american securities association
America's Voice for Main Street's Investors

December 13, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Proposed Rulemaking "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights"

To Whom It May Concern:

The American Securities Association (ASA)[1] welcomes the opportunity to comment on the Department of Labor's (DOL or Department) proposed rule entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights." The ASA has been actively involved with Congress, regulatory agencies, and market participants regarding the debate over environmental, social, and governance (ESG) investing and the role that regulators should play to address the growth of ESG products.

Background

In 2020, the DOL adopted a rule which clarified the duties of fiduciaries under the Employee Retirement Income Security Act (ERISA) when selecting investments and managing plan assets.[2] As the DOL explained at the time, the rule was intended to assist fiduciaries in "navigating ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments that sacrifice investment return…or assume additional investment risk to promote non-pecuniary benefits or objectives."

The rule also provided lasting certainty for fiduciaries about their ERISA obligations after the DOL had issued several – and sometimes conflicting – iterations of guidance on the subject dating back to the 1990s.

The Department adopted the 2020 rule after a thorough examination of the underlying issues, substantial public comment, and a belief the rule was necessary because of the increase in ESG-

[1] The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a diverse membership of almost one hundred members located in every geographic region of the United States.
[2] https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf

themed products and ESG investment strategies. A recent analysis estimated that total assets for ESG funds may hit $53 trillion by 2025 – equal to *one-third* of all global assets under management.[3] This has occurred despite there being no clear definition of "ESG" and that ESG funds have been shown to charge higher fees than traditional funds.

Given that investor assets continue to flow into ESG products despite these shortcomings, we supported the DOL's adoption of the 2020 rule because it provided fiduciaries with clarity regarding plan investments.

Proposal: Investment Criteria

The Proposal reverses the 2020 rule in a way that would weaken protections for retirement investors. ERISA fiduciaries should *never* be permitted to subordinate the interests of plan participants to political objectives. Yet, the Proposal's intent is to do exactly that by facilitating the flow of investor capital into products seeking to achieve political goals that are not correlated with investor return.

Far from being "neutral" on the topic of ESG investing, the Proposal seems to instruct fiduciaries to incorporate *more* ESG criteria into their decision-making. In other words, the Department is taking the position that if a fiduciary does not include the undefined criteria of the ESG movement into its investment analysis, then the fiduciary could be running afoul of its legal duties.

This would be a historic and unprecedented change to the obligations of a plan fiduciary that will harm workers and retirees.

Proposal: Proxy Voting

Over the last decade, corporate proxies have increasingly become vehicles to debate social and political issues that often have no economic relationship to the operations of the underlying company. The DOL has long held that the voting of proxies is covered by a fiduciary's obligations under ERISA. However, the Proposal changes this precedent by making it easier for plan assets to be used for proxy voting on matters that may not be tied to economic return at all.

That is a dramatic departure from current law, and it completely undermines the reason retirement plans were created. Either a proposal will improve the economic returns for plan beneficiaries, or it won't. And, if a proposal does not improve returns, then it should be voted down.

[3] https://www.bloomberg.com/professional/blog/esg-assets-may-hit-53-trillion-by-2025-a-third-of-global-aum/

This principle is of heightened importance considering the recently issued Staff Legal Bulletin 14L (SLB 14L) from the Securities and Exchange Commission (SEC).[4] SLB 14L basically states that the SEC will not allow companies to reject shareholder proposals that involve topics of a "broad societal impact" – *even if the topic has no nexus to the underlying business.* This is an extraordinary position that could lead to an explosion of shareholder proposals that deal with hot button social or political issues.

If the proposal is adopted, then ERISA fiduciaries will find themselves in the position of (1) determining whether to vote on political proposals; and (2) deciding *how* to vote on such proposals if they do choose to vote. Rather than taking a hands-off approach to proxy voting – as the DOL appears to be doing with the Proposal – the agency should be more vigilant than ever in examining proxy voting behavior by ERISA plans and whether such voting actually creates value for plan beneficiaries.

ESG Resource Index

Earlier this year, the ASA submitted a compilation of articles, academic papers, and other research to the Securities and Exchange Commission (SEC) which shows there is no consensus related to the benefits of ESG investing.[5] In fact, growing evidence suggests ESG funds are overpriced and deliver underperformance to shareholders. An ESG resource index supporting these facts is included as an Appendix to this letter, and incorporated herein. We expect the DOL to consider each fact set forth below before adopting any new rules to support ESG investing that would dramatically alter the obligations of a plan fiduciary.

Conclusion

As detailed above, the ASA believes that the 2020 reforms related to plan investments and proxy voting were long overdue. These reforms include important protections for workers who depend on their company's pension or 401(k) plan to secure their retirement. Accordingly, we urge the DOL to immediately drop this Proposal and focus on implementation of the 2020 reforms. We look forward to working with the Department on these critical issues.

Sincerely,

Christopher A. Iacovella

Christopher A. Iacovella
Chief Executive Officer
American Securities Association

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[4] https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals
[5] https://www.sec.gov/comments/climate-disclosure/cll12-8906849-244183.pdf

Appendix: ESG Resources

ESG Performance

"Money Keeps Pouring Into Sustainable Funds – Even as Performance Lags" (Barron's – July 20, 2021)

"This year, the average large-cap fund with a sustainable mandate is up 14.7%, trailing the 15.2% gain of the SPDR S&P 500 exchange-traded fund (ticker: SPY), according to Morningstar Direct. Consider that the largest actively managed sustainable fund, $28.4 billion Parnassus Core Equity (PRBLX) is up 15.04%, while the largest sustainable index fund, iShares ESG Aware MSCI USA ETF (ESGU), is up 15.02%. Money has continued to pour into environmental, social, and governance, or ESG, focused assets. Consultant Casey Quirk forecasts that assets dedicated to the style will reach $13 trillion globally by 2025, more than quadruple the total at year-end 2020, driven in part by conversions from conventional portfolios to sustainable ones."

"ESG Outperformance Looks Set to End, Study Suggests" (Financial Times – July 5, 2021)

"Abraham Lioui, professor of finance at Edhec Business School and an expert in the strategy of investing according to good environmental, social, and governance principles, believes he and his-coauthors have found signs that the ESG market is reaching maturity and could become a victim of its own success. 'We are going to the zone where the positive impact of the ESG buzz on prices is coming to the end of its cycle,' Lioui said. 'Soon we will be at the stage where the relationship between ESG and performance will be negative as it [logically] should be…"

"Choosing an ESG Mutual Fund? Don't Trust the Name" (As You Sow – July 12, 2021)

"BlackRock's new U.S. "Carbon Transition Readiness ETF", which attracted $1.25 billion in investor dollars on the first day it launched, is chock-full of fossil fuel companies. "The people who invested in that fund thought they were addressing climate risk," says Andrew Behar, As You Sow *CEO. "Instead they got business as usual." Sadly, that's not unusual. Of the 88 funds with "ESG" in their name, 35 earn a D or F on climate change or deforestation and 43 earn a D or F on at least one issue in our Invest Your Values screens. So don't believe the name or the marketing."*

"ESG Investing – the Great Wall Street Money Heist" (ZeroHedge – June 28, 2021)

"Wall Street is once again in the midst of a "money heist" *from naive investors. This time in the form of* "woke activism" *called ESG. ESG refers to the Environmental, Social, and Governance risk theoretically embedded in a business. However, while ESG investing is about taking these*

risks into account in investment decisions, these are all the things NOT on a company's balance sheet or earnings statements. Such is the inherent problem…ETFs are supposed to carry lower fees than regular funds because they mirror a typical basket of stocks like the S&P 500, as shown above. However, by "claiming" to have ESG screening methods, Wall Street found a way to inflate management fees of a simplistic investment."

"Corporate Collusion: Liability Risks for the ESG Agenda to Charge Higher Fees and Rig the Market" (C. Boyden Gray for the Texas Public Policy Foundation – June 2021)

"We are in the middle of the largest wealth transfer in history. Experts expect older generations to transfer approximately $68 trillion in wealth to rising generations over the next several years, and businesses want to capture this wealth by catering to young people's values. Financial institutions know that millennials fear climate change and are often willing to sacrifice maximum financial benefits to achieve "socially responsible" goals.2 This has contributed to an investment management strategy that is more concerned with marketing investments to young people specifically than with maximizing return for investors in general.

As social-values-based investing booms, progressive organizations and others are adopting more forceful methods for financing environmental and social causes—and for defunding politically incorrect industries. These tactics include coordinated action pressuring banks not to lend to oil, gas, or other "unclean" businesses; using private and public pension funds to finance "green" causes (and divest from others); and interfering with potential or existing contracts between lenders and disfavored industries. This white paper examines causes of action that can be brought by federal or state enforcers or private parties to combat inappropriate attempts to defund businesses that do not align with progressive environmental policies. These bases for suit include antitrust violations, breaches of fiduciary duty in retirement plans, and tortious interference with contract.

This white paper highlights how politically correct corporate practices may conflict with longstanding legal rights and obligations, concluding that investigations or civil suits may turn up the factual predicates for legal liability. Additional legal issues not discussed in this paper may arise from federal regulatory policies designed to favor environmental and social causes, such as forthcoming Securities and Exchange Commission (SEC) disclosure rules or the likely reversal of the Department of Labor's regulation protecting private pension plans from non-pecuniary investment trends such as environmental, social, and governance (ESG). These and other federal regulatory actions may ripen into challenges to administrative agency action taken without statutory authority or in violation of the U.S. Constitution but are not the focus of this paper."

"Tidal Wave of ESG Funds Brings Profit to Wall Street" (Wall Street Journal – March 16, 2021)

"Sustainability has been good for Wall Street's bottom line. Exchange-traded funds that explicitly focus on socially responsible investments have 43% higher fees than widely popular standard ETFs. The environmental, social, and governance funds' average fee was 0.2% at the end of last year, while standard ETFs that invest in U.S. large-cap stocks had a 0.14% fee on average, according to data from FactSet. "ESG creates a fantastic revenue possibility for large firms," said Dr. Wayne Winegarden, a senior fellow at the Pacific Research Institute. Asset managers are among the biggest cheerleaders for sustainable investing. Their efforts are all aimed at capturing some of the tidal wave of money that has flowed into funds that promote things like clean energy or diversity. As a broader fee war has narrowed profit margins for money managers over the last decade, firms are looking to wring more revenue from the surge."

"Why Green Assets May Not Continue to Outperform" (Wharton School Podcast – June 29, 2021)

"Recent years have seen high returns for investments in green assets, or stocks and bonds of companies that espouse environmental, social, and governance (ESG) principles. Green funds are being aggressively marketed and about $3 billion a day is being invested in such assets. The $17 trillion of sustainable assets under management make up a third of the $51 trillion that is professionally managed, according to the 2020 report on trends in sustainable and impact investing by the U.S. SIF Foundation. Many investors are attracted to ESG securities on promises of high returns, but they are "misguided," Wharton finance professor Luke Taylor said on the Wharton Business Daily radio show on SiriusXM. (Listen to the podcast here.) The past performance of ESG securities is not a reliable indicator of returns in the future, especially when past returns were largely driven by "shocks" such as bad news about climate change, he noted. "Absent more unexpected shocks in the future, we don't see those green stocks outperforming ['brown' or environmentally unfriendly stocks] in the future."

"Many ESG Funds Are Just Expensive S&P 500 Indexes" (Bloomberg – May 7, 2021)

- *"Not all ESG ETFs and mutual funds are closet indexers, but true ESG funds generally come with higher fees and definitely come with more tracking error risk. Index funds give you cheap average performance. It's hard to save the world by being cheap and average."*

"ESG Outperformance Narrative is Flawed, New Research Shows" (Financial Times – May 2, 2021)

- *"The widely held belief that 'sustainable' investing delivers outperformance is a mirage and the above-market returns are actually driven by exposure to so-called style factors long known to boost investment returns…"*

"Beware ESG ratings, strategist warns – look past them to find the best stocks to buy" (CNBC – May 18, 2021)

- *"ESG refers to environmental, social and governance factors and has become a big area of focus for investors as they look to assess the sustainability of their portfolios. However, the huge amounts pumped into ESG funds in 2020 created a bubble in the sector, the [Bernstein] strategists argued, and the funds have "spectacularly underperformed" in 2021."*

"The World's Largest Pension Fund has Cooled on ESG. Should you?" (Shuli Ren, Bloomberg Opinion – May 5, 2021)

- *"But top officials of [Japan's $1.6 trillion Government Pension Investment Fund] have been talking up fiduciary duty lately. GPIF "can't sacrifice returns for the sake of buying environmental names or ESG names," a senior director at the fund's investment strategy department told Bloomberg News in April. At issue is poor performance. For instance, one of GPIF's earliest ESG picks was a thematic social index, which invests in domestic companies that hire and promote women. The MSCI Japan Empowering Women Index, the so-called Win index, has fared poorly against the benchmark Topix Index. Performance is all-important to GPIF: the fund is required to pursue a real investment return of 1.7% to support an aging Japan."*

"Honey, I Shrunk the ESG Alpha: Risk-Adjusting ESG Portfolio Returns" (Scientific Beta research report – April 2021)

- *"Recent strong performance of ESG strategies can be linked to an increase in investor attention. Flows into sustainable mutual funds show that attention to ESG has risen remarkably over the later period of our sample, from about 2013. We find that alpha estimated during low attention periods is up to four times lower than alpha during high attention periods. Therefore, studies that focus on the recent period tend to overestimate ESG returns. We conclude that claims of positive alpha in popular industry publications are not valid because the analysis underlying these claims is flawed. Omitting necessary risk adjustments and selecting a recent period with upward attention shifts enables the documenting of outperformance where in reality there is none."*

"Is ESG Intrinsically Inflationary?" (Financial Advisor Magazine – April 27, 2021)

- *"As its popularity continues to grow, some professional investors are warning that ESG (Environmental, Social and Governance) investing could be inflationary. Their argument is predicated on the expectation that complying with an expanding set of socially* *conscious mandates may be a worthy goal, but one that flies in the face of Milton Friedman's dictum that the only raison d'etre for corporations was to maximize profits for shareholders. It's perfectly understandable that investors will want to avoid companies reliant on child labor in foreign countries and with toxic environmental practices. But changing corporate behavior comes with a cost."*

"Valuing ESG: Doing Good or Sounding Good?" (Bradford Cornell (UCLA), Aswath Damodaran (NYU) – March 20, 2020)

- *"The ESG bandwagon may be gathering speed and getting companies and investors on board, but in our view, when all is said and done, a lot of money will have been spent, a few people (consultants, ESG experts, ESG measurers) will have benefitted, but companies will not be any more socially responsible than they were before ESG was invented. In our view, what is needed is an open, frank, and detailed national dialogue concerning ESG related public polices, particularly those related to climate change. Hopefully, that discussion will produce wise policies that will set the legal and regulatory framework in which corporations operate. With the proper framework in place, corporations can get back to focusing on maximizing shareholder wealth."*

"Socially Conscious ETFs Have Some Baffling Holes" (Yahoo Finance – January 27, 2020)

- *"Exchange-traded funds that cater to environmental, social and governance principles are being pitched as a way for investors to sleep with peace of mind, but they better be prepared to wake up with something less than dreamy returns.* ***Consider the iShares MSCI USA ESG Select Social Index Fund (SUSA), one of the oldest and largest ESG ETFs on the market. SUSA, which tracks the 100 stocks with the highest ESG ratings, has trailed the S&P 500 Index by 37 percentage points during the past 10 years****."*

"The ESG Performance Paradox" (Jordan Boslego, CFA Institute Blog – September 16, 2020)

- *"The argument that ESG factors lead to better long-term performance outcomes is much harder to prove than we might imagine. Academics have found a surprisingly low correlation between ESG ratings across providers. In other words, experts can't even agree on which firms have solid ESG credentials in the first place. Part of the problem is that the ESG umbrella encompasses so many different issues, whose salience is continually shifting."*

"ESG Didn't Immunize Stocks During the COVID-19 Crisis, But Investments in Intangible Assets Did." (Demers, Hendrikse, Joos, Lev – March 1, 2021)

- *"Environmental, social, and governance ("ESG") scores have been widely touted as indicators of share price resilience during the COVID-19 crisis. Contrary to this conventional wisdom, we present robust evidence that, once industry affiliation, market-based measures of risk, and accounting-based measures of performance, financial position, and intangibles investments have been controlled for, ESG offers no such positive explanatory power for returns during the COVID crisis. Specifically, ESG is insignificant in fully specified returns regressions for each of the Q1 2020 COVID market crisis period, and for the full COVID year of 2020. By contrast, a measure of the firm's stock of investments in internally generated intangible assets is an economically and statistically significant positive determinant of returns during each of the Q1 market implosion and full 2020 COVID year periods. Our results are robust to alternative measures of returns, as well as to using Refinitiv, Refinitiv II, and MSCI data to capture ESG performance. We conclude that ESG did not immunize stocks during the COVID-19 crisis, but that investments in intangible assets did."*

"Capitalism, Socialism, and ESG" (Rupert Darwall, Real Clear Foundation – May 2021)

- *"The corollary of the ESG thesis—that low-ESG-rated "sin stocks" are condemned to underperform the stock market—is decisively refuted by the data. When institutional investors "went underweight" by selling down their holdings in tobacco stocks, it made them cheaper for other investors to buy and make money, especially when they subsequently outperformed the market."*

- *"The profit opportunities that ESG creates for Wall Street, however, are clear. BlackRock charges 46 cents annually for every $100 invested in its iShares Global Clean Energy ETF and just 4 cents for its iShares fund linked to the S&P 500."*

"Where ESG Fails" (Porter, Serafeim, Kramer – October 2019)

- *"In many cases, ESG factors are not material to the performance of a particular business, nor do they highlight areas where the business has the greatest impact on society. The carbon footprint of a bank, for example, is not material to a bank's economic performance, nor would reducing its footprint materially affect global carbon emissions. In contrast, banks' issuance of subprime loans that customers were unable to repay had devastating social and financial consequences. Yet ESG reporting gave banks credit for the former and missed the latter altogether, in part because the voluntary and reputation-focused nature of sustainability reports tends to leave out bad news. Such broad and upbeat ESG reporting may make investors and consumers feel good by encouraging* *corporate window dressing, but it distracts from incentivizing and enabling companies to deliver greater social impact on the issues most central to their businesses."*

"ESG is All the Rage. Big Investors Can't Agree on Why" (Wall Street Journal – March 4, 2021)

- *"The theory is lovely: stocks with less exposure to new government restrictions on carbon emissions, biodiversity, water use or stronger labor standards should be more highly valued, as should companies that are better run. Flip it over, and investors should demand higher returns from riskier companies, to compensate for those risks, which means "bad" stocks should be cheaper. Unfortunately reality is messy. Even for a single factor, such as climate, it isn't clear how to pick winning stocks or sectors, because we can only guess at the mix of sticks and carrots governments will choose. Try to trade off E, S and G against each other and it becomes entirely subjective."*

"ESG Investing and Public Pensions: An Update" (Boston College Center for Retirement Research – October 2020)

- *"The results show a negative relationship between the rate of return and both state mandates and ESG policies, although only…It suggests that having a state mandate in place for a single year was associated with an annualized return that was nearly two basis points lower over the 18-year period. To put this finding in context, plans with state mandates have had them for an average of 10 years. So, the average annualized return for those with a state mandate would be 20 basis points lower than for those without a mandate."*

Costs of climate change and ESG disclosures

"Putting the Electric Cart before the Horse: Addressing Inevitable Costs of a New ESG Disclosure Regime" (Speech by Commissioner Elad Roisman – June 3, 2021)

- *"The costs are more obvious. Any new disclosure requirement causes companies to incur costs in obtaining and presenting the new information. Beyond the costs of collecting (and in some cases, calculating) and preparing the information for submission are the costs of increased liability for making such disclosures. None of these cost categories are necessarily unique to ESG disclosures. They may, however, be greater given both the potential scope and novelty of the "E" and certain "S" categories in particular. Also, to the extent that any new requirements call for information beyond our existing materiality standards, these costs could be even higher. The advantage of foreseeing costs is that we can do something to head them off—and I believe the SEC will have the obligation to do just that if the goal is to craft a proposal that gets ESG information into the hands of investors."*

“Rethinking Global ESG Metrics” (Statement from Commissioner Hester Peirce – April 14, 2021)

- *“The strength of our capital markets can be traced in part to our investor-focused disclosure rules and I worry about the implications a stakeholder-focused disclosure regime would have. Such a regime would likely expand the jurisdictional reach of the Commission, impose new costs on public companies, decrease the attractiveness of our capital markets, distort the allocation of capital, and undermine the role of shareholders in corporate governance.”*

“Wall Street’s Trillion-Dollar ESG Club Comes with Huge Tax Perks” (Bloomberg – April 23, 2021)

- *“In fact, pretty much everyone is. This month, JPMorgan Chase & Co. announced a pledge to finance and facilitate at least $2.5 trillion of sustainable and climate-friendly deals over the next decade, Bank of America set a target of $1.5 trillion, and Citigroup Inc. and Morgan Stanley said they would be mobilizing $1 trillion each. Meet Wall Street’s new trillion-dollar ESG club. The banks created it, analysts say, to please regulators, impress shareholders and activists, do some good -- and cut their tax bills.”*

June 3, 2021 letter from 22 members of Congress regarding the SEC’s climate change initiative

- *“It is the SEC’s job to look out for Main Street investors, not a cottage industry of standard setters and ratings firms that stand to benefit from further SEC regulation in this area.”*

- *“There is no evidence that points to public companies being unaware or ignoring the fact that investors are demanding more information on climate change.”*

- *“We are concerned that in the context of climate change disclosures, the SEC is currently on a course that will take it far afield of its statutory mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.”*

“A Response to Calls for SEC-Mandated ESG Disclosure” (Amanda Rose, Vanderbilt University – May 2021)

- *“The breadth of topics embraced by ESG, and the breadth of motivations spurring the ESG movement, has created a big tent that has undoubtedly served a purpose in terms of helping the various causes of those involved to gain momentum. But it has also created* *problems. For example, ESG performance ratings are inconsistent and difficult to decipher. Which of the myriad ESG issues are factored into a rating, how performance on those issues is measured, and the weight each issue is given are subjective, usually non-transparent determinations that vary across ratings providers. The breadth of ESG topics also makes studies that purport to show a positive link between ESG performance and financial performance difficult to interpret. There is no* a priori *reason to believe that a company's approach to climate change and a company's approach to diversity or any other ESG issue will have the same sort of impact on a company's financial performance; yet these studies often bundle ESG issues together to measure ESG performance or rely on ESG performance ratings that themselves bundle them together. They therefore leave unanswered which, if any, discrete corporate policies related to ESG actually impact financial performance."*

"Environmental, Social, and Governance Theory: Defusing a Major Threat to Shareholder Rights" (Richard Morrison, Competitive Enterprise Institute – May 2021)

- *"Despite the significant problems with inconsistent definitions and controversial policies, many proponents now suggest that ESG goals should be mandated by government policy. Recent legislation proposed by members of Congress, including Sen. Elizabeth Warren (D-MA), and regulatory proposals advanced by the current leadership of the Securities and Exchange Commission would require that U.S. corporations move from the longstanding legal presumption of shareholder primacy to one in which government agencies manage the priorities of business entities, but bear none of the cost for their mandates. This shift would constitute a major threat to the property, due process, and association rights of investors. However, there is another way. Many of the conflicts described above can be avoided if policy makers embrace a voluntary system of "benefit corporation" charters, augmented by private certification standards. Legally binding corporate charters that elevate other stakeholders above shareholders are available to those founders and board members who want to embrace them, as are the private, voluntary standards that publicly certify a similar balance of priorities. If the wave of enthusiasm for ESG investing is anywhere as significant and broad-based as its proponents claim, these non-coercive alternatives should be sufficient for the enlightened investors and managers of the 21st century to structure their commitments. Conversely, a legally mandatory process—in which detailed lists of rules for all firms are drawn up and enforced by the federal government—would be expensive, time-consuming, and afflicted by the same problems that beset most regulatory policy. Regulatory capture, privileging of incumbent firms, and negative effects on growth and innovation would likely all result from the policy making and enforcement processes. Moreover, flawed rules would become entrenched and become extremely difficult to change once regulated entities start spending money and making long-term compliance plans. This would achieve few of ESG advocates' progressive goals and leave dominant firms even more powerful than before."*

2011 Decision of U.S. Court of Appeals for the D.C. Circuit striking down the SEC's proxy access rule

- *"Under the APA, we will set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…" Indeed, the Commission has a unique obligation to consider the effect of a new rule upon "efficiency, competition, and capital formation," and its failure to "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation" makes promulgation of the rule arbitrary and capricious and not in accordance with law."*