation*, CORP. GOVERNANCE: AN INT'L REV. 1, 16–18 (July 12, 2021). While a corporate executive "may feel compelled by his personal moral beliefs to donate to a social cause or avoid working in a sinful industry," these "social responsibilities" should be pursued using his own resources on his own time, not the shareholders'. Friedman, *supra* note 158. To the extent the pursuit of socially responsible actions reduces returns, raises prices, or lowers wages, the fiduciary is spending the shareholders', the customers', and employees' money. *Id.*

167. Wang, *supra* note 165, at 155.

168. Griffith, *supra* note 163, at 1010. Share price at the time of a merger is a less subjective measurement than whether a company was environmentally friendly. *Id.*

169. *Now Is the Time*, *supra* note 41, at 17.

170. *See* Bhagat & Hubbard, *supra* note 166, at 16. Liability for deviating from SWM has encouraged trust in the system that spurs future investments. *Id.* at 13. *Cf.* Wang *supra* note 165, at 142 ("[M]any commentators have sought to redefine the purpose of a company to encompass some form of corporate social responsibility or duty to stakeholders.").

171. *Id.* at 143.

172. Samuel M. Hartzmark & Abigail B. Sussman, *Do Investors Value Sustainability? A Natural Experiment Examining Ranking and Fund Flows* *5 (Eur. Corp. Governance Inst., Working Paper No. 565/2018, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016092 [https://perma.cc/F6TE-XEG8] (finding "a strong positive relation between globe ratings and expected future performance and a strong negative relation between globe ratings and expected riskiness").

outflows.[173] Despite the capital influx, some studies find "no consistent evidence that ESG ratings are positively related to long-term shareholder value."[174]

ERISA's exclusive benefit rule encapsulates the "common investor purpose" theory put forth by Professor Griffith.[175] While investors undoubtably are driven by their own personal, social, political, and financial motives, corporate directors, officers, institutional investors, and other fiduciaries can only assume a single motive shared across the investor class: they are here to make money.[176] And although ESG seems to capture headlines, almost two in three Americans respond as either being "not too familiar" or "not at all familiar" with what ESG means.[177] Likewise, "there is little consensus" on the relative importance and contents of each ESG letter.[178] Those who are familiar are split on whether ESG is worth pursuing, while there is at least a consensus that investors want a positive return.[179] The exclusive benefit rule, and ERISA's statutory purpose, reflect plan participants motivations for a stable retirement, which necessitates maximizing return while minimizing risk, not necessarily just maximizing return.[180] In turn, considering non-pecuniary benefits, even with participants wealth maximization in mind, contradicts ERISA's text.[181]

The sole interest rule binds fiduciaries to act in the interest of all plan participants, not just a small subsect or even a majority, such as a cohort

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173. *Id.* at *3. Investors were more focused on fund ratings "and largely ignored the more detailed sustainability information." *Id.*

174. Bhagat, *supra* note 164, at 709.

175. *See ESG Investing*, *supra* note 45, at 129 (citing Griffith, *supra* note 163, at 983–98.

176. Griffith, *supra* note 163, at 983–98 ("Shareholder wealth maximization is often posited or assumed not because it is the highest and best thing for real-life shareholders but because it is the most that can be assumed about shareholders as a class.").

177. Lydia Saad, *ESG Not Making Waves with American Public*, GALLUP (May 22, 2023), https://news.gallup.com/poll/506171/esg-not-making-waves-american-public.aspx [https://perma.cc/Z77Z-R2SJ].

178. Curtis et al., *supra* note 12, at 400.

179. Kahan & Rock, *supra* note 31, at 513 (focusing on the only discernible shared interest among shareholders "avoids all of the complex issues that arise in reconciling heterogeneous interests and preferences").

180. Fifth Third Bancorp, 573 U.S. 409, 421 (2014) (quoting § 1002(2)(A)) (defining "employee pension benefit plan" and "pension plan" to mean plans that provide employees with "retirement income" or other "deferral of income").

181. *ESG Investing*, *supra* note 41, at 129.

"who advocate[s] for an increased use of ESG investing."[182] The plurality of "participants and beneficiaries" in Section 1104 reinforces this notion.[183] And the statute's exclusive benefits language recognizes that all participants may have differing interests around and outside the margin of financial return.[184] Participants will likely be motivated in their personal investment decisions by their own interests and values, so the common law of trusts deals with this problem through the duty of impartiality.[185] Gary argues that the duty to "act impartially with respect to all participants and beneficiaries" is implied in ERISA.[186]

Professor Dana Muir argues, on the other hand, that *Dudenhoeffer*'s interpretation of the exclusive benefits rule is more expansive.[187] She suggests that the Court's reference to "financial benefits (*such as* retirement income)" uses retirement income as only one example of possible pecuniary *and* non-pecuniary benefits.[188] She adds that fiduciaries may consider participant preferences, such as ESG, if doing so will "empower and motivate participants to build greater retirement wealth."[189] This position recognizes that socially conscious investors derive what Posner and Langbein describe as "consumption value"—personal gratification from an investment not inherently tied to financial returns.[190] Gary also argues that non-pecuniary goals can be pursued if the investment is otherwise prudent.[191]

Read in the context of Section 1104, "benefits" is used in conjunction with "expenses," and in relation to payments made to participants and

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182. *Id.* at 113.

183. Langbein & Fischel, *supra* note 23, at 1159 (1988); *see also* 29 U.S.C. § 1104(a).

184. Langbein & Fischel, *supra* note 23, at 1159 ("[ERISA] does not assume, as it could not logically assume, that all participants and their beneficiaries will always have the same interests.").

185. *Id.* The Supreme Court read the duty of impartiality into ERISA in *Variety Corp. v. Howe*. 516 U.S. 489, 514–15 (1996) ("The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries.").

186. Gary, *supra* note 40, at 614.

187. Muir, *supra* note 80, at 77.

188. *Id.* at 74.

189. *Id.*

190. Langbein & Posner, *supra* note 44, at 94.

191. Gary, *supra* note 40, at 643–45 ("A pension fiduciary should not worry that considering non-financial information somehow taints the investment process. As long as investments are prudent, made in compliance with the prudent investor standard and the DOL guidance, the investments will comply with the fiduciary's duties.").

beneficiaries, suggesting benefits are monetary.[192] The narrow language suggests an ERISA trust is established to exclusively provide financial retirement benefits and not alternative objectives "which provide collateral or speculative 'benefits'. . . or appeal to the philosophical leanings of the plan sponsor" or third parties.[193] As a default, trusts are established to financially support and generate income solely for the beneficiary.[194]

While the sole interest rule does not impose liability for "incidental benefit[s] to third part[ies]," it does prohibit any investing "with the primary purpose of benefiting any [third] party," regardless of direct or indirect benefits to participants.[195] A common example is a union pension fund investing in companies that are union friendly.[196] Even if members benefit from a union-friendly business climate, the investment's primary purpose is geared towards promoting union strength, not the retirement plan's financial return.[197]

An investor who buys into an ESG fund has "presumably . . . balanced the possible financial costs of such a policy against" the consumption value that he derives from supporting the fund's social mission.[198] But many 401(k) and retirement plan investors have not weighed these risks and may lack an understanding of ESG's meaning.[199] Investors who understand ESG already allocate some of their personal portfolio to ESG funds.[200] The uncertainty in ESG's meaning has not stopped investors, of which 78% of plan participants believe social investing will yield superior financial returns.[201] As Easterbrook

192. Hutchinson & Cole, *supra* note 35, at 1370; *see also* 29 U.S.C. §§ 1002, 1104(a)(1)(A)(i)–(ii).

193. Hutchinson & Cole, *supra* note 35, at 1371.

194. Langbein & Posner, *supra* note 44, at 75.

195. Hutchinson & Cole, *supra* note 35, at 1360.

196. *See, e.g.*, *supra* note 34 and accompanying text.

197. *See, e.g.*, *supra* note 34 and accompanying text.

198. Langbein & Posner, *supra* note 44, at 74–75.

199. Muir, *supra* note 80, at 60. More than 75% of investors surveyed failed to correctly identify what ESG means. *Id.*

200. *Id.* at 62.

201. Curtis et al., *supra* note 12, at 399; *see also Schroder 2022 US Retirement Survey, ESG Report*, SCHRODERS (2022), https://mybrand.schroders.com/m/66957dca482684c2/original/2022_Schroders_US_Retirement_Survey_ESG_Rpt_FINAL.pdf [https://perma.cc/Q8M5-ZLTH] ("31% of 401(k) plan participants surveyed who knew their plan offered ESG options, nine out of ten invested in those options, and almost

explained in the corporate setting, a fiduciary shifting from a PWM purpose to a social purpose would breach the default contract between the fiduciary and participant.[202]

ERISA participants with little choice in either their investment menu or designated investment vehicle do not yield a consumption value if their values do not align with that of the socially conscious investor.[203] The average employee's occupational choices, Posner and Langbein argue, are not "materially influenced by his agreement or disagreement with the announced standards of the relevant pension fund managers."[204] A question remains as to the extent to which they are aware of these standards and policies before joining the team. Using plan assets to promote controversial positions will impose "disutility," the opposite of consumption value, on ERISA participants on the other end of the spectrum.[205]

Ordinary trust law allows beneficiaries to waive certain fiduciary duties, such as the sole interest rule, but waivers are not effective "in the multiparty setting."[206] One beneficiary cannot wield the trust to impair the rights of another beneficiary.[207] One could argue that, if *all* participants consented to social investing, then pursuing that objective aligns with the sole interest and exclusive benefit rule.[208] But doing so should require nothing less than a unanimous consensus among all current and future employees. Indeed, 87% of plan participants want investments that align with their values.[209] But what are their values, and is there unanimous consensus? 51% of the Schroder 2022 US Retirement Survey respondents would like to invest in companies that pay their employees a living wage; about 33% want to invest in companies that are fighting against climate change and for "human rights;" and about 25% want to invest in companies that support DEI.[210] While the survey suggests a sizable

three-quarters (73%) estimate they allocate 50% or more of their assets to socially responsible choices.").

202. Rock, *supra* note 159, at 401 and accompanying text.
203. Langbein & Posner, *supra* note 44, at 94–95.
204. *Id.* at 95.
205. *Id.*
206. Langbein & Posner, supra note 44, at 105.
207. *Id.*
208. Hutchinson & Cole, *supra* note 35, at n.127.
209. *Schroder 2022 US Retirement Survey, ESG Report*, *supra* note 201.
210. *Id.*

portion of participants support social investing, it does not tell us which side respondents fall on or which issues to prioritize.[211]

b. The Removal of Pecuniary/Non-Pecuniary Language and ERISA Duty of Prudence

Even if a fiduciary sufficiently pursues a risk-return ESG investment strategy, in compliance with ERISA's duties of loyalty, he still must meet the fiduciary duty of prudence.[212] While risk-return ESG investing can satisfy the duty of prudence, it does not necessarily do so.[213] The prudent investor rule does not mandate any particular strategy, including the use or avoidance of ESG factors, because no strategy is perpetually prudent.[214] As this section demonstrates, the effectiveness of ESG investing is mixed and leads to no clear answers.

In choosing one investment over another, the fiduciary "must reasonably conclude that the strategy will in fact provide better returns with the same or less risk."[215] Above market returns from one investment must offset any additional fees associated with the investing strategy compared to the forgone investment.[216] Incorporating financially relevant ESG-friendly factors into an investment decision must not come at the expense of the investment's relative "safety, return, diversification, or marketability in order to employ noninvestment considerations."[217]

Additionally, the duty of prudence extends to assembling investment menus.[218] While Section 1104(c) immunizes fiduciaries for participant decisions using a plan menu, the fiduciary is still responsible for assembling "an acceptable menu" using "generally accepted investment theories," and is not shielded from liability for "the imprudent design of the menu itself."[219]

It is not uncommon for socially responsible, active investing strategies—like green screening—to reduce diversification and have

211. *Id.*
212. Schanzenbach & Sitkoff, *supra* note 15, at 425.
213. *Id.*
214. *Id.* at 426.
215. *Id.*
216. *Now Is the Time*, *supra* note 41, at 26.
217. Hutchinson & Cole, *supra* note 35, 1345.
218. *Is Bitcoin Prudent*, *supra* note 32, at 522.
219. *Id.* at 522, 524; *see also* 29 C.F.R. § 2550.404c-1(d)(2)(iv) (2021).

higher administrative fees.[220] Section 1104 imposes several mandates, such as minimizing direct (admin fees) and indirect (non-diversified) costs, which Posner and Langbein explain creates a potential prudence conflict between *active* ESG investing and ERISA.[221] Fiduciaries cannot offset risk and fees with the non-monetary gain in consumption value.[222]

Even if an investment today is not objectively prudent, Zelinsky argues that an investment class may later become objectively prudent when it achieves "general acceptance" after a track record of stable success.[223] A prudent investment is not necessarily one that the fiduciary would make himself; each investor has his own degree of risk tolerance and personal values that factor into their personal investment decisions.[224] Zelinsky adds that fiduciaries should take a "participants' often minimal investment skills, shorter time horizons, and the small amounts they invest" into account before offering an investment vehicle that may adversely affect portfolio diversification.[225]

The evidence on whether ESG funds are inherently more financially viable than socially neutral funds is mixed. Proponents of ESG investing argue they can exceed "market rates of return" and "generate positive economic externalities" simultaneously.[226] It is possible for the market to either over value or under value different ESG factors if investors are drawn for reasons other than the investment's intrinsic value.[227] Schanzenbach and Sitkoff argue that G factors "have straightforward theoretical relationships to firm performance," but the extent G factors can be "reliably measured" is debated.[228] E and S factors may positively

220. Langbein & Posner, *supra* note 41, at 76 ("The usual forms of social investing involve a combination of reduced diversification and higher administrative costs.").

221. *Id.*

222. *Id.*

223. *Is Bitcoin Prudent*, *supra* note 32, at 532.

224. *Id.* at 541. Here highlights another difference between ERISA and trust law. *See, e.g.*, RESTATEMENT (SECOND) OF TR. § 227(a) (1959) (A trustee is "to make such investments and only such investments as a prudent man would make *of his own property* having in view the preservation of the estate and the amount and regularity of the income to be derived.").

225. *Is Bitcoin Prudent*, *supra* note 32, at 525. Participants may not appreciate "the benefits of diversification" and may take on excessive risk due to their inexperience, unless their menu is limited. *Id.* at 526.

226. *Id.* at 535.

227. Schanzenbach & Sitkoff, *supra* note 15, at 452.

228. *Id.* at 434 ("The entrenchment of management, executive compensation arrangements, and whether a firm has a controlling shareholder are familiar governance

affect a firm's value by identifying overlooked risks such as "weak internal controls, poor compliance records, or . . . political, regulatory, and litigation risks," or management quality.[229] Engaging in socially responsible activities to build goodwill may divert resources away from core business units. Despite concerns, ESG funds soundly beat the S&P 500, the benchmark for fund performance, in 2020.[230]

Eagle-eyed investors could profit from these arbitrage opportunities. Studies suggest that ESG funds "do not cost investors more than comparable funds in terms of higher fees, reduced returns, or diminished risk-adjusted performance."[231] Proponents also argue that "the links between ESG factors and financial performance are increasingly being recognized," so integrating ESG factors into investing is "permissible and is arguably required."[232]

Analysis of other studies, on the contrary, found that "there was a consistent cost to SRI" funds which reduced annualized returns by roughly 1% compared to non-SRI investments, often attributed to the higher administrative costs of actively managed funds.[233] ESG funds must "respond to changing ESG factors" leading to active management, and

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factors routinely considered by active investors . . . can have a significant effect on firm performance.").

229. Schanzenbach & Sitkoff, *supra* note 15, at 435. "Management quality [is] an important investment consideration that is hard to observe directly." *Id.* ("There is evidence that contrarian investment strategies, such as betting that the reduced share price of a firm that has had a run of bad publicity reflects an overreaction to the bad news, can produce excess risk-adjusted returns.").

230. Jon Hale, *Sustainable Equity Funds Outperform Traditional Peers in 2020*, MORNINGSTAR (Jan. 8, 2021), https://www.morningstar.com/funds/sustainable-equity-funds-outperform-traditional-peers-2020 [https://perma.cc/PES5-XJ2W].

231. Curtis et al., *supra* note 12, at 442. However, "these industry-level measurements are not substitutes for evaluating individual funds as suitable investment options." *Id.* at 446. *See also* RBC Global Asset Management, *Does Socially Responsible Investment Hurt Investment Returns?* 8 (2012), https://www.rbcgam.com/documents/en/articles/does-socially-responsible-investing-hurt-investment-returns.pdf [https://perma.cc/Z9XE-G6W9] (finding that SRI does not lead to lower investment returns). Rose, *supra* note 27, at 916 ("[T]he empirical evidence supports the theory that the impact on risk-adjusted returns of a carefully constructed, socially screened portfolio is zero.").

232. UNEP Finance Initiative, A Legal Framework for the Integration of Environmental, Social, and Governance Issues into Institutional Investment 13 (Oct. 2005).

233. Zachary Barker, *Socially Accountable Investing: Applying Gartenberg v. Merrill Lynch Asset Management's Fiduciary Standard to Socially Responsible Investment Funds*, 53 COLUM. J. L. & SOC. PROBS. 283, 303 (2020).

face "serious diversification costs" from screening asset classes.[234] Another study found that the lowest rated ESG funds outperformed the highest rated ESG funds.[235] ESG funds characterize ESG factors and valuation creation "as distinct rather than interrelated. . . even cautioning that financial performance may suffer as a result of incorporating ESG factors into the investment process."[236] The study also found "no evidence that ESG funds' portfolio firms outperform non-ESG funds' portfolio firms with respect to most of the measures of *stakeholder-centric* behavior."[237] Sharfman argues that much of ESG funds' success in recent years comes from portfolios overweighing of "healthcare and technology industries[,] the two best-performing sectors in the first part of 2020."[238] Some even argue that the recent success of ESG funds comes down to little more than luck.[239]

Proponents and investors in ESG funds, aside from earning a profit, aim to encourage companies to act in socially responsible ways by

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234. *Id.* at 302.

235. Hartzmark & Sussman, *supra* note 172, at 28 ("The point estimate on five globes is lower than that on one globe in each specification, suggesting the low sustainability funds outperformed high sustainability funds, though the weak statistical significance in some specifications is also consistent with a lack of a relation between globe ratings and performance."); *see also* Benjamin R. Auer & Frank Schuhmacher, *Do Socially (Ir)responsible Investments Pay? New Evidence from International ESG Data*, 59 Q. REV. ECON. & FIN. 51, 57–60 (2016); James R. Copland, et al., *Proxy Advisory Firms: Empirical Evidence and the Case for Reform* *5, MANHATTAN INST. (May 2018) (describing "a negative relationship between share value and public pension funds' social-issue shareholder-proposal activism.").

236. Aneesh Raghunandan & Shiva Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?* *2, REV. OF ACCT. STUD. (2022). The study also found "that ESG funds (i) obtain lower stock returns but (ii) charge higher management fees." *Id.* at *4.

237. *Id.*

238. *ESG Investing*, *supra* note 45, at 123; *see also* Elizabeth Demers et al., *ESG Didn't Immunize Stocks Against the COVID-19 Market Crash* (Aug. 27, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675920 [https://perma.cc/G4G9-XQ6E].

239. *ESG Investing*, *supra* note 45, at 123–24:

> 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.

incentivizing such conduct with capital.[240] In such case, participants can both earn non-monetary consumption value and influence boards to initiate social change.

Their efforts may be in vain, argues Rose, because "'boycotting a stock is unlikely to have any impact on its price, because the demand for a company's stock is almost perfectly elastic.'"[241] A perfectly elastic demand curve means that there will always be demand for any stock at a particular risk-return ratio.[242]

2. Tiebreaker Rule

The 2022 Rules' language replaced the 2020 Rules' "indistinguishable" requirement with one that only requires the fiduciary determine the two investments "equally serve the financial interests of the plan over the appropriate time horizon."[243] The rhetoric shifted from a strict prohibition with narrow exceptions to a generally open policy expands the ability of fiduciaries in mixed motive situations to claim two investments tied to pursue collateral benefits over PWM.[244] Looser language may encourage fiduciaries to seek out ties to engage in collateral benefits of ESG investing.[245]

With the number of factors that go into making a financial investment decision, it is questionable whether ties actually exist or the frequency of such.[246] The Freshfield Report, authored for the United Nations and which favors the tiebreaker rule, argues that situations requiring tiebreaker considerations "could be legitimate and might occur

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240. Langbein & Posner, *supra* note 44, at 74.

241. Rose, *supra* note 27, at 914 (citations omitted).

242. *Id.*

243. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73827 (Dec. 1, 2022) (codified as 29 C.F.R. § 2550).

244. Schanzenbach & Sitkoff, *supra* note 15, at 410.

245. Edward A. Zelinsky, Comment Letter on Proposed Rule Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights at *13, 86 Fed. Reg. 57272 (to be codified as 29 CFR § 2550.404a-1) (Nov. 30, 2021) [hereinafter Comment Letter].

246. Muir, *supra* note 80, at 77 ("Commenters are divided on the likelihood that tie-breakers actually exist.").

more frequently than anticipated."[247] On the contrary, the 2020 Rules took the position that tiebreakers "occur very rarely in practice, if at all."[248]

A lax approach to designating investments as ties may encourage fiduciaries to seek faux ties so they can consider collateral benefits.[249] Hutchinson and Cole argue that even highly comparable investments "may offer slight differences in probable risk, return, and diversification," making true ties rare.[250] In a comment to the 2022 Rule, Zelinsky argued that, even in the presence of ties, the "[DOL] should instead abolish the notion of tiebreaking altogether" as it subverts the mandated "exclusive concentration on participants' welfare."[251] Proponents suggest considering collateral benefits during ties does not harm participants' financial returns, as the two investments are by definition equal, while providing consumption value in accordance with participant preferences.

Assuming that ties exist, the debate begs the question of whether fiduciaries can invest while staying true to ERISA's duty of loyalty and prudence. Zelinsky says "better to flip a coin . . . [than to] introduce . . . considerations which, unconsciously or deliberately, can skew that process."[252] Whereas Muir argues that ERISA requires considering collateral benefits that could benefit participants, even if the benefit is not financial.[253]

3. QDIA

Regulation changes affecting QDIAs will affect passive participants who choose not to personalize their 401(k) portfolio. Proponents of the 2022 Rule's change to QDIA standards argue that aligning available investments with the values and preferences of prospective participants may encourage employees to enroll in their 401(k) plan and increase their

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247. *Id.*

248. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72879 (Nov. 13, 2020) (formerly codified in 29 C.F.R. § 2550).

249. Schanzenbach & Sitkoff, *supra* note 15, at 381 ("Given the inherent subjectivity in active investing, the risk and return attributes of a given investment will be highly contestable.").

250. Hutchinson & Cole, *supra* note 35, at 1367.

251. Comment Letter, *supra* note 245, at *13.

252. *The Continuing Battle*, supra note 117, at 204.

253. Muir, *supra* note 80, at 78 (arguing that considering collateral benefits is better "than a random action such as a coin flip"). "It is an unwarranted leap in tie-breaker situations to conclude that the duty of loyalty necessarily always precludes fiduciaries from considering any interests other than maximization of financial returns." *Id.*

plan contributions.[254] In turn, investing more and earlier will lead to a greater nest egg and more secure future.

Zelinsky argues for a paternalistic approach that "limit[s] alternative investments in the 401(k) context" to protect those he deems as unsophisticated participants who may be swayed to invest an oversized chunk of their portfolio into alternative investments, such as bitcoin, art, or ESG funds.[255] Ordinarily, an investor who does not like a stock can sell. However, in a 401(k) or comparable plan, doing so incurs tax penalties.[256] The average participant may rely on the fiduciary's recommended QDIA as the gold standard for his own retirement goals.[257] If the fiduciary considered ESG benefits to the detriment of future risk or diversification, the participant may be investing under the misimpressions that he and the fiduciary are both pursing PWM.[258] Likewise, given the diversity of opinion surrounding ESG, some participants will invariably experience disutility from socially responsible investing and it is unlikely that a QDIA can adequately capture all participants' social preferences.

4. Exercising Shareholder Rights

ERISA's fiduciary duties extend to the exercise of shareholder rights.[259] However, not all proxy votes affect firm value. Fund voting is

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254. *Id.* at 73.

255. *Is Bitcoin Prudent*, *supra* note 32, at 516.

256. Jen Glantz, *Not Contributing to your 401(k) Is a Big Mistake for 4 Reasons, According to Financial Planners*, BUS. INSIDER (Apr 14, 2022, 3:07 PM), https://www.businessinsider.com/personal-finance/reasons-mistake-skip-401k-contributions-2022-4#:~:text=You%20miss%20out%20on%20employer,from%20ever%20saving%20for%20retirement [https://perma.cc/R5W6-GUDW].

257. Field Assistance Bulletin No. 2018-1 (Apr. 23, 2018) ("Nothing in the QDIA regulation suggests that fiduciaries should choose QDIAs based on collateral public policy goals.").

258. *Id.* ("The decision to favor the fiduciary's own policy preferences in selecting an ESG-themed [QDIA] for a 401(k)-type plan without regard to possibly different or competing views of plan participants and beneficiaries would raise questions about the fiduciary's compliance with ERISA's duty of loyalty.").

259. Jayne Elizabeth Zanglein, *From Wall Street Walk to Wall Street Talk: The Changing Face of Corporate Governance*, 11 DEPAUL BUS. L.J. 43, 48 (1998). "A plan manager is allowed to engage with the management of a portfolio company but only if the engagement conforms to its fiduciary duties." Bernard S. Sharfman, *The Conflict*

often delegated to investment managers, which can then be outsourced to proxy advisory firms or kept in-house with internal stewardship teams.[260]

Even though investment advisors are not directly governed by ERISA, plan managers are and must thoroughly investigate each prospective investment advisor, including prior shareholder activism.[261] Prudence requires fiduciaries value shareholder activism during such investigation and determine whether the fund acts in the plan's interests.[262] Only if stewardship costs–potentially decreased return and administrative fees–are lower than potential upsides, would stewardship be prudent.[263] This "indirect approach" holds investment advisors accountable under ERISA, less they be fired.[264]

ESG shareholder proposals have historically received single-digit support, with only four proposals passing between 2006 and 2015, but have seen a significant increase in recent years.[265] While ESG investing and ESG voting are not necessarily linked,[266] commentators often spot noticeably different voting patterns between ESG and non-ESG funds; the former more frequently votes against management and in ways that align with their investing policy.[267]

Between BlackRock's Shareholder Activism and ERISA's Fiduciary Duties, 71 CASE W. RES. 1241, 1262 (2021) [hereinafter *The Conflict*].
at 1262.

260. Griffith, *supra* note 163, at 1001.

261. *The Conflict*, *supra* note 259, at 1247.

262. *Id.* at 1264 ("The investment adviser's shareholder activism must be investigated for its potential to financially harm or benefit the plan.").

263. *Id.* at 1265–66 ("Shareholder activism implicates the potential for increased principal competence or conflict costs while at the same time signaling the potential for reduced agent competence or conflict costs.").

264. *Id.* at 1247.

265. Wang, *supra* note 165, at 132 ("Within Fortune 250 companies, two ESG shareholder proposals passed in 2016, three in 2017, five in 2018, three in 2019, seven in 2020, and an astounding twenty-one thus far in 2021.").

266. Schanzenbach & Sitkoff, *supra* note 15, at 431 ("There need not be a conceptual connection between an ESG stock selection strategy and an ESG voting strategy. An ESG index fund may select stocks based on an ESG index, but the fund's investment advisor may apply uniform voting policies . . . [that] may or may not reflect ESG considerations.").

267. *Id.* at 408, 432. "A fund that screens investments based on their carbon footprint . . . might also support shareholder proposals that seek to address climate change" whereas a fund that screens out companies in the alcohol industry would not seek related proxy votes. Curtis et al., *supra* note 12, at 432.

Shareholder activism can be financially beneficial, just like ESG factors can contribute to financial growth, if applied correctly.[268] A fund would act prudently by exclusively considering financially relevant factors in its engagement with management and proxies.[269] Of the three letters, G proposals are more clearly related to firm performance.[270] Unlike E or S proposals, voters in governance proposals are all seeking the same outcome: a governance structure that will maximize short- and long-term returns.[271] G proposals present a clearer path for funds to pursue their PWM purpose.

Proponents of ESG investing argue that pursuing social policies, including at the proxy ballot, will attract new clients who otherwise would not have set up a 401(k), or encourage existing participants to invest more, leading to greater net returns by retirement without affecting rate of return.[272] Additionally, taking a "socially responsible" position may help keep the investment industry off the radar and reduce the likelihood of future governmental regulations.[273]

Others argue that ERISA's fiduciary duties "require that, in voting proxies," fiduciaries only consider factors related "to the economic value of a plan's investment" in the pursuance of PWM.[274] However, the 2022 Rule's ESG-friendly rhetoric creates a complexity in judging whether a fiduciary considered ESG factors for its risk-return benefits because these factors are often pursued for other non-pecuniary objectives.[275] An

268. Zanglein, *supra* note 259, at 69–70. Forty-two companies tracked for five years while "CalPERS was actively involved in corporate governance . . . 'beat the S&P 500 by 41 percent—while in the prior five years the same companies underperformed the S&P 500 by 66 percent.'" *Id.* Another study "concluded that companies on the Council of Institutional Investors' focus list of poor performing companies, 'experienced improvements in operating profitability and share returns' in the post-listing period." *Id.*

269. *Now Is the Time*, *supra* note 41, at 27.

270. Griffith, *supra* note 163, at 990 ("Governance issues are distinguishable from both contests and from environmental and social proposals.").

271. *Id.* Despite the difference in means, "mutual funds can assume a common investor purpose with respect to governance"—maximizing participant wealth and income. *Id.*

272. *Id.* at 1015.

273. *Id.*

274. *Now Is the Time*, *supra* note 41, at 5; *see also* Dorothy Shapiro Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 527 (2018).

275. *Id. Now Is the Time*, *supra* note 41, at 6 ("This complexity is enhanced by ESG objectives and factors being extremely subjective and easily conflated, creating additional risk.").

ERISA fiduciary who selects a fund that considers third party interests—such as stakeholders'—may face a conflict of interest between pursuing the participant interests and stakeholder interests.[276] Voting on non-pecuniary, financially neutral matters could likewise be motivated by a fiduciary's personal views, his public image, or to further a social interest.[277]

Stewardship teams of institutional investors may not be sufficiently staffed to properly inform themselves on all proxy matters that come their way.[278] The costs associated with getting a stewardship team sufficiently staffed and decreasing its informational barrier would be passed along to the participant. ERISA requires fiduciaries to be cognizant of high administrative fees.[279]Sharfman explains that they often outsource voting decisions to proxy advisors, such as ISS and Glass Lewis, who are known for embracing ESG stewardship.[280] The proxy advisors are statutorily excluded from ERISA's fiduciary duties.[281] Institutional investors may not be well suited to steer social policy in a corporation.[282] Funds that take on this risk and additional cost for a portion of the returns are inappropriate options for the QDIA.[283]

The DOL's current position to vigorously encourages managers to vote plan shares may encourage more fund managers to exercise plan rights in financially irrelevant proxies.[284] While the SEC requires funds to

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276. Chaffee, *supra* note 98, at 1299. "The pervasive potential for conflicts of interests is yet another reason why one should be reluctant to deprive some shareholders of voting rights because their incentives to cast an informed vote are lower than those of other shareholders." Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders*, 100 B.U. L. REV. 1771, 1813 (2020).

277. Griffith, *supra* note 163, at 1039.

278. Lund, *supra* note 274, at 515 ("It would not be possible for teams of that size to prepare corporate governance reports, issue and evaluate governance guidelines, research and thoughtfully vote proxies, and also meet with management and the board.").

279. 29 U.S.C. § 1104(a)(1)(A)(ii).

280. *See id.*; *see also* Lund, *supra* note 274, at 517.

281. *Now Is the Time*, *supra* note 41, at 3.

282. *ESG Investing*, *supra* note 45, at 117 ("The management of these [stakeholder] 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.").

283. Lund, *supra* note 274, at 529 ("Investors who cared about governance could choose a certified fund and pay a higher fee to support its governance efforts. Other investors who wanted nothing more than stable returns could invest in truly passive funds, without fear.").

284. Griffith, *supra* note 163, at 996.

vote proxies in the best interest of its clients, disclose all voting policies and its voting record to clients, and does not "require mutual funds to vote,"[285] these beneficiary protections are not present in the 2022 Rule, even though doing so is required under trust common law.[286]

B. THE MAJOR QUESTIONS DOCTRINE

If a major question was present, the court would need to find a clear statement from the statute delegating the agency to make the policy shift.[287] The DOL bases its authority to promulgate the 2022 Rule under Section 1135 of ERISA, which permits the Secretary of Labor to "define accounting, technical and trade terms used in" the statute.[288] Under the major questions doctrine, the court would need to find that the enabling statute permits such change in policy.[289]

In a footnote, Judge Kacsmaryk of the Northern District of Texas rejected plaintiffs' claims that the 2022 Rule answered a major question reserved to Congress, opting instead to apply Chevron Deference.[290] Judge Kacsmaryk found that the 2022 Rule's changes are neither a major question, nor were the changes a significant deviation from ERISA.

First, the court argued that neither ERISA nor Congress has contemplated the possibility of an investment "tie," and that the DOL's interpretation, which read-in an avenue for collateral ESG investing, is "reasonable" under Chevron step two.[291] The court relied on a history of

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285. *Id.* at 999–1000; *see also* Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, 68 Fed. Reg. 6564 (Feb. 7, 2003).

286. "The duty of prudence requires a trustee to maintain adequate records of 'the administration of the trust,' documenting important decisions and the reasons." Schanzenbach & Sitkoff, *supra* note 15, at 429 (citing 3 RESTATEMENT (THIRD) OF TR. § 83)).

287. *See supra* Part I.D.

288. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73855 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550).

289. West Virginia v. EPA, 597 U.S. 697, 723 (2022). ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'") (citation omitted).

290. Utah v. Walsh, 2:23-CV-016-Z, 2023 WL 6205926, at *4 n.3 (N.D. Tex. Sept. 21, 2023) ("the history and the breadth of". . . [the agency's authority] "does not provide a 'reason to hesitate before concluding that Congress meant to confer such authority.") (citations omitted).

291. *Id.* at *4–5.

non-binding interpretive bulletins to establish a nearly 30 year history of the DOL embracing the tiebreaker rule.[292] Second, the court cites the 2020 Rules, which state that risk-return ESG investing may be permissible, or even required, under ERISA to maximize a participant's return, concluding that "the 2022 Rule changes little in substance from the 2020 Rule[s]."[293] The court argued that the 2022 Rule solidified agency neutrality on whether plans should consider ESG factors relevant to a plan's financial return, and unambiguously does not create a mandate to consider or reject ESG factors.[294] The claim that the 2022 Rule changes little in substance is bolstered by the 2020 Rules' acknowledgement that ERISA does not prohibit risk-return ESG investing and that it maintained the tiebreaker rule.

Subsequent acts may be informative of the present statute's meaning when "Congress has spoken subsequently and more specifically to the topic at hand."[295] In *West Virginia*, the Court found it compelling that Congress "conspicuously and repeatedly declined to enact" a policy similar to the one passed by the EPA.[296] On the eve of ERISA's passage, Congress rejected four provisions that would have codified SRI investing alternatives; Congress again, in 2023, acted to reverse the 2022 Rule, only to be overridden by a presidential veto.[297] The court failed to cite any

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292. *Id.* at n.3 (The "DOL stated in 2008 that fiduciaries may 'rely on factors outside the economic interests of the plan in making investment choices.'"). The Court also cites 2015 interpretive bulletins. *Id.*

293. *Id.* at *4 ("[W]hile Plaintiffs aver that the 2022 changes loosen restrictions on fiduciaries, there is little meaningful daylight between 'equally serve' and 'unable to distinguish.'"). "The [2022] Rule also explains that fiduciaries remain free 'to determine that an ESG-focused investment is not in fact prudent,'" while adhering to the requirements of risk-return analysis. *Id.*

294. *Id.* at *5.

295. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

296. West Virginia v. EPA, 597 U.S. 697, 724 (2022).

297. Hutchinson & Cole, *supra* note 35, at 1366–67 ("In light of these congressional responses to specific proposals for social investing, it appears inappropriate to stretch the 'solely in the interest' language of section 404(a)."). President Biden vetoed a bipartisan Congressional effort to reverse the 2022 Rule. Justin Haskins, *Biden's First Veto Could Make Your Retirement Account Go Woke. Here Are 5 Steps to Protect Your Savings*, FOX NEWS (Mar. 30, 2023, 2:00 AM), https://www.foxnews.com/opinion/biden-first-veto-could-make-your-retirement-account-woke-here-5-steps-protect-savings [https://perma.cc/LF58-D6HT].

NPRM regulations older than 2020 that both took the same interpretive position as the 2022 Rule and carried the force of law.[298]

The rule itself was promulgated under the auspices of a climate change executive order, making the 2022 Rule, in effect, a national climate policy, not an effort to protect seniors' retirement plans.[299] Such move skirts the legislative process by using ERISA to accomplish non-ERISA policy goals.

By adopting looser language in the 2022 Rule, the DOL effectively shifted the standards of ERISA from the most stringent "sole interest" rule down to the "best interest" rule. The best interest rule is measured under the entire fairness doctrine which effectively eliminates statutory protections for improper motives under the sole interest rule.[300] In his comment to the 2022 Rule, Zelinsky argues that the "one-sided examples" in the proposal biases fiduciaries who look to the rule for guidance.[301] And by tempting fiduciaries with arguably non-pecuniary considerations, the 2022 Rule "introduces into the fiduciary decision making process extraneous considerations best left aside."[302] The 2022 Rule adds a metaphorical asterisk to Section 1104, loosening the effect of its extremely strict language, namely solely and exclusively, by permitting the creeping in of collateral motives.[303] Recentering the discussion of retirement benefits away from pecuniary benefits and towards the extent

298. *See generally* Utah v. Walsh, No. 2:23-CV-016-Z, 2023 WL 6205926 (N.D. Tex. Sept. 21, 2023).

299. Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

300. While "the best interest rule need not preclude sustainable investment strategies," ERISA's sole interest rule is "incompatible with sustainable investment strategies to the extent that social or environmental investment objectives look also at the interests of third parties . . . or involve purposes that may go beyond financial benefits." Felix E. Mezzanotte, *Recent Law Reforms in EU Sustainable Finance: Regulating Sustainability Risk and Sustainable Investments*, 11 AM. U. BUS. L. REV. 215, 265–66 (2023). Under a best interest approach, if the duty of prudence "was met, it would not matter whether or not the purpose of investment partially contained nonfinancial features, or whether or not the interest of society or of any other third-party group were also influenced by the investment." *Id.* at 266. While violations of ERISA's duty of loyalty would trigger "an irrebuttable presumption of wrongdoing," transactions under the best interest rule only have to be prudent and entirely fair to all those involved. *Id.* at 265.

301. *Comment Letter*, *supra* note 245, at *2.

302. *The Continuing Battle*, *supra* note 117, at 204.

303. *Id.* (this Note argues that Zelinsky's criticisms of the 1994 tiebreaker rule are applicable to the 2022 Rule's iteration of the tiebreaker rule).

to which ESG factors may be considered potentially adds a secondary purpose to ERISA not contemplated by the text.

III. REEMPLOYING THE 2020 RULE, RETIRING THE TIEBREAKER RULE, AND THE MAJOR QUESTION GETS ANSWERED

In recognition of ERISA's unwaivable incorporation of trust common law, this Note argues that the DOL's 2022 Rule is inconsistent with ERISA's text. It further argues that while risk-return ESG investing does not necessarily breach ERISA's fiduciary duties, consideration of ESG factors for their status as such does. Likewise, because incorporating ESG into retirement plans is a contentious economic and political issue, any rule that purports otherwise usurps congressional power and warrants examination under the major questions doctrine.

A. ERISA'S FIDUCIARY DUTIES

The 2020 Rules reinforced the "bedrock principle of ERISA," that "plan fiduciaries . . . must focus solely on the plan's financial risks and returns and keep the interests of plan participants . . . paramount."[304] This Note argues that the language in the 2020 Rules, without the tiebreaker rule, should be reinstated to emphasize adherence to the statute's text.

1. Adding Back the Pecuniary/Non-Pecuniary Language

The pecuniary and non-pecuniary language should be reinstated because a pecuniary driven investing strategy is in line with participants' common investor purpose whereas non-pecuniary investments, like ESG, do not have a sufficiently long track record of success to be deemed objectively prudent.

ESG investing strategies that prioritize a social good over financial return are inconsistent with ERISA,[305] and strategies that consider ESG

304. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72848 (Nov. 13, 2020) (formerly codified in 29 C.F.R. § 2550).

305. Schanzenbach & Sitkoff, *supra* note 15, at 412. Motivations for such investments are the determining factor. *Id. Cf.* Rory Sullivan et al., *Fiduciary Duty in the 21st Century* 9 (2015) ("Failing to consider long-term investment value drivers, which include

factors for its financial relevance "must be regularly . . . updated as circumstances change" because investing strategies may not remain prudent indefinitely.[306] Re-incorporating pecuniary/non-pecuniary language into DOL regulations would ground future investment decisions around these fiduciary duties. Few traditional investors would argue against a financially wise, ESG approved, investment.[307] Investing plan assets in ESG funds, under Schanzenbach and Sitkoff's risk-return ESG strategy, requires two assumptions to be met: 1) the investment decision was made solely for its financial prowess, not the collateral benefits, and 2) the ESG investment is objectively prudent.[308] If either assumption is not met, the fiduciary risks violating his fiduciary duties.

a. The Duty of Loyalty Requires a Single Focus on the Participant's Financial Interests

ERISA's two pronged duty of loyalty ensures that the fiduciary only considers factors relevant to a plan's financial return and that a factor's inclusion is done specifically for financial gain, and not some abstract social benefit.[309] The practical ramifications of ERISA's exclusive benefit rule is that plan fiduciaries may not consider collateral or non-pecuniary benefits when making an investment decision, whether that is selecting investments or exercising shareholder rights.[310] Even mixed motives, where wealth maximization is the trustee's primary purpose, does not get a pass under the sole interest rule because doing so is not acting with an eye *solely* to wealth and income maximization, *ex ante*.[311] However, the statute does not fault the fiduciary if third parties unintendedly benefit from an otherwise permissible investment, so long as third party interests were not at all considered.[312]

ERISA's unwaivable fiduciary duties were put in for good measure. Consensus on financial performance is a simple, binary question—

environmental, social and governance issues, in investment practice is a failure of fiduciary duty.").

306. Schanzenbach & Sitkoff, *supra* note 15, at 386.

307. *See 2023 401(k) Participant Study*, *supra* note 1 (noting that 55% of respondents want investments that align with their values).

308. Schanzenbach & Sitkoff, *supra* note 15, at 406.

309. *Id.*

310. *Id.* at 405.

311. *Id.*

312. *Now Is the Time*, *supra* note 41, at 43.

investors want the line to go up—however, consensus on ESG matters becomes more complex as participants would not only need to align on both ESG issue prioritization *and* its position on such issue. Surveys tell fiduciaries little about which specific positions participants hold on open ended questions of social policy.[313] Unveiling the nuanced positions of participants takes time, resources, and money, and will be passed along to participants as higher fees or reduced return.[314] ERISA's impartial approach to participant preferences focuses exclusively on the one benefit at the core of ERISA's statutory purpose: making more money for retirement.[315] ERISA's un-waivable fiduciary duties protects current and *future* employees against super majorities of current participants shifting the purpose of a plan away from PWM.[316] Without such provision, new participants may have to buy into a program that subordinates financial return or forfeits the incentives of employment-base retirement plans.[317] Almost half of participants are unaware of what investments comprise their retirement plan,[318] so this Note recommends adherence to stricter

313. *Compare Schroder 2022 US Retirement Survey, ESG Report*, *supra* note 201 (survey describing the issues participants would like their retirement assets to support but not stating what it means to support each issue) *with* Saad, *supra* note 177 (survey describing the disagreement among investors of whether companies should support ESG initiatives).

314. Langbein & Posner, *supra* note 44, at 93–94 (describing "research," along with transaction costs and reduced diversification, as costs borne against an active trading fund's net return for participants). Low management fees often follow passive investing. *Id.* at 83.

315. *Id.* at 105; *Now Is the Time*, *supra* note 41, at 14:

> From a practical perspective, it appears that this [common investor purpose] is the only way to approach the management of an ERISA plan without violating a plan manager's fiduciary duties.

316. *See supra* Part II.

317. Langbein & Posner, *supra* note 44, at 75 ("A legal issue arises only when the investor or investment beneficiary has not consented to a decision by the investment manager to subordinate the investor's financial welfare to other objectives."). Without a unanimous consensus among participants, beneficiaries would have their interests subverted. *Id.* at 95 (arguing that employment decisions are not "materially influenced by his agreement or disagreement with the announced standards of the relevant pension fund managers").

318. Greg Iacurci, *46% of 401(k) Investors Are Clueless About Their Investments, CNBC Survey Finds. That's Not Always Bad*, CNBC (Sept. 7, 2023, 9:35 AM), https://www.cnbc.com/2023/09/07/almost-half-of-401k-investors-clueless-about-their-investments-cnbc.html [https://perma.cc/B5CJ-FATK].

duties of loyalty for participant protection. And while the duty of loyalty was implemented to avoid the necessity of monitoring, reintegrating the robust documentation requirements of the 2020 Rules will further deter floating outside ERISA's permitted boundaries because participants will have the tools to hold fiduciaries accountable.

Positive aspects of social investing—maximizing participant consumption value of some—are accompanied by disutility for others, so fiduciaries should adopt a socially impartial investing strategy—like PWM—that minimizes the friction between competing non-pecuniary interests among participants.[319] By taking a controversial position to gain clients who support the policy, Wang argues there is a competing "risk [of] losing *other* clients who are unwilling to support the special interest."[320] ESG investors are not motivated exclusively by investment returns; they seek the "double bottom line" from the "social dividend,"[321] but those benefits can be gained on a participant's own time. This author believes that acting impartially to conflicting interests requires the fiduciary to focus on the common investor purpose that unites participants.

b. ERISA's Duty of Prudence Requires a Risk-Adverse Investing Strategy

Active ESG investing for its collateral benefits passes additional costs and diminished returns onto plan participants, lacks a track record of beating the market that would make it objectively prudent, and is ineffective at promulgating its intended social change. An argument can be made for more paternalistic protections for golden years investments. If safeguards against non-pecuniary investing are removed, we cannot be sure that unsophisticated participants will contemplate the benefits of a well-diversified, cost-minimizing plan.[322]

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319. Langbein & Posner, *supra* note 44, at 94.

320. Wang, *supra* note 165, at 157.

321. Barker, *supra* note 233, at 297. Financial returns are still one of their driving factors. *Id.*

322. *Is Bitcoin Prudent*, *supra* note 32, at 526 ("The consensus among commentators follows these lines: Many, if not most, 401(k) participants invest poorly."). "We can be less certain that unsophisticated 401(k) participants, when confronted with the same non-diversified investment alternative, will build overall properly diversified portfolios." *Id.* at 522.

Just as mandating corporate disclosures of CSR information can "influence firms' CSR activities and policies," explicitly permitting consideration of financially relevant ESG considerations could nudge ERISA fiduciaries to adopt broader ESG investment policies.[323] For example, new ESG disclosure requirements proposed by the SEC suggest that the government's nudge towards encouraging institutional investors to consider ESG factors is accelerating.[324] The SEC recognized that "the proposed rules may prompt some funds to change their current investment strategies and investment implementation practices" and that compliance costs associated with disclosures are passed along to investors.[325] It stands to reason that regulations which explicitly permit the consideration of ESG factors and remove documentation requirements may have a similar effect on ERISA fiduciaries. By singling out ESG factors as a potential source of prudent considerations in line with participant interests, the DOL will likely encourage more plan fiduciaries to incorporate ESG funds into its menu or as the QDIA, or scale back investments that misalign with conventional ESG designations.[326]

Collateral benefits investing violates ERISA's mandate to minimize direct and indirect costs. In addition to costs associated with active trading and reduced diversification, ESG funds may overvalue or undervalue certain sectors.[327] Cost-bearing active investing common in ESG funds

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323. Hans Bonde Christensen et al., *Economic Analysis of Widespread Adoption of CSR and Sustainability Reporting Standards*, SUSTAINABILITY ACCT. STANDARDS BD. 3 (Nov. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315673 [https://perma.cc/3A42-4GHT] ("Corporate disclosures can have real effects, that is, lead to changes in corporate behavior, including changes in CSR activities. Such real effects are particularly relevant in a CSR context, as the goal of CSR reporting could be to influence firms' CSR activities and policies.").

324. *See generally Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices*, 87 Fed. Reg. 36654 (proposed June 17, 2022) (to be codified at 17 C.F.R. pts. 200, 230, 232, 239, 249, 274, 279). The proposal aims to "require additional specific disclosure requirements regarding ESG strategies" in disclosure statements. *Id.* at 36659.

325. *Id.* at 36710.

326. Christensen, *supra* note 323, at 8 (2018) ("The literature suggests that firms generally respond to CSR reporting requirements by expanding and adjusting their CSR activities.") "[S]ome firms likely respond to a CSR reporting mandate by adjusting and reducing activities in highly sensitive CSR areas or even exiting certain markets. . . . it is possible that some firms scale back or disinvest activities that are more peripheral." *Id.*

327. Schanzenbach & Sitkoff, *supra* note 15, at 428 (ESG investing "entail investigation and analysis expenses and tend to increase general transaction costs . . . [which] reduce[s] diversification by narrowing the range of the portfolio's holdings or overweighting certain holdings").

can only improve a portfolio's risk-return matrix "if those [ESG] factors are not already reflected by market prices."[328] Fiduciaries can assume the efficient market already incorporates financially relevant ESG factors into its pricing, so investors are paying a premium for active trading on information that cannot be used to arbitrage a pricing advantage.[329] As a general rule, funds that employ active stock selection and screening tactics do no better than buying and holding a market index.[330] Active funds that incorporate screening strategies are also "likely employing collateral benefits ESG," and may underweight stocks with long, consistent histories of growth and predictable risk, while increasing the fund's unsystematic risk by overweighing emerging or green companies.[331] If demand for certain green companies is not driven by their intrinsic value, prudence may require the investment in socially *ir*responsible investments, if the fiduciary reasonably believes that firms with low ESG scores are presently undervalued.[332]

Even if a particular ESG asset is prudent, professor Zelinsky argues that "ESG assets as a class are not an objectively prudent" investment and should not be includable in investment menus.[333] Investment menus, he states, should be comprised of investment classes that have been "sufficiently accepted in the defined benefit context to be [] objectively prudent."[334] Funds like Bitcoin, fine art, and ESG ETFs have not been wholly embraced by the investment community and should not be options in a plan menu.[335] "If economically targeted investments yield . . . market rates of return," then "encouraging such investments is unnecessary since

328. *Id.* at 437 ("A relationship between ESG factors and firm value is a necessary but not sufficient condition for a profitable ESG active investment strategy.").

329. Fifth Third Bancorp, 573 U.S. 409, 427 (2014) (internal citations omitted) ("[A] fiduciary usually 'is not imprudent to assume that a major stock market . . . provides the best estimate of the value of the stocks traded on it.'").

330. Langbein & Posner, *supra* note 41, at 82 ("[S]tudies show that there are almost no consistently successful mutual funds.").

331. *ESG Investing*, *supra* note 45, at 120. "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 [because] the fund did not invest in Amazon." *Id.*

332. Schanzenbach & Sitkoff, *supra* note 15, at 452 ("[P]erhaps because the market has overreacted to high ESG scores").

333. *Is Bitcoin Prudent*, *supra* note 32, at 534.

334. *Id.* at 515.

335. *See generally id.*

normal market forces will allocate capital to such investments."[336] If correlations between ESG policies and firm performance are causal, ERISA fiduciaries still must determine whether the financially beneficial effects can be captured by investors for profit or if it's already baked into the efficient market.[337] However, studies are inconclusive on whether ESG indicators are financially relevant and significant.[338] When dealing with people's retirements, mixed results are not good enough. This debate should be periodically revisited if and when ESG funds secure a durable track record of low risk and strong returns.

Regardless of a company's negative externalities, the demand for a forgone, non-ESG investment at a given risk return rate is perfectly elastic.[339] So long as the risk-adjusted return of that company's stock is desirable, another investor in the market for a stock matching that matrix will purchase the security.[340] SRI campaigns and policies rarely achieve the broad societal change they seek, proving to be more of a PR strategy than a catalyst for change.[341] In other words, the metaphysical consumption value some investors seek may not often materialize and should not be afforded weight in ERISA investment decisions.

2. *The Tiebreaker Rule Is Incompatible with ERISA*

The 2020 Rules' tiebreaker rule implemented public accountability as substitutes for monitoring where fiduciaries had to document their use of non-pecuniary factors and justify their considerations in terms of ERISA's PWM goals.[342] While the 2020 Rules' language is preferable to

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336. Edward A. Zelinsky, *Economically Targeted Investments: A Critical Analysis*, 6 KAN. J. L. & PUB. POL'Y 39, 39 (1997). "If . . . the ETI label is used to justify noncompetitive investments, the economic security of current and future retirees is jeopardized by the ETI program." *Id.*

337. Schanzenbach & Sitkoff, *supra* note 15, at 390–91. Such a market play would require the fiduciary to know something about an ESG factor not already known by the rest of the professional investing industry; considering market price incorporation of public information is near instantaneous, this will require substantial research at a high cost to participants.

338. *See infra* Part II.A.2.

339. Bhagat, *supra* note 164, at 709.

340. *Is Bitcoin Prudent*, *supra* note 32, at 535.

341. Rose, *supra* note 27, at 916 ("The evidence from certain SRI efforts in past decades, such as boycotts, shows poor results.").

342. Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72846, 72851 (Nov. 13, 2020) (formerly codified in 29 C.F.R. § 2550). The language is phrased to "prevent fiduciaries from improperly finding economic equivalence." *Id.*

the current iteration, the tiebreaker rule is inconsistent with ERISA. The documentation requirement put fiduciaries on notice that participants could easily monitor their conduct and framed the range of permissible non-pecuniary factors into very limited circumstances.[343] While there may be the exceptionally rare occurrences where, in spite of every possible factor, two investments are truly indistinguishable, the duty of prudence already provides an answer: invest in both to achieve an optimally diversified portfolio.[344] No coin flipping is required, nor would a tiebreaker rule be necessary.

The 2022 Rule's less restrictive tiebreaker language "invites a fiduciary who wants to pursue collateral benefits to declare a tie to relieve himself of his obligation of loyalty to the plan's participants," which may "nudge[] [fiduciaries] to find ties among investment alternatives so that they can pursue third party benefits as the tie-breaking consideration."[345]

Sharfman argues the tiebreaker rule "creates a safe harbor for collateral benefits of ESG to enter the investment portfolio of an ERISA plan."[346] Even in the event of a true tie, a codified tiebreaker rule may lead investors to question whether the tie was artificial.[347] Without strict safeguards and the documentation requirement, the burden of monitoring the fiduciary shifts back to participants who are ill-equipped for such undertaking without the documentation requirement removed in the 2022 Rule. Trust law's calls for fiduciaries to document their decision making

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343. Easterbrook & Fischel, *supra* note 26, at 700–03 and accompanying text; see also; Gary, *supra* note 40, at 634 (the 2020 Rules' "documentation requirement may chill consideration of climate change and other ESG factors").

344. Schanzenbach & Sitkoff, *supra* note 15, at 409:

> If two investments in fact have identical risk and return attributes, textbook financial economics teaches that . . . the investor should invest in both on diversification grounds . . . . [A] joint investment improves diversification and thereby reduces overall portfolio risk without a loss in the portfolio's expected return.

345. *Comment Letter*, *supra* note 245, at 13–14.

346. *ESG Investing*, *supra* note 45, at 130.

347. *See, e.g.*, Hutchinson & Cole, *supra* note 35, at 1368. "[T]he fiduciary may not be able to demonstrate that the socially sensitive policy followed was intended to benefit the interests of the beneficiaries, rather than to vindicate his own interests or views." *Id.*

process,[348] and strong fiduciary duties were codified because of the difficulty of participant monitoring and a history of pension trustees pursuing dual interests under the guise of participant benefits.[349] Strictly limiting the pool of considerations to pecuniary factors, by eliminating the tiebreaker rule, may limit the potential creep of objectives unrelated to the common goal of participants.[350] Without it, fiduciaries would have fewer opportunities to introduce non-pecuniary objectives and benefits.

3. QDIA as a Market Fund Default

In a plan's menu, the QDIA should, when compared to other options, be invested using a risk-conservative and generally accepted investment theory.[351] It should be the market itself; an index fund tracking the S&P 500.[352] As most participants inactively manage their retirement funds, if at all, the QDIA should be a consistent, predictable, and diversified investment with no unnecessary risks or alternative motives other than

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348. Schanzenbach & Sitkoff, *supra* note 15, at 429 (citing 3 RESTATEMENT (THIRD) OF TR. § 83) ("[T]he duty of prudence requires a trustee to maintain adequate records of 'the administration of the trust,' documenting important decisions and the reasons.").

349. *ESG Investing*, *supra* note 45, at 131; *supra* note 34 and accompanying text.

350. Amir Amel-Zadeh & George Serafeim, *Why and How Investors Use ESG Information*, FIN. ANALYSTS J. 91–92 (2018) (22% of investment professionals do not consider ESG factors because they believe doing so violates their fiduciary duties); *see also* Hutchinson & Cole, *supra* note 35, at 1367:

> Once noneconomic considerations are permitted entry into the analysis, there is a real danger that the fiduciary will be tempted to choose one investment on the basis of its perceived general utility to the community rather than to refine further the comparison of financial characteristics to determine whether there is actual equivalence between the investments.

See also Schanzenbach & Sitkoff, *supra* note 15, at 408 ("With respect to law, the tiebreaker is irreconcilable with the strict 'sole interest' or 'exclusive benefit' rule.").

351. *Is Bitcoin Prudent*, *supra* note 32, at 524 (arguing that QDIA investments should be both risk-conservative and generally accepted).

352. Stefan Walters, *Is the S&P 500 All You Need to Retire a Millionaire?*, THE MOTLEY FOOL (May 27, 2023, 5:23 AM), https://www.fool.com/retirement/2023/05/27/is-the-sp-500-all-you-need-to-retire-a-millionaire/ [https://perma.cc/KV93-M77M] (index funds tracking the S&P 500 offer participants the most consistent return with the lowest outside of the bond market).

producing a comfortable retirement,[353] which is best achieved by tracking the market as a whole.[354] Fiduciaries can avoid sidelining the interests of some participants for the interests of others by embracing the duty of impartiality.[355] Fiduciaries should restrict their pool of considerations to the common investor purpose of the average participant who acquiesced to the QDIA and took no initiative to indicate their social policy preferences or seek to align their retirement plan with such.[356]

4. *To Exercise or Not to Exercise Shareholder Rights*

The DOL should learn from the SEC's approach to fund proxy voting and reinstate the 2020 Rules' documentation requirements and safe harbor protections to keep proxy voting standards consistent with ERISA's longstanding duty of loyalty and to reduce monitoring barriers.[357] Both the 2020 Rule and SEC rules require fiduciaries to maintain records of voting activities and neither mandated the exercise of shareholder rights.[358] The 2022 Rule removed both the documentation requirement and the 2020 Rules' duty to monitor proxy advisor activities, in addition to removing two non-voting safe harbors. This Note argues that providing participant watchdogs with fewer monitoring opportunities and having funds incur the cost of informed voting puts participants in a worse position.

Exercising shareholder rights, like any investment activity, incurs costs associated with gathering sufficient information to cast an informed vote.[359] The information asymmetry between a firm's management and outside stewardship teams on stakeholder relationships is too great and

353. 29 C.F.R. § 2550.404c-5. A QDIA must be "[a]n investment fund product or model portfolio that applies generally accepted investment theories, [and] is diversified. . . . *Id.*; *cf.*, Muir, *supra* note 80, at 63 ("Participants could, however, believe they might earn superior returns from sustainable investing, but still be willing to trade financial returns in order to have their investments align with their personal values. Surveys have not asked U.S. participants whether they would make that trade-off.").

354. Walters, *supra* note 146.

355. *See supra* notes 185–86 and accompanying text.

356. *See supra* notes 185–86, 315 and accompanying text.

357. *The Conflict*, *supra* note 259, at 1259.

358. *See infra* Part II.D.

359. Lund, *supra* note 274, at 527 ("An institutional investor is required to balance the cost of casting a vote on a particular matter—which includes the cost of analysis and casting the vote, as well as the risk the vote would reduce shareholder value-against the potential economic benefit to be gained by voting.").

too individualized from firm to firm to yield enough value to investigate thousands of shareholder proxy votes each year.[360] Passive funds' secret sauce is its low cost ability to track the market; costs incurred by gathering tangential information defeats their intended purpose.[361]

Instead, plans could forgo those costs by abstaining or divert those decisions from the plan to participants on non-pecuniary issues.[362] While certain proxies may be attractive to fund managers, participants, who bear the full costs of stewardship, gain a fractional return and little utility from their pursuit; many more may experience disutility.[363] Lund proposed a system of pass-through voting for mutual funds generally, in which "non-routine" or non-pecuniary matters would pass through to participants who could themselves allocate their shares as they see fit.[364] However, one cannot ignore the practical costs of first determining whether a proxy is pecuniary, then developing a system where participants can access proxy statements, cast their votes, and where the fund can vote in accordance with its participants.[365] ERISA already requires Employee Stock Ownership Plans, which are plans comprised exclusively of the employer's stock, to pass shareholder votes to participants.[366] This rule could be extended to all passive funds in an ERISA plan.

The residual risk of voting and its outcomes is ultimately borne by the plan's participants and other shareholders, not the proxy advisor, so the current incentive structure is misaligned.[367] For their part, proxy advisors do not necessarily have a perfect reputation of recommending

360. *Now Is the Time*, *supra* note 41, at 28 ("It is simply not feasible or economically desirable to internally perform independent research on the thousands of shareholders votes that plan managers may face each year.").

361. Lund, *supra* note 274, at 527. Engaging with the company's management, drafting, and submitting proposals, and soliciting proxies from major investors all takes time and money, much like actually becoming informed on the matter takes time and money. Wang, *supra* note 165, at 160.

362. Wang, *supra* note 165, at 159.

363. Griffith, *supra* note 163, at 1039. The fund who initiates the change will only gain a proportional share of the increased value to the percentage of the company it owns. Wang, *supra* note 165, at 160.

364. Lund, *supra* note 274, at 529.

365. *Id.* at 530 ("[The] burden of passing voting authority for hundreds of companies to investors would not only be overwhelming for the fund, but also for investors.").

366. 26 U.S.C. § 409(e)(2).

367. Griffith, *supra* note 163, at 1006 ("Although other stakeholders, most notably creditors and employees, also bear risk, their risk is fixed by contract and thus limited by terms to which they have agreed.").

the fiscally best option.[368] If the costs of passing votes along to participants exceeds any financial benefit that may come, ERISA's mandate to minimize direct and indirect costs instructs fiduciaries to completely abstain from non-pecuniary proxies. ERISA also prescribes that funds should refrain from participating in financially relevant proxies unless it is clear that the proxy will increase firm value and the cost of becoming adequately informed on the issues is less than the fund's increase in value.[369] The 2020 Rule recognized this capital budgeting problem; the removed safe harbors should thus be reemployed.

B. Applying the Major Questions Doctrine to the 2022 Rule

The four elements of a major question needed for a court to hesitate in greenlighting the tiebreaker rule are present.[370] After determining that the tiebreaker rule and related regulatory changes present a major question, the DOLs enabling statute lacks a clear statement delegating the decision to permit socially responsible considerations by ERISA fiduciaries.

To determine whether an issue present is a major question, as a matter of semantics, courts should first ask whether a policy promulgated outside the legislative process poses significant economic and political consequences.[371] Such policies may evidence attempts by the executive branch to impose wide-reaching change by going around Congress. Impactful policies should be scrutinized for adherence to the statutory authority, which can then be done by analyzing the agency's history of similar interpretations and acquiescence by Congress, and whether the breadth of the disputed policy is transformative.

368. Lund, *supra* note 274, at 524 (describing a study that found "that the average risk-adjusted return for companies that followed proxy advisor recommendations when adjusting compensation was 0.44% lower than firms whose changes to compensation were unrelated to proxy advisor recommendations").

369. Griffith, *supra* note 163, at 991 ("In the absence of meaningful information concerning the effect of a given governance reform on the performance of a specific firm, mutual funds should abstain from voting on governance proposals.").

370. *See supra* note 152 and accompanying text.

371. West Virigina v. EPA, 597 U.S. 697, 742 (2022) (Gorsuch, J. concurring) (situations "when an agency claims the power to resolve a matter of great 'political significance'" "or end an 'earnest and profound debate across the country'" or "when [an agency] seeks to regulate 'a significant portion of the American economy," "or require 'billions of dollars in spending' by private persons or entities" triggers the major questions doctrine).

First, the 2022 Rule addresses an issue of vast economic and political importance. ERISA plans cover over 152 million Americans and assets worth in excess of $12 trillion.[372] Likewise, consideration of ESG in the boardroom remains a highly contentious subject. While SRI and ESG investing is not a new phenomenon, according to Gallup polls, approximately 1 in 3 American adults who understand ESG, support incorporating its policies into business decisions and approximately 1 in 3 oppose such practice.[373] An agency decision to encourage private retirement plan managers to incorporate new factors into its investing strategies that are both politically contentious and carry dual motives should give courts pause since such policy has the potential to impact every retirement account. ERISA regulates the conduct of investment managers, but the 2022 Rules incorporate issues discussed around the dinner table. The magnitude of such policy should trigger an inquiry into whether the rule was unheralded and transformative.

Second, the 2022 Rule is unheralded and transformative. History should not be a dispositive factor. An over reliance on regulatory *stare decisis* as a deference to longstanding agency action would permit agencies to override the legislative process by riding out the Congressional gridlock. If the major question doctrine's hook is its common sense reading of a statute's text, challenges to agencies usurping congressional authority cannot be time barred. When the text runs contrary to agency conduct, history, at best, could be a probative, not dispositive, factor.[374] Instead, the major questions doctrine should remain grounded in the text, not time. If historical interpretations are invoked, equal weight should not be afforded to legislative (Congressional action), quasi-legislative (NPRM), and non-legislative (interpretive bulletins) evidence. The three avenues have varying degrees of public and judicial review and weight should only be afforded to the legislative and, to a lesser extent, the quasi-legislative process. As history would have it,

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372. *Fact Sheet: EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries*, DEP'T OF LAB., https://www.dol.gov/sites/dolgov/files /ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf [https://perma.cc/JQ5S-LNJJ] (last visited Dec. 16, 2023).

373. Saad, *supra* note 177 (noting that 59% of American adults polled have no opinion on ESG).

374. Precursors to the major questions doctrine have historically inevitable turned on the text. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (quoting the statute, the "core objective[]" of the FDCA is to "ensure that any product regulated by the FDA is 'safe' and 'effective' for its intended use," so regulating cigarettes in any way but by prohibiting them would contradict the statutory text).

Congress has affirmatively acted against adding social investing provisions to ERISA in the leadup to its passage and in 2023.[375] While the tiebreaker rule has occupied a corner of DOL interpretive bulletins dating back to 1994, the rule did not have the full force of law until the 2020 Rules, making it much more legally modern than Judge Kacsmaryk suggests.

When an agency addresses a major question, or any question, it must have a clear statement from Congress delegating such authority. Congress seldom greenlights extraordinary changes through an executive agency with implied language and subtle ambiguities, and ERISA is no different.[376] The DOL bases its authority to promulgate the 2022 Rule under Section 1135 of ERISA, which permits the Secretary of Labor to "define accounting, technical and trade terms used in" the statute.[377] While the agency may define trade terms, it may not rewrite the statute to add considerations and purposes beyond the text. Regulations promulgated to achieve collateral benefits are beyond the scope of ERISA's "sole" and "exclusive" language, even in the event of a tie, given its history in trust law and *Dudenhoeffer*'s interpretation of "benefits."[378]

The 2022 Rule was promulgated under an executive order focused on national climate policy,[379] not retirement benefits, suggesting the 2022 Rule is a roundabout way to effectuate climate policy without Congress. Just as Congress did not task the EPA with the authority to balance "the many vital considerations" of national energy policy,[380] there is little to suggest Congress, in 1974, tasked the DOL with turning retirement fund fiduciaries "into effective de facto regulators" of America's social issues in the unlikely event that two investments were truly equal.[381]

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375. *See supra* notes 35–37, 279 and accompanying text.

376. *West Virginia*, 597 U.S. at 723 ("[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking here."). Adoption of a policy which has been hotly debated across the political world "makes the oblique form of the claimed delegation all the more suspect." *Id.* at 702.

377. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73855 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550).

378. *See supra* Part III.A.

379. Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822, 73826 (Dec. 1, 2022) (to be codified in 29 C.F.R. § 2550).

380. West Virginia v. EPA, 597 U.S. 697, 701 (2022).

381. *See* Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV'T L. REP. 10155, 10156 (2019).

ERISA's inclusion of some factors—financial benefits through diversification—and congressional rejection of others—collateral benefits-suggest Congress was particular in limiting the world of benefits a fiduciary may pursue. Coupled with specific references to ESG within the rule and removal of "pecuniary" language, the latest DOL regulation provides fiduciaries with a method to consider factors not contemplated and rejected by ERISA.[382] The tiebreaker rule's (latest) looser linguistic standard effectively adds collateral benefits as a permissible goal, albeit in narrow circumstances, without a textual basis, changing the statute's meaning.

A more textual interpretation would be that Section 1104 requires fiduciaries to invest in both equal investments, insomuch as possible, to maximize plan diversification. The tiebreaker rule requires a fiduciary to weigh the moral and social interests of a diverse array of participants whereas the later restrains the decision making to the controlling statute's purpose. The statute's strong language, a step above ordinary trust law, would suggest Congress wrote the statue with a closed room in mind. Opening the door even a crack becomes transformative; a closed room is no longer closed whether the door is ajar or off its hinges.

CONCLUSION

ERISA has a long, treasured history extending beyond its half century lifespan in which Congress drafted this retirement protection and financial security statute with the strictest fiduciary duties known into common law. [383] Fiduciaries are trusted with this noble purpose to act with an eye single to participants and to make investment decisions solely to provide them with a comfortable retirement. [384]

While the change was small, maybe hardly noticeable, allowing even the slightest exception to the strict statutory language scheme will alter its meaning and may affect fiduciary conduct moving forward.[385] With trillions of dollars under management, any small change to ERISA will have wide ranging effects on retirees far down the road. [386] Removal of language limiting ERISA plan considerations to pecuniary factors signals

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382. Fifth Third Bancorp, 573 U.S. 409, 425 (2014) (limiting ERISA benefits to financial benefits).

383. *Infra* Part I.B.

384. *See id.*

385. *Infra* Part II.A.

386. *See id.*

to the investment community that at least some deviation from the exclusive benefits rule, in favor of collateral benefits, is within the bounds of ERISA if certain boxes are checked.[387] However, as this Note attempts to explain, such deviations are at odds with the statute and Congress's history of rejecting socially responsible investments schemes in ERISA. The 2022 Rule's four alterations to ERISA fundamentally change the statute's mandate and should be repealed in favor of the 2020 Rules' language, less the tiebreaker rule.

387. *Infra* Part III.A.