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Economy and Society: House Democrats urge repeal of Trump administration ESG rule

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On July 29, 13 Democratic Members of the House of Representatives sent an open letter to Labor Secretary Marty Walsh asking him to take the Labor Department's actions on ESG investments one step further.

The Trump Labor Department enacted a rule late last year that directed retirement-fund managers to assess investments governed by the Employee Retirement Income Security Act (ERISA) using pecuniary factors only. Although the rule did not preclude ESG investments altogether, its aim was to make their inclusion in retirement investment funds far more complicated than it would otherwise have been and thus far less likely.

Upon taking office, President Biden called for that rule to be reexamined by Labor, and, on March 10, the Labor Department's Employment Benefits Security Administration announced that, until further notice, the Trump administration rule would not be enforced.

In their July 29 letter, the House Members—including Andy Levin (MI) and Suzan DelBene (WA), who have introduced legislation touching on this subject—asked Secretary Walsh to take the next step:

"While ending that rule's enforcement is a necessary first step, we feel it is just that – a first step. A new rule is essential to eliminate the aforementioned chilling effect and allow plan fiduciaries to incorporate ESG factors into their investment strategies without fear of legal consequences.

ESG investing is growing at a tremendous rate. In 2020 alone, $51.1 billion in net investments went into sustainable funds, nearly double the previous annual record. We believe this is evidence of workers' desire to make sure that their retirement investments reflect their values. This desire is backed up by evidence that shows that investments that consider ESG principles generally performed as well or better than comparable conventional investments. Workers do not have to make a trade-off between getting a return on their investments and their principles, and the rules and regulations governing pension investments should not force them to. Instead, those rules should provide clarity so that sustainable investing is not burdensome."

The Members did not ask Walsh for a specific response or a date by which they would like to hear back from him, only that they look forward to working with him on the issue.

Who wants greater disclosure?

In a July 28 post at the website of the Cato Institute, Jennifer Schulp, Director of Financial Regulation Studies, advanced an argument made previously by SEC Commissioner Hester Peirce

about the alleged investor demand for new, mandatory ESG disclosures from publicly traded companies. Whereas Peirce recently drew a distinction between investors and activists, Schulp articulates the potential differences between professional investors and individual investors, between Wall Street and Main Street:

"[T]here's no denying the current interest in ESG.

Those who want public companies to be required to disclose ESG information point to this investment behavior as a sign that the "crowd" agrees. During his confirmation hearing, SEC Chairman Gary Gensler cited the "tens of trillions of dollars in assets" as proof that investors "really want to see" climate risk disclosure, which is part of the "E" in "ESG." SEC Commissioners Lee and Crenshaw also have both pointed to investor demand as supporting SEC efforts to mandate ESG-related disclosure. But do we understand this "investor demand?"

[T]he common refrain that "investors are demanding ESG disclosures" fails to address who those investors are. Investors, of course, are not a monolith, but the conclusions drawn from empirical research in the space often treat them as such. That research tends to ignore individual investors and focuses on professional investors, including many who themselves offer ESG-related products. That research also has largely been conducted by organizations, such as Blackrock, Ernst & Young, and Natixis, that themselves have an interest in the promotion of ESG.

The emphasis on investment professionals is certainly warranted as they are an important constituency to understand. Many of these professionals are making decisions that affect individual investors through mutual funds, ETFs, or the direct management of retirement assets. But even where fiduciary duties are supposed to ensure that these professionals are acting in their clients' interests, Wall Street and Main Street may not necessarily see eye to eye. While surveys generally show professional investor interest in ESG, few have asked about individual investors. Those that have found that individual investors show only some interest in ESG investing, which largely disappears during economic stress, and individual investors broadly view ESG disclosures as irrelevant when making investment decisions. It's a stretch, then, to say that investor interest in ESG issues applies uniformly to different investor types."

On Wall Street and in the private sector

Investors get creative

According to MBH Corporation, a UK-based financial services company, investors are so consumed by the desire to find good smaller companies with solid ESG qualifications that they are willing to look almost anywhere and to accept almost any positive data as evidence of a company's qualifications:

"A lack of publicly available information on companies' ESG credentials is prompting investors to turn to overlooked sources to acquire data, new research shared exclusively with *City A.M.* reveals.

Figures from MBH Corporation shows 89 per cent of UK based professional investors think employee satisfaction platforms will provide crucial information on the validity of firms' adherence to good environmental and governance initiatives.

MBH Corporation said investors are combing through employee reviews published on sites such as Glassdoor and Vault for ESG information to evaluate whether to invest in a company….

Vikki Sylvester, chief executive of Acacia Training and executive director of MBH Corporation, said…

"Investors are so hungry for information and will reference relevant websites for clear insights into companies.""

In the spotlight

Ben and Jerry's governance

According to Effi Benmelech, a finance professor at Northwestern University's Kellogg School of Management, the recent decision by the Ben and Jerry's ice cream company to end its license with its current Israeli affiliate has left its parent company, Unilever, in a very tough spot, one that might end up costing it:

"In the U.S., 33 states have passed laws that restrict government investment or contracting in companies that boycott Israel; if Unilever does not act to reverse the board's decision, it could face divestment and losses.

When founders Bennet Cohen and Jerry Greenfield (a.k.a., "Ben and Jerry") turned the company over to Unilever in 2000, the acquisition agreement laid out a unique governance structure that retained the company's independent board of directors, responsible for protecting the company's brand and pursuing ESG efforts. And in their view, the board is acting exactly as intended. As they wrote in a recent Op-Ed, "[W]e unequivocally support the decision of the company to end business in the occupied territories… While we no longer have any operational control of the company we founded in 1978, we're proud of its action and believe it is on the right side of history.""

As Professor Benmelech notes, Ben and Jerry's is, in his words, a practitioner of "ESG with no G." Benmelech concludes that, in his opinion, the only solution for Unilever is to terminate Ben and Jerry's special conditions and impose some "G" on its subsidiary, whether it likes it or not.