GREEN TRANSITION AND THE ROLE OF AMERICAN LABOR'S CAPITAL:
LEGAL CHALLENGES AND POLICY IMPLICATIONS

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PRESENTATION STRUCTURE

1. American labor’s capital
2. The role of institutional investors (pension funds)
3. The role of (individual) workers
4. Recent and upcoming developments

AMERICAN LABOR'S CAPITAL

Retirement savings invested in pension plans

Seven countries in the OECD area responsible for more than 90% of pension fund assets: the **United States (USD 20.1 trillion)**, the United Kingdom (USD 3.2 trillion), the Netherlands (USD 2.1 trillion), Australia (USD 1.8 trillion), Canada (USD 1.6 trillion), Japan (USD 1.5 trillion) and Switzerland (USD 1.2 trillion). [OECD, 2021]

The total amount of assets held by (**PRIVATE**) pension plans increased 16.0 percent, from $9.2 trillion to $10.7 trillion, the largest increase since 2008. DC plan assets increased 18.6 percent, to $7.4 trillion, while DB plan assets increased 10.3 percent, to $3.3 trillion [DOL, 2021]

→ **Major issue**: the shift from centrally managed "defined-benefit" plans to individually managed, outsourced "defined-contribution" funds like 401(k)s → centralized, defined-benefit plans are capable of engaging in shareholder activism in ways that are almost impossible to do with 401(k) plans or the like [Webber, 2018]

THE ROLE OF INSTITUTIONAL INVESTORS

Common understanding: in the U.S. fiduciary duties prevent corporations and its institutional shareholders from pursuing nonfinancial interests.

PENSION FUNDS – **ERISA** (1974) codifies the trust law "*sole interest rule*" by mandating that a pension trustee act "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose" of "providing benefits" to them.

Reconciliation [Schanzenbach, Sitkoff, 2020]:

ESG investing is permissible under American trust fiduciary law if two conditions are satisfied:

1) the trustee reasonably concludes that ESG investing will benefit the beneficiary directly by improving risk-adjusted return;

2) the trustee's exclusive motive for ESG investing is to obtain this direct benefit.

THE ROLE OF (INDIVIDUAL) WORKERS

Most of mutual funds is purchased as 401(k) plans for retirement in which the employer chooses the **options** available and the **default** fund: OPT-OUT

→ CONSTRAINTS:

behavioral [Thaler, Sunstein, 2008]

and **legal** (e.g., employers choose the default option for employees, plan sponsors believe there is added legal liability if they pick poor ones; layers of intermediaries)

→ MAJOR DEVELOPMENTS:

✓ Legal constraints easing up (starting at least from 2006 DOL regulation);

✓ Growing interest of individuals (especially millennials) in sustainable investing [Morningstar, Natixis, MS Surveys]

✓ (Consequently) institutional investors, such as the "Big Three" are offering more sustainable-related 401(k) products.

RECENT AND UPCOMING DEVELOPMENTS

Executive Order 14030, signed by President Biden on May 20, 2021

“*The intensifying impacts of climate change present physical risk to assets, publicly traded securities, private investments, and companies (...). The failure of financial institutions to appropriately and adequately account for and measure these physical and transition risks threatens the competitiveness of U.S. companies and markets,* ***the life savings and pensions of U.S. workers and families****, and the ability of U.S. financial institutions to serve communities*”.

2.14.2021, Department of Labor (DOL), “*Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*”

proposed rules that would remove barriers to plan fiduciaries’ ability to consider climate change and other environmental, social and governance factors when they select investments and exercise shareholder rights (“*Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*”)

2.14.2022, Employee Benefits Security Administration (EBSA), Request for Information (RFI)

to solicit public input on EBSA's future work relating to retirement savings and climate-related financial risk. Focus: agency actions that can be taken to protect the life savings and pensions of U.S. workers and families from the threats of climate-related financial risk.

3.21.2022, Securities and Exchange Commission (SEC)

proposed rule changes that would require registrants to include certain climate-related disclosures in their registration statements and periodic reports, including information about climate-related risks that are reasonably likely to have a material impact on their business, results of operations, or financial condition, and certain climate-related financial statement metrics in a note to their audited financial statements

THANKS FOR YOUR ATTENTION!

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