February 24, 2023

The Honorable Chuck Schumer
Senate Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Senate Minority Leader
United States Senate
Washington, DC 20510

The Honorable Kevin McCarthy
Speaker of the House
United States House of Representatives
Washington, DC 20510

The Honorable Hakeem Jeffries
House Minority Leader
United States House of Representatives
Washington, DC 20510

Chairman Bernie Sanders
HELP Committee
United States Senate
Washington, DC 20510

Ranking Member Bill Cassidy
HELP Committee
United States Senate
Washington, DC 20510

Chairwoman Virginia Foxx
Education and the Workforce Committee
United States House of Representatives
Washington, DC 20510

Ranking Member Bobby Scott
Education and the Workforce Committee
United States House of Representatives
Washington, DC 20510

Re: Defend the Department of Labor Rule that Safeguards Workers' Retirement Security

Dear Senate Majority Leader Schumer, Senate Minority Leader McConnell, House Speaker McCarthy, House Minority Leader Jeffries, HELP Committee Chairman Sanders, HELP Ranking Member Cassidy, House Education and the Workforce Committee Chairwoman Foxx, and House Education and the Workforce Committee Ranking Member Scott:

The undersigned organizations urge you to <u>defend the Department of Labor's important fiduciary rule that safeguards the savings of millions of workers who participate in private-sector employee benefit plans.</u> The rule, titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," has four main components: 1) removes costly and impractical record-keeping burdens on fiduciaries to ensure those who manage workers' money have the flexibility needed to consider *all* financially relevant risks and opportunities; 2) allows consideration of collateral benefits such as creating union jobs *only if* different investment options equally serve the financial interests of the plan over the appropriate time horizon; 3) increases workers' investment choices within the confines of ERISA's stringent protections; and 4) removes costly and unnecessary barriers to the exercise of shareholder rights.

A vote in favor of a Congressional Review Act (CRA) resolution to nullify the rule is an affirmative vote for unworkable, burdensome Trump-era rules. Trump-era rules erected "needless barriers" and had a "chilling effect . . . on considering environmental, social and governance factors in investments" that are financially relevant.[1] The Trump rules also put the thumb on the scale against workers' ability to exercise their shareholder rights, diluting workers' shareholder voice.[2] Additionally, three lawyers, all experts in ERISA, recently published a paper that included an in-depth analysis of why the distinction between "pecuniary" and "non-pecuniary," first introduced in the Trump-era rules and "roundly criticized during the rulemaking comment process," is self-contradictory and unworkable.[3]

The Biden DOL rule repeatedly affirms the core ERISA tenet: that fiduciaries are not allowed to sacrifice returns in the pursuit of collateral benefits. The Biden rule returns power to fiduciaries to make the best decisions regarding relevant risks and returns in their participants' best interests, in contrast to the Trump-era rules, which sought to inject politics into fiduciary decision-making.

The CRA resolution is part of a larger, failing effort to imbue "ESG" with false meaning, vilify it, and legislate against it. This effort is backed by powerful corporate interests – including fossil fuel companies looking to postpone the inevitable decarbonization of the economy – that are attempting to roll back progress that has been made on climate change, workers' rights, racial equity, and other ESG issues with clear financial implications. They are doing so by pushing legislation and other policies that hurt both workers' hard-fought pensions and taxpayers.

This effort is unpopular – with 63% of voters agreeing the government should not set limits on corporate ESG investments, including 70% of Republicans and 57% of Democrats[4] – and has suffered numerous, recent failures including: 1) Indiana's budget office finding that a bill forcing pension funds to divest from asset managers that consider ESG factors would cost $6.7

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[1] "US Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments," U.S. Department of Labor News Release, Nov. 22, 2022, *available at* https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122.

[2] *See* "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights," Employee Benefits Security Administration, Department of Labor, Dec. 1, 2022, 87 FR 73822, 73849-52, *available at* https://www.federalregister.gov/documents/2022/12/01/2022-25783/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights.

[3] David J, Berger, David H. Webber, and Beth Young, "The Liability Trap: Why the ALEC Anti-ESG Bills Create a Legal Quagmire for Fiduciaries Connected with Public Pensions," SSRN, Feb. 15, 2023, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360119, 4-10

[4] "Navigating ESG in the New Congress," ROKK Solutions & Penn State University's Center for the Business of Sustainability," 17, Fall 2022, *available at* https://rokksolutions.com/wp-content/uploads/2022/12/Navigating-ESG-in-the-new-Congress.pdf.

billion over the next decade in sub-market returns, force retirees to increase their contributions, and impose an additional $550,000 administrative costs a year;[5] 2) Arizona Attorney General Kris Mayes announcing Arizona will no longer participate in investigations into banks and other financial institutions over ESG investing practices, stating that she believes "it is not the place of government to tell corporations and their investors that they cannot invest in sustainable technologies and practices or improve their governance processes;"[6] 3) a study finding that a 2021 Texas investment blacklist would cost municipalities an additional $303 million to $532 million in bond interest;[7] and 4) North Dakota voting down, 90-3, a Texas-style bill that would have required the state treasurer to prepare a blacklist of financial firms that have committed to reducing carbon emissions.[8]

For all the reasons stated above, we urge you to protect workers' pensions from anti-ESG attacks and vote no on the CRA resolution. For further discussion, please contact Natalia Renta at natalia@ourfinancialsecurity.org and Rachel Curley at rcurley@citizen.org.

Sincerely,

Americans for Financial Reform
Public Citizen
1worker1vote
350Hawaii
7 Directions of Service
Abacus Wealth Partners
Adrian Dominican Sisters, Portfolio Advisory Board
American Family Voices
American Sustainable Business Network
As You Sow
B Lab U.S. & Canada
California Reinvestment Coalition
Change Finance
Change the Chamber
Climate Finance Action
Climate Hawks Vote

[5] Leslie Bonilla Muñiz, "Anti-ESG pension bill could drop state pension returns $6.7 billion in next decade," Indiana Capital Chronicle, Feb. 6, 2013, *available at* https://indianacapitalchronicle.com/2023/02/06/anti-esg-pension-bill-could-drop-state-pension-returns-6-7-billion-in-next-decade/.
[6] Mark Segal, "Arizona Drops Support for Anti-ESG Measures," ESGtoday, Feb. 14, 2023, *available at* https://www.esgtoday.com/arizona-drops-support-for-anti-esg-measures/.
[7] Daniel G. Garrett & Ivan Ivanov, "Gas, Guns, and Governments: Financial Costs of Anti-ESG Policies, SSRN, Jun. 7, 2022, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123366.
[8] Rob Kozlowski, "North Dakota House rejects bill to create ESG boycott list," Pensions & Investments, Feb. 7, 2023, *available at* https://www.pionline.com/esg/north-dakota-house-rejects-bill-create-esg-boycott-list.

Community Development Venture Capital Alliance
Congregation of St. Joseph
Connecticut Citizen Action Group (CCAG)
Consumer Federation of America
Daughters of Charity, Province of St. Louise
Demand Progress
Divest Oregon
Earth Action, Inc.
Earthjustice
Florida for Good
FreshWater Accountability Project
Future Nexus
Green America
Harrington Investments, Inc.
Honor the Earth
Intentional Endowments Network
Interfaith Center on Corporate Responsibility (ICCR)
Kingdom Living Temple Church
League of Conservation Voters
Mercy Investment Services, Inc.
Montana Environmental Information Center
National Community Investment Fund
National Employment Law Project
Natural Investments LLC
New Alpha Community Development Corporation
NYU Stern Center for Business and Human Rights
Oil & Gas Action Network
Omidyar Network
Opportunity Finance Network
Oxfam America
Pensions & Investment Research Consultants, Ltd.
Physicians for Social Responsibility - Pennsylvania
Predistribution Initiative
Rabbis and Cantors Retirement Plan
Revolving Door Project
Rights CoLab
Sciencecorps
Seventh Generation Interfaith Coalition for Responsible Investment
Sierra Club
Shareholder Rights Group

SOC Investment Group
Socially Responsible Investment Coalition
The B Team
Toniic Institute
Trillium Asset Management
Union of Concerned Scientists
U.S. Impact Investing Alliance
Whitney M. Slater Foundation
Zero Hour

cc: Members of the Senate Committee on Health, Education, Labor & Pensions
Members of the House Education and the Workforce Committee