



## **INSURED RETIREMENT INSTITUTE**

**IRI Summary of Pertinent Questions for the Record Responses  
from the United States Senate Committee on Health, Education, Labor, and Pensions  
Hearing on the Nomination of the Hon. Marty Walsh for Secretary of Labor  
February 4, 2021**

### ***Fiduciary Proposals***

*Senator Maggie Hassan (D-NH)*

As you know, the previous administration finalized the Prohibited Transaction Exemption to update the fiduciary standard. If confirmed, do you have plans to make changes to the finalized exemption?

**Answer: If confirmed, I intend to instruct EBSA to prioritize a reexamination of the exemption consistent with regulatory procedures and the Administrative Procedure Act.**

*Senator Richard Burr (R-NC)*

If confirmed, will you commit to working with the SEC and providers of investment advice on any DOL regulation or guidance that would affect securities recommendations?

**Answer: Yes. Although the Department and the SEC have independent statutory authority, I believe it is important for us to consult with each other where there are matters of shared jurisdiction. I also believe in the importance of gaining input from interested persons, during the regulatory notice and comment process.**

*Senator Bill Cassidy (R-LA)*

During the Obama Administration, the Department of Labor promulgated a fiduciary regulation that would have harmed small and moderate retirement savers by reducing access to certain financial products and services, creating an advice gap for those most in need of help. This rule was struck down by the courts, and today we now have the SEC's Regulation Best Interest, which requires broker-dealers to only recommend financial products to their customers that are in their customers best interests, while clearly identifying any potential conflicts of interest and financial incentives that the broker-dealer may have with the products offered. This rule provides enhanced protections that appropriately benefit savers from all walks of life. If confirmed as Secretary, how will you make sure that ERISA's fiduciary requirements do not undo these balanced protections and undercut access to commission-based advice that smaller investors rely on to achieve financial security?

**Answer: Although the Department and the SEC have independent statutory authority, I believe it is important for these two agencies to consult with each other where there are matters of shared jurisdiction. I believe that public input, including the notice and comment process, can play a significant role in helping us to understand the range of perspectives on these issues and help us ensure that we strike the appropriate balance.**

*Senator Mike Braun (R-IN)*

Experience with the Department of Labor's now vacated 2016 fiduciary regulation showed that, when faced with a strict "sole interest" fiduciary standard, many financial firms moved to a fee-for-service only model, eliminating commission-based services relied upon by small and moderate balance savers and typical buy-and-hold investors. As such, it was clear that imposing a strict fiduciary standard on all financial professionals reduced choice for consumers in the marketplace. If confirmed as Secretary, how will you ensure that the Department's administration and interpretation of ERISA's fiduciary requirements continue to ensure that small and moderate balance savers have access to commission based services?

**Answer: I believe that public input, including the notice and comment process, can play a significant role in helping to understand the varying perspectives that exist and help to ensure that the appropriate balance is struck.**

*Senator Tim Scott (R-SC)*

If confirmed, how will you work to ensure that the Department's administration and interpretation of ERISA's fiduciary requirements continue to preserve access to commission-based financial advising for everyday Americans?

**Answer: I believe that public input, including the notice and comment process, can play a significant role in helping to understand the diverse perspectives that exist and help to ensure that we strike the appropriate balance.**

In your view, what are the some of the benefits of this type of consumer choice and access for Main Street retirement savers and everyday investors in South Carolina and across the country?

**Answer: I believe retirement investors benefit from being able to pay for advice in a way that makes sense for them, whether that is through commissions, an hourly fee, an advisory fee based on the value of the account, or another arrangement. At the same time, it is important to ensure that investors are protected from conflicts of interest that could lead brokers and advisers to put their own financial interests in the driver's seat, rather than the interest of their customers. Investors can best choose the advice models and investments that are right for them when they receive sound advice on these questions from investment professionals that are looking out for the investors' interests.**

During the fiduciary rulemaking process in the second term of the Obama administration, a number of my colleagues and I raised concerns with the Department's economic analysis of the rule's likely impact. We suspected, based on consultations with experts, that the Department's approach had substantially underestimated the compliance costs and product offering limitations that the rule would produce. These fears proved valid, with real-world consequences for working Americans and their retirement savings options. What lessons would you take away from the substantial gap between the Department's economic projections and real-world economic impacts in the case of the 2016 fiduciary rule, and what steps will you take, if confirmed, to restore public trust in the integrity and validity of the economic models and analyses used by the Department to inform its regulatory actions?

**Answer: As part of drafting a rule, agencies request and must address comments received on a proposal. If appropriate, changes will be made to address concerns about costs and burdens of compliance.**

### ***Retirement Security***

*Senator Maggie Hassan (D-NH)*

As you know, the United States Department of Labor is tasked with helping more workers save for retirement and helping retirees protect and utilize their savings. One recent survey found that 1 in 5 Americans in their 70s have less than \$50,000 saved. With Americans of all ages struggling to save for retirement, and many workers and retirees are at a risk of outliving their retirement savings can you share what policies you would focus on to help workers save more for retirement as Secretary of Labor?

**Answer: Too many Americans do not have access to well-paying jobs with benefits, including retirement benefits. A critical part of building back the middle class is improving wages and increasing access to benefits so that more workers have opportunities to save. During his campaign, President Biden called for providing almost all workers with access to a retirement savings plan through an "automatic 401(k)." It is also important for the Department to enforce the law, provide compliance assistance, and promote public education to help ensure the value and security of workers' hard-earned retirement savings. If confirmed, I look forward to working with you and other members of the Committee on policies to help workers save more for retirement.**

*Senator Richard Burr (R-NC)*

Bipartisan legislation was introduced in Congress to modernize the way retirement plan communications are delivered, and the Department of Labor finalized a rule to expand the use of default electronic delivery while preserving paper delivery for those who prefer it. At the time, the DOL rule was broadly supported by union pension funds and nearly the entire retirement savings community who have embraced 21st century technology but were limited in their retirement plan communications. If confirmed, do you intend to build on this progress to enhance retirement plan communications and the use of defaults to make it easier for retirement savers to engage early and set themselves up for retirement security in the long run?

**Answer: If confirmed, I look forward to learning more about this issue, and about ways that we can facilitate retirement savings and make disclosure more effective for America’s workers.**

*Senator Tim Scott (R-SC)*

More broadly, what do you see as the administration’s top priorities for bolstering retirement security, both from a regulatory standpoint and from a legislative standpoint?

**Answer: I believe it is important for all stakeholders to work together to address the multiemployer pension crisis. In addition, expanding access to retirement savings so that more individuals have the opportunity to save is critical. During his campaign, President Biden addressed this issue by calling for providing almost all workers with access to a retirement savings plan through an “automatic 401(k).” President Biden has also called for a Social Security reform package that would improve the fiscal health of the program and would improve retirement security for many Americans. If confirmed, I look forward to working with you on these and other ways to improve retirement security.**

Under the previous administration, I led an effort, with strong bipartisan support, to promote retirement plan auto-portability as a means of reducing plan leakage and bolstering retirement security, particularly for Americans who change jobs relatively often, Americans with low-account balances, and Americans from underserved communities and communities of color. In response to our efforts, the Department of Labor took the regulatory actions needed to facilitate auto-portability. I hope to build on this legacy of success in the coming years, increasing access to auto-portability in order to open the door to opportunity and long-term prosperity for more working Americans. What steps do you plan to take in order to further advance and expand access to auto- portability, and can you commit to prioritizing this bipartisan policy area?

**Answer: If confirmed, I look forward to learning more about this issue, and about how we can promote savings and reduce leakage from the retirement system.**

### ***ERISA Issues – ESG***

*Senator Patty Murray (D-WA)*

Guidance from the DOL around inclusion of environmental, social and governance (ESG) criteria and proxy voting in ERISA-governed retirement plans has changed with the past several administrations. These policy shifts are not beneficial for retirement savers. There is abundant academic and market research that show sustainable investments and proxy voting are suitable for ERISA-governed plans. Will it be a priority for you, if confirmed, to reverse these two rules – “Financial Factors in Plan Selection” and “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” – and replace them with new rules that give fiduciaries the ability to consider ESG criteria and vote proxies?

**Answer: If confirmed, I will instruct EBSA to prioritize a reexamination of these issues, consistent with rules for rulemaking. I am especially concerned that the recent rules could make it harder for plans to make investment decisions based on ESG factors, even when those factors are related to the economic wellbeing of plans and their participants. Given ERISA’s overarching goal of protecting**

**plans and their participants, that is reason enough to review the rulemakings. I understand that President Biden has identified this as a priority for review.**

*Senator Tammy Baldwin (D-WI)*

During the Trump Administration, the Department of Labor sought to limit the ability of ERISA fund managers from including investments that put an emphasis on ESG factors, and even presumed in their draft rule that such investments would not perform as well as other investments. Do you think that ERISA fund managers should be able to include funds that consider ESG factors? Can companies and funds that emphasize ESG factors be sound investments, in your opinion?

**Answer: For many years, the Department has recognized the ability of ERISA fiduciaries to select ESG investments under appropriate circumstances. I understand that the previous Administration sought to limit those circumstances, and that President Biden has identified this as a priority for review. I am concerned that the recent regulations may deter plans from making investment decisions based on ESG factors, even when those factors are related to the economic wellbeing of plans and their participants. Given ERISA's overarching goal of protecting plans and their participants, that is reason enough to take a hard look at the rulemakings. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

Are you familiar with the previous Administration's rulemakings last year, which sought to limit the ability of ERISA retirement plan managers to consider ESG factors when choosing investments as part of an overall responsible investment strategy? Do you have plans to revise these rules? Are you planning to enforce these rules?

**Answer: For many years, the Department has recognized the ability of ERISA fiduciaries to select ESG investments under appropriate circumstances. I understand that the previous Administration sought to limit those circumstances, and that President Biden has identified this as a priority for review. I am concerned that the recent regulations may deter plans from making investment decisions based on ESG factors, even when those factors are related to the economic wellbeing of plans and their participants. Given ERISA's overarching goal of protecting plans and their participants, that is reason enough to review the rulemakings. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

How will you respond to the previous Administration's rulemakings that seek to effectively limit ERISA plans' investments in ESG-related securities and/or other ESG-related investment products?

**Answer: For many years, the Department has recognized the ability of ERISA fiduciaries to select ESG investments under appropriate circumstances. I understand that the previous Administration sought to limit those circumstances, and that President Biden has identified this as a priority for review. I am concerned that the recent regulations may deter plans from making investment decisions based on ESG factors, even when those factors are related to the economic wellbeing of plans and their participants. Given ERISA's overarching goal of protecting plans and their participants, that is**

**reason enough to review the rulemakings. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

Do you believe ERISA plans should be encouraged to vote their proxies and provide voting guidelines that are independent of their investment managers'? How will your Administration enforce the DOL's rule discouraging ERISA plans to vote their proxies? Do you have plans to re-propose the rule?

**Answer: For many years, the Department has recognized that the fiduciary act of managing employee benefit plan assets includes the management of voting rights as well as other shareholder rights connected to shares of stock. I understand that the previous Administration sought to limit the circumstances in which those shareholder rights were exercised. Plans should always be able to vote their stock to protect their interests as shareholders and ensure corporate management's accountability. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

*Senator Tina Smith (D-MN)*

Last year, the Department issued a final rule titled "Financial Factors in Selecting Plan Investments" that sharply restricted ERISA-governed pension and 401(k) plans from considering firms' records on racial equity, climate change, treatment of workers, and other factors in their investment decisions. What is your view of this rule? Will you review the rule for revision or repeal? Do you intend to adopt a non-enforcement policy with respect to the rule while it is under review?

**Answer: For many years, the Department has recognized the ability of ERISA fiduciaries to select ESG investments under appropriate circumstances. I understand that the previous Administration sought to limit those circumstances, and that President Biden has identified this as a priority for review. I am concerned that the recent regulations may deter plans from making investment decisions based on ESG factors, even though those factors are often related to the economic wellbeing of plans and their participants. Given ERISA's overarching goal of protecting plans and their participants, that is reason enough to review the rulemakings. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

*Senator Tommy Tuberville (R-AL)*

I am concerned about the recent push for retirement fund managers to prioritize environment and social governance considerations over total return when building out the retirement portfolios of hard-working Americans. If confirmed, you will be responsible for enforcing ERISA, the federal law that sets standards for employer-sponsored retirement plans. Millions of Americans, including many Alabamians, rely on funds produced by these accounts during retirement. What do you believe should be the primary goal of the people managing these funds: maximizing investment return or fighting for social causes they believe in?

**Answer: I understand that ERISA itself is quite clear that a fiduciary's obligations are to discharge their fiduciary duties prudently solely in the interests of the plan's participants and beneficiaries. That said, for many years, the Department has recognized the ability of ERISA fiduciaries to select ESG investments under appropriate circumstances. I understand that the**

**previous Administration promulgated regulations that sought to limit those circumstances. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

*Senator Jerry Moran (R-KS)*

As our nation considers ways to fund much-needed modernization of infrastructure, some commentators have noted the need to ensure that ERISA funds be provided clearer standards for considering “economically-targeted investments” and how to analyze such opportunities against other reasonably available investments. What is your view regarding if, and when, generating returns to a plan through an investment in a building or infrastructure project may be deemed a legitimate pecuniary factor relied in the selection of an investment?

**Answer: I look forward to being briefed by Departmental personnel on this issue. ERISA fiduciaries are obligated to invest plan assets with prudence and undivided loyalty to the interests of the plan participants and beneficiaries. It is my understanding that plan fiduciaries can consider such investments in much the same way that they would consider any other investment. In other words, they would have to evaluate the needs of the plan’s portfolio, and the investments’ potential risks, returns, and other salient economic features.**

Do you plan to revisit the Department’s current position on this issue?

**Answer: For many years, the Department has recognized the ability of ERISA fiduciaries to select ESG (or ETI) investments under appropriate circumstances. I understand that the previous Administration sought to limit those circumstances, and that President Biden has identified this as a priority for review. I am especially concerned that recent regulations may deter plans from making investment decisions based on ESG factors, even when those factors are related to the economic wellbeing of plans and their participants. Given ERISA’s overarching goal of protecting plans and their participants, that is reason enough to review the rulemakings. If confirmed, I intend to instruct EBSA to prioritize a reexamination of this issue, consistent with the Administrative Procedure Act.**

### ***ERISA Issues – Other***

*Senator Tammy Baldwin (D-WI)*

Employee Stock Ownership Plans (ESOPs) provide an opportunity for workers to own a part of the companies for which they work, and these empowering arrangements provide meaningful retirement savings while also driving economic growth and creating jobs. They have also been shown time and again to improve employee productivity, and help the company’s bottom line. Congress has, on a bipartisan basis, gone to great lengths to encourage ESOPs. However, the Department of Labor (DOL) has never issued guidance on key issues such as valuation of stock that is bought or owned by the ESOP, which has created ambiguity and made it difficult for companies to make business decisions. The lack of guidance has additionally led to what many ESOP companies perceive as unfair enforcement activities by DOL against ESOPs, which has had the unfortunate consequence of deterring business owners from transitioning to an ESOP model. Can I have your commitment to work to promote broad-based employee ownership among private companies, and to

issue official guidance on valuation rules and similar ESOP policy issues to help create clarity for existing and prospective ESOP companies?

**Answer: At their best, ESOPs both provide valuable retirement benefits to workers and give them a direct stake in the companies that employ them. These are important goals, well worth promoting. These goals are undermined, however, when ESOPs overpay for stock or engage in transactions that waste corporate assets for the benefit of selling shareholders or management. I am looking forward to being briefed by Department staff on the scope of existing guidance and the ways in which we can promote Congress' important goals with respect to ESOPs, while avoiding abusive transactions and overpayments that harm the workers ESOPs should be designed to protect.**

Mayor Walsh, I appreciate that in your time as Mayor of Boston, your office led an initiative to encourage more employee ownership, including the adoption of Employee Stock Ownership Plans, or ESOPs. I too have been a supporter of ESOPs, however for some time now the ESOP community has sought greater regulatory clarity from the Department of Labor regarding appropriate methods and standards for the valuation of companies. When ERISA was passed in 1974, it directed the Department of Labor to promulgate regulations, including specifically a regulation regarding what constitutes an ESOP fiduciary's "Adequate Consideration" for the establishment of a company's share price. Unfortunately, DOL has not yet fulfilled that responsibility and no formal rulemaking process has been brought to a conclusion. Can you commit that as Secretary of Labor you will initiate that rulemaking process, including the opportunity for the interested stakeholders to provide their input and comments as provided under the Administrative Procedures Act?

**Answer: For the reasons indicated in the previous response, I look forward to being briefed by Departmental staff on the scope of existing guidance on valuation issues, as well as on any need for additional regulatory action. The Department would fully comply with the Administrative Procedure Act (APA) in any rulemaking, including the APA's requirements for public notice and comment.**

*Senator Tina Smith (D-MN)*

What is your view of forced arbitration and venue limitation clauses with respect to ERISA claims? If such clauses are inserted in plan documents or included in an employment contract, should they be enforced?

**Answer: ERISA expressly states which courts have jurisdiction over actions by participants and beneficiaries to enforce their rights. If confirmed, I look forward to being briefed by EBSA and the Solicitor's Office on this issue.**

## **Regulatory Process**

*Senator Richard Burr (R-NC)*

Under the Obama Administration, the Department of Labor made a practice of issuing guidance documents and treating them as if they were legally binding, even though they are not supposed to be binding under the law. If confirmed, how do you plan to use guidance documents at the Department?



**Answer: If confirmed, I will issue and handle guidance documents in a manner consistent with all relevant laws, and consistent with the Department's authority.**

Will you commit to not treating guidance as legally binding?

**Answer: If confirmed, I will treat guidance documents in a manner that is consistent with all relevant laws, and consistent with the Department's authority.**

Will you commit to following the Administrative Procedure Act and Executive Order 12866, the long-standing Executive Order issued under President Clinton, on regulatory process when proposing regulations and when attempting to repeal any regulation?

**Answer: Yes, where applicable. If confirmed, I intend to follow all the relevant laws governing the regulatory process.**

If Congress has overturned a rule using the Congressional Review Act, will you commit to not issuing a similar policy through subregulatory guidance?

**Answer: I intend to fully comply with the requirements of the Congressional Review Act. In the circumstance you described, I will discuss with agency leadership whether further guidance was appropriate given the particular factual and legal circumstances at issue.**