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Congress of the United States

House of Representatives

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June 6, 2024

The Honorable Daniel Werfel
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Dear Commissioner Werfel:

As part of an ongoing investigation into efforts by leftist activists to impose favored environmental, social, and governance (ESG) policies across the U.S economy and society, the Committee on Oversight and Accountability is investigating whether state-sponsored pension funds are violating provisions of the Internal Revenue Code (IRC) related to investing for the exclusive benefit of their enrollees. The Committee seeks certain information from the Internal Revenue Service (IRS) to advance its oversight of this matter.

To help Americans save for their retirement, Congress has utilized the IRC to incentivize employers to offer employer-sponsored retirement plans and individuals to maximize their opportunities to save in preparation for retirement income. A key tool in this incentive structure are myriad tax code provisions incentivizing employer-sponsored retirement plans. And central to these plans is the deferral of income which allows tax-free growth within a plan, with the income only being taxed only when it is withdrawn through distributions.

In return for the benefits of tax-deferred retirement plans, the IRC prescribes certain statutory and regulatory requirements which a plan must meet to be considered a qualified plan. Put another way, plan sponsors and administrators have an obligation to ensure all the rules are followed so as not to jeopardize their plan's preferred tax status. The IRC sets out numerous rules for "a trust created in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employee or their beneficiaries."[1]

A key to these rules is that they are "for the exclusive benefit of" the employee. This means an employer surrenders use of the funds contributed to a tax qualified plan, with few

[1] The Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.

limited exceptions. However, recently some state pension funds have acted in ways that clearly are not "for the exclusive benefit" of employees, instead using the plans' assets and their associated shareholder voting rights to pursue their own political agenda.

In 2017, the Supreme Court considered the question of "exclusive purpose" under the Employee Retirement Income Security Act of 1974 (ERISA). The Court found that "read in the context of ERISA as a whole, the term 'benefits' in the provision just quoted must be understood to refer to the sort of *financial* benefit (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries."[2] Some state-sponsored retirement plans have similar requirements. For instance, California's state employee pension system requires that "the Board and its officers and employees shall discharge the duties with respect to this system solely in the interest of the participants and beneficiaries: (a) for the exclusive purpose of… (1) providing benefits to members, retired members, and their survivors and beneficiaries."[3]

While state-sponsored pension funds are not covered by ERISA, that law was built on the experience of existing retirement plans and the commonly used fiduciary standards of loyalty and care. In *Central States Pension Fund v. Central Transportation*, Justice Marshall, writing for the majority, noted "that Congress enacted ERISA after 'almost a decade of studying the Nation's private pension plans.'"[4] A footnote elaborating on this comment states "[a]lthough most of ERISA's legislative history focused on pension plans, Congress also studied the operation of other employee benefit plans and developed a similar regulatory framework respecting these other plans."[5]

Recently, blue-state retirement plans' administrators have become aggressive in using the voting rights associated with their participant retirement assets to pursue anti-oil and gas policies, potentially in violation of the IRC's exclusive benefit requirements. A perfect example of this activism is how the California Public Employees Retirement System (CalPERS) pledged to use their shares to vote against Exxon Mobil's entire Board of Directors, including the company's CEO, because the company has not dropped litigation against two nuisance left wing activists: *Arjuna Capital* and *Follow This*. It is clear that this vote, designed to pressure the company to stand down from action taken to lower costs and protect shareholder value, meets the exclusive benefit test.

Arjuna Capital is an investment management fund established to change corporate behavior through shareholder engagement. However, unlike traditional investors who seek to maximize company value, thus fortifying their investment, *Arjuna Capital's* stated purposes is to

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[2] *Fifth Third Bancorp et. al. v Dudenhoeffer*, 573 U.S. 409 (2014) (emphasis in original).
[3] California Government Code § 20151.
[4] *Central States Pension Fund v. Central Transportation*, 472 U.S. 559 (1985).
[5] *Id*.

"divest from fossil fuels"[6] and "shrink"[7] oil companies. Yet despite its publicly stated goal, *Arjuna Capital* has not divested from Exxon Mobil but rather holds the minimum investment needed to repeatedly offer nuisance shareholder proposals seeking to harm the company.

Follow This, an Amsterdam-based non-profit, sets out to force companies to change their behavior to meet the Paris Climate Accord, a goal which the U.S. is estimated to miss by 23-37%.[8] *Follow This* discloses its intent and by association, its positioning fund managers who vote for its proposals to violate their fiduciary duty. In its amended Articles of Association, *Follow This* explicitly states "the object of this association is to stop global climate change and global warming by encouraging oil and gas companies to adapt their business operation to the UN Climate Agreement in Paris. The Association explicitly does not aim to achieve returns on behalf of its members through shares acquired to achieve this goal…"[9] *Follow This* calls this strategy its "Goldilocks Trojan Horse."[10]

To assist the Committee in better understanding if state pension funds are truly operating for their participants' exclusive benefit and to determine whether amendments to the IRC are appropriate, please provide the following information no later than June 20, 2024:

1. The process used by the IRS to determine plans' compliance with the exclusive benefit requirements of 26 U.SC. § 401;

2. Copies of any guidance the IRS has published to ensure the "exclusive benefit" test is met by plan sponsors; and

3. The number of enforcement actions the IRS has taken against plan sponsors related to the "exclusive benefit" test in fiscal years 2018-2024 along with a brief description of the facts and circumstances underlying the enforcement action.

To make arrangements to deliver the requested information or to ask any related follow-up questions, please contact the Committee on Oversight and Accountability Majority staff at (202) 225-5074. Attached are instructions for producing requested documents and information to the Committee.

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[6] Arjuna Capital, *available at* https://arjuna-capital.com/ (last accessed May 28, 2024).
[7] Natasha Lamb, *Arjuna Capital's Natasha Lamb: You Can't Deny Big Oil Need to Shrink*, RESPONSIBLE INVESTOR (May 12, 2016).
[8] *See* Climate Action Tracker: USA, *available at* https://climateactiontracker.org/countries/usa/ (last accessed May 28, 2024).
[9] Amendment to the Articles of Association of Follow This (Jun. 20, 2022), *available at* https://www.follow-this.org/wp-content/uploads/2022/11/Articles-of-Association-English.pdf.
[10] Follow This: For Investors, *available at* https://www.follow-this.org/for-investors/ (last accessed May 28, 2024).

The Committee on Oversight and Accountability is the principal oversight committee of the U.S. House of Representatives and has broad authority to investigate, "any matter" at "any time" under House Rule X. Thank you for your attention to this important matter.

Sincerely,

James Comer
Chairman
Committee on Oversight and Accountability

cc: The Honorable Jamie B. Raskin, Ranking Member
Committee on Oversight and Accountability