February 14, 2023

The Honorable Mitch McConnell
Minority Leader
United States Senate
317 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Kevin McCarthy
Speaker
United States House of Representatives
2468 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Mike Braun
United States Senate
404 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Andy Barr
United States House of Representatives
2430 Rayburn House Office Building
Washington, D.C. 20515

Re: **Braun/Barr CRA Resolution - Save Americans' Retirement Savings from Political Sacrifices to ESG Investing**

To Members of Congress:

We, the undersigned attorneys general representing 27 States, are writing to urge you to exercise your authority under the Congressional Review Act (CRA) to disapprove the Department of Labor (DOL)'s rule titled "*Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*," 87 Fed. Reg. 73822 (Dec. 1, 2022) ("2022 Rule"). As we explain below, because the 2022 Rule threatens the financial stability of millions of Americans and blatantly violates federal law, we have sued the Secretary of Labor over the 2022 Rule.[1] Nonetheless, we also urge you to exercise your separate powers under the CRA.

[1] *Utah et al. v. Walsh et al.*, No. 2:23-cv-00016-Z (N.D. Tex.).

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA) to protect Americans' hard-earned retirement savings in private benefit plans (*e.g.*, pension and 401(k) plans).[2] ERISA imposes strict fiduciary duties of prudence and loyalty on the managers responsible for investing the funds in these plans.[3] It mandates that fiduciaries must focus solely on obtaining financial returns and reducing risks and expenses.[4] Courts have described ERISA's fiduciary duties as "the highest known to the law."[5] Today, ERISA protects 152 million workers—approximately two-thirds of the United States adult population—and $12 trillion in assets.[6]

However, Americans' retirement savings are now threatened as hundreds of asset managers have committed to prioritize Environmental, Social, and Governance (ESG) policies over workers' financial interests.[7] Specifically, asset managers are using their ownership stake in public companies to pressure them to comply with woke environmental and social agendas. For example, asset managers have voted for shareholder resolutions forcing companies to reduce their greenhouse gas emissions, even when doing so harms the company's financial viability.[8] And they have voted to remove company directors for failing to meet various gender and diversity quotas.[9] In other words, asset managers are using hard-working Americans' retirement savings to advance political agendas.

Not only are these practices problematic for using people's retirement savings to advance causes they disagree with, but "multiple studies" have found that "ESG investing" reduces returns.[10] "Over the past five years, global ESG funds have

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[2] *See* 29 U.S.C. § 1001, *et seq*.
[3] *See, e.g.*, *id.* §§ 1103, 1104, amended by P.L. 117-328, Dec. 29, 2022, 136 Stat 4459.
[4] *See id.*
[5] *Schweitzer v. Inv. Comm. of Phillips 66 Sav. Plan*, 960 F.3d 190, 194 (5th Cir. 2020); *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (en banc).
[6] *See* U.S. Dep't of Lab., Fact Sheet: EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries 1 (2022), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results-2022.pdf.
[7] *See, e.g.*, Net Zero Asset Managers Initiative, https://www.netzeroassetmanagers.com/ (last visited Jan. 31, 2023) (stating that 220 asset managers have "committed to supporting the goal of net zero greenhouse gas emissions by 2050 or sooner"); Climate Action 100+, https://www.climateaction100.org/ (last visited Jan. 31, 2023) (announcing that 700 investors have committed "to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change").
[8] *See, e.g.*, BlackRock, Vote Bulletin: AGL Energy Ltd. (Sept. 22, 2021), https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-agl-energy-sep-2021.pdf.
[9] *See, e.g.*, State St. Glob. Advisors, Stewardship Report 2021 66 (Apr. 2022), https://www.ssga.com/library-content/pdfs/asset-stewardship/asset-stewardship-report-2021.pdf.
[10] Terrence R. Keeley, Opinion, *ESG Does Neither Much Good nor Very Well*, Wall St. J., Sept. 12, 2022, https://www.wsj.com/articles/esg-does-neither-much-good-nor-very-well-evidence-composite-scores-impact-reports-strategy-jay-clayton-rating-agents-11663006833.

underperformed the broader market by more than 250 basis points per year, an average 6.3% return compared with an 8.9% return. This means an investor who put $10,000 into an average global ESG fund in 2017 would have about $13,500 today, compared with $15,250 if he had invested in the broader market."[11] So these asset managers are also threatening the financial security of two-thirds of the United States adult population.

Finding shortcomings in the rigor of the prudence and loyalty analysis by some fiduciaries, the DOL under the Trump Administration issued regulations implementing ERISA's fiduciary duties in 2020 ("the 2020 Rules"), which prevented asset managers from "sacrific[ing] investment returns" to promote ESG factors.[12] These rules explained that because asset managers owe retirement beneficiaries a fiduciary duty of care and loyalty under ERISA, managers must evaluate investments "based solely on pecuniary factors" and "act with a single-minded focus on the interests of beneficiaries."[13] If a manager needed to break a tie between two financially indistinguishable investments, the 2020 Rules required the manager to provide documentation to the beneficiaries proving that the options were "economic[ally] equivalen[t]."[14] To prevent managers from using their proxy voting power for activism, the 2020 rules also required managers to maintain records of their proxy voting activities and other exercises of shareholder rights.[15]

Unfortunately, the protections in the 2020 Rules were improperly erased when the Biden Administration issued the 2022 Rule.[16] The 2022 Rule affirmatively embraces managers' use of ESG factors in investment decisions and proxy voting. In fact, the 2022 Rule explicitly allows managers to consider "the economic effects of climate change and other *environmental, social, or governance* [*(ESG)*] *factors*."[17] It also abandons the narrow tie-breaker provision and the requirement on maintaining proxy voting records in the 2020 Rules.[18] Put simply, the 2022 rule gives managers a free pass to use other peoples' retirement funds to push ESG causes without ever having to fully document their decisions for the beneficiaries of those retirement funds.

Because the 2022 Rule threatens the financial stability of millions of Americans and blatantly violates federal law, we sued the Secretary of Labor to

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[11] *Id.*
[12] Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 72848 (Nov. 13, 2020) ("2020 Investment Rule"), and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," 85 Fed. Reg. 81658 (Dec. 16, 2020) ("2020 Proxy Voting Rule").
[13] 2020 Investment Rule, 85 Fed. Reg. at 72848, 72851.
[14] *Id.* at 72851.
[15] *See* 29 C.F.R. § 2550.404a-1(e)(2)(ii)(E) (2021).
[16] 87 Fed. Reg. 73822
[17] 29 C.F.R. § 2550.404a-1(b)(4) (2023) (emphasis added).
[18] *See id.*

overturn the 2022 Rule.[19] As we explained in our complaint, there are three reasons why the 2022 Rule contravenes federal law. First, the 2022 Rule contradicts the plain language of ERISA, which requires managers to invest the assets of a retirement plan "for the *exclusive purposes* of providing *benefits* to participants in the plan and their beneficiaries" and to act "*solely* in the interests of the participants and beneficiaries."[20] As the Supreme Court unanimously explained, the term "benefits" in this provision means "*financial* benefits (such as retirement income)" and "does not cover nonpecuniary benefits."[21] But the 2022 Rule explicitly allows fiduciaries to select an investment or investment course of action "based on collateral benefits other than investment returns" whenever the fiduciary "prudently concludes that competing investments . . . equally serve the financial interests of the plan over the appropriate time horizon."[22] DOL's rule is invalid for attempting to rewrite ERISA through regulation.

Second, separation of powers principles prohibit administrative agencies from usurping the powers of Congress. Under ERISA, the Secretary of Labor is authorized to issue regulations "necessary or appropriate to carry out" its provisions.[23] Given that the 2022 Rule contradicts ERISA, it does not fit within this statute. And even if a regulation has "a colorable textual basis," the Supreme Court has further explained that Congress typically does not "use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[24] Under the major questions doctrine, an agency "must point to 'clear congressional authorization'" beyond "a merely plausible textual basis" when it wants to "assert[] highly consequential power" of "economic and political significance."[25] Because the 2022 Rule is "highly consequential" and threatens $12 trillion of retirement savings, the vague enabling provision is not enough to justify "the radical and fundamental changes" to ERISA in the 2022 rule.

Third, the 2022 Rule is arbitrary and capricious in violation of the Administrative Procedure Act.[26] A rule is arbitrary and capricious when the agency has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for [promulgating the rule] including a 'rational connection between the facts found and the [rule issued].'"[27] Here, there are two overarching problems with the 2022 Rule. It fails to rebut DOL's prior finding that strict regulations are necessary to protect participants from financial harm due to shortcomings in the rigor of the prudence and loyalty analysis by some fiduciaries. The alleged need for the 2022 Rule is also

[19] *Utah et al. v. Walsh et al.*, No. 2:23-cv-00016-Z (N.D. Tex.).
[20] 29 U.S.C. §§ 1103(c)(1), 1104(a)(1) (emphasis added).
[21] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014).
[22] 87 F.R. at 73885 (new 29 C.F.R. § 2550.404a-1(c)(2))
[23] 29 U.S.C. § 1135.
[24] *W. Va. v. Env't Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (citation omitted).
[25] *Id.* at 2608-09.
[26] *See* 5 U.S.C. § 706.
[27] *E.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

inadequate. Turning to specific provisions, the 2022 Rule's changes are unreasonable, internally inconsistent, and rely on impermissible considerations. This applies to expanding the tiebreaker provision, authorizing consideration of participants' nonfinancial preferences, authorizing nonpecuniary factors in proxy voting and other exercises of shareholder rights, removing documentation requirements for fiduciaries acting for collateral purposes, and eliminating specific restrictions on qualified default investment alternative ("QDIAs"). The 2022 Rule also unreasonably removed the collateral benefit disclosure requirement included in the notice of proposed rulemaking. In addition, the rule failed to consider the alternative of not amending the regulation and instead issuing sub-regulatory guidance, and it is the product of prejudgment.

Given the detrimental effects this brazen violation of federal law will have on millions of Americans, we urge Congress to disapprove the 2022 Rule. Under the CRA, Congress has the power to erase this federal rule by issuing a joint resolution of disapproval.[28] However, Congress only has a limited sixty-day period to disapprove this rule and must act immediately.[29] Senator Mike Braun and Representative Andy Barr have introduced a joint resolution to eradicate the 2022 Rule. We ask every member of the United States Congress to support this resolution to prevent asset managers from sacrificing Americans' hard-earned retirement savings for political causes.

Sincerely,

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[28] *See* 5 U.S.C. § 802.
[29] *See id.* § 801.

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