



AMERICANS FOR LIMITED GOVERNMENT

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July 9, 2020

Secretary Eugene Scalia
U.S. Department of Labor
200 Constitution Avenue, NW
C-2318
Washington, DC 20210

Dear Secretary Scalia:

The Labor Department has a fiduciary responsibility to end all private retirement investments in dangerous Chinese investments by amending the current pending regulation on Financial Factors in Selecting Plan Investments¹ to disqualify all companies that do not adhere to the transparency requirements of Dodd-Frank and Sarbanes-Oxley.

As a former Labor Department political appointee under President George W. Bush and a member of President Trump's Labor Transition team, I have been focused upon the importance of the Department's oversight role on private pension investments as well as the Pension Benefits Guaranty Corporation's solvency.

I want to assure you that I agree wholeheartedly with your assessment and decision on excluding risky Chinese assets from the federal employees 401(K) Thrift Savings Plan.² Your statement that stopping the inclusion of Chinese assets was necessary because it, "would place millions of federal employees, retirees, and service-members in the untenable position of choosing between forgoing any investment in international equities or placing billions of dollars in retirement savings in risky companies that pose a threat to U.S. national security" is exactly on point.

The obvious question is if these assets are too risky for inclusion in the federal TSP, why would they be allowed to be included in private 401(K) investments where the same argument directly applies? The answer is that they are not, and under ERISA it is the Labor Department's job to protect private sector retirement specific investments or pensions from choices that are unsuitably risky.

In the attached July 7 letter³ from National Security Advisor Robert O'Brien and Larry Kudlow, Director of the National Economic Council to the head of the U.S. Railroad Retirement Board, they state, "The NRRI's Trust's investment in the PRC exposes the retirement funds of railroad workers to significant and unnecessary economic risk."

Once again the question is why should private pension investments be allowed to be put into this risk when other public retirement funds are being urged to protect their retirees by ending these investments?

¹ <https://www.federalregister.gov/documents/2020/06/30/2020-13705/financial-factors-in-selecting-plan-investments>

² <https://presentdangerchina.org/wp-content/uploads/2020/05/Sec.-Scalia-Letter-to-FRTIB-51120.pdf>

³

https://d3n8a8pro7vhmx.cloudfront.net/prosperousamerica/pages/5876/attachments/original/1594241915/NSC_letter_to_RRB.pdf?1594241915

O'Brien and Kudlow continue by citing the exact transparency risk which directly puts Chinese assets in conflict with both the letter and intent of ERISA, "Another key reason why the NRI Trust's investments in PRC companies expose American railroad retirees to substantial economic risk is because the Chinese government prevents companies with Chinese operations listed on U.S. exchanges from complying with applicable U.S. securities laws, leaving investors without the benefit of important protections."

You are well aware of the recent determination by the Pentagon that twenty Chinese companies are owned or controlled by the Chinese Communist Party. You are also undoubtedly aware that in May, the U.S. Senate voted to require transparency for Chinese firms listed on American exchanges. As you yourself are aware, the U.S. Department of Labor's Bureau of International Labor Affairs annually issues a report on countries ⁴ which use child and slave labor in the manufacture of goods. China is listed not once, not twice but twelve times in the latest report for using children and slaves to make goods, many of which find their place on the shelves of U.S. retailers like Walmart. Artificial flowers, bricks, Christmas decorations, coal, cotton, electronics, fireworks, footwear, garments, nails, textiles and toys are all listed as being made with child or slave labor in China.

The very Christmas ornaments we put on our trees, the toys, clothing under that tree including the latest Colin Kaepernick shoe, and the phone or other Chinese made electronics are likely the product of the blood and toil of children and slaves.

While moral determinations are not part of ERISA, it is sickening to think that American pensions and 401(k) investors are capitalizing the grotesque abuse of helpless and oppressed Chinese religious minorities and political dissidents. Americans would be appalled to learn that they were effectively providing the capital for the enslavement of their fellow man, and you can stop it.

Nothing prevents non-retirement assets from being invested in these same Chinese companies, but allowing private retirement investments to continue to invest in non-transparent, risky assets whose reliance on slavery rightfully offends our national sensibilities is not only a violation of the Labor Department's statutory responsibility under ERISA, it is immoral.

Thank you for your consideration of this issue. Given your previous statements and those which are currently coming from the National Security Advisor and National Economic Council, I am confident that you will come to the determination that Chinese assets and other risky non-transparent assets have no place in America's retirement portfolios.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard Manning". The signature is stylized with a large, looped "R" and a trailing flourish.

Richard Manning
President
Americans for Limited Government

P.S. I applaud the Department's regulatory effort to take the thumb off the retirement investment scale in favor of ESG's, returning to a neutral, returns driven approach. Those depending upon returns from their investments to fund retirement deserve apolitical investing designed to build their retirement nest egg. I will be submitting a comment to this effect.

⁴ <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>

SECRETARY OF LABOR
WASHINGTON, D.C. 20210

MAY 11 2020

Via E-mail

Mr. Michael D. Kennedy
Chairman
Federal Retirement Thrift Investment Board
77 K Street, NE
Washington, D.C. 20002

Dear Chairman Kennedy:

I wish to thank you and your fellow Board members for your service on the Federal Retirement Thrift Investment Board. The work you have done on behalf of the millions of current and former federal employees and service-members invested in the Thrift Savings Plan (TSP) is deeply appreciated.

I am writing with regard to the Board's decision to change the benchmark index for the TSP's International Stock Index Investment Fund, or "I Fund," and to communicate to the Board a direction from the President.

As you know, the I Fund gives plan participants the option to invest a portion of their retirement savings in the international equity markets. The Board, as plan fiduciaries, must select a stock index as a benchmark for the Fund, and retirement savings directed to the Fund are then invested directly in the stocks comprising the benchmark index. The I Fund is the principal means for plan equity participation in international equity markets. Currently, there are more than \$40 billion in the I Fund.

In November 2017, the Board selected a new benchmark index for the I Fund, switching from the MSCI Europe, Australasia, and Far East Index—which captures equities in developed markets—to the MSCI All Country World ex USA Investable Market Index (MSCI ACWI ex USA IMI), which contains equities in what MSCI has labeled "Emerging Markets" as well, including the People's Republic of China. The Board evaluated that decision again last year, after a bipartisan group of Senators expressed concern that companies benefiting from this investment would include those involved in military activities, espionage, and human rights abuses by the Chinese government. However, the Board declined to reverse the decision. The I Fund is scheduled very shortly to begin investing in companies listed in the MSCI ACWI ex USA IMI, including approximately \$4.5 billion in Chinese equities.

Enclosed is a letter from the Assistant to the President for National Security Affairs, Robert O'Brien, and the Assistant to the President for Economic Policy and Director of the National Economic Council, Larry Kudlow,¹ expressing grave concerns with the planned investment on

grounds of both investment risk and national security. In their letter, Messrs. Kudlow and O'Brien document risks to investors resulting from inadequate investor disclosures and protections under Chinese law, drawing in part on a recent series of joint statements by the chairs of the Securities and Exchange Commission (SEC) and Public Company Accounting Oversight Board (PCAOB). Kudlow and O'Brien state that this investment risk is augmented by the Chinese government's concealment of critical information concerning the novel coronavirus, which exacerbated the COVID-19 pandemic and, they note, materially increases the risk that Chinese companies will be subject to sanctions or boycotts. Messrs. Kudlow and O'Brien also explain that some of the Chinese companies in which the TSP will invest "present significant national security and humanitarian concerns for the United States, which increases the risk that they could be subject to sanctions, public protests, trade restrictions, boycotts, and other punitive measures that jeopardize their business and profitability." Several of the companies listed on the MSCI ACWI ex USA IMI arm the People's Liberation Army, provide equipment that is used to oppress China's religious minorities, and have violated U.S. sanctions by engaging in economic activity with Iran and North Korea.

As you know, the concerns expressed in this letter have also been voiced by both Republican and Democratic members of Congress, as well as in the extraordinary recent joint statement by the chairs of the SEC and PCAOB.¹ SEC Chairman Clayton has personally reinforced these investor protection concerns to me.

The attached letter, which is authored by the President's principal economic and national security advisors, establishes that linking the I Fund to the MSCI ACWI ex USA IMI would place millions of federal employees, retirees, and service-members in the untenable position of choosing between forgoing any investment in international equities, or placing billions of dollars in retirement savings in risky companies that pose a threat to U.S. national security. Moreover, because the federal government "matches" TSP contributions, selecting the MSCI ACWI ex USA IMI would result in the federal government funding activities that are diametrically opposed to U.S. military interests.

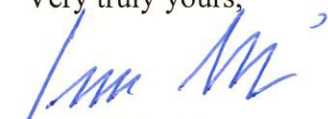
At the direction of President Trump, the Board is to immediately halt all steps associated with investing the I Fund according to the MSCI ACWI ex USA IMI, and to reverse its decision to invest Plan assets on the basis of that international equities index. This now is the only acceptable course, given the concerns expressed by the President's advisors and the chairs of the SEC and PCAOB, as well, of course, as the President's own directive to the Board. I also note, with all respect to the many years of service by you and your fellow Board members, that you and the other members serve on expiring terms, and the President last week nominated three replacements. Deferring the MSCI ACWI ex USA IMI investment will enable a newly-

¹ See Letter from Sen. Marco Rubio, Sen. Jeanne Shaheen, et al. to Michael Kennedy (Oct. 22, 2019), *available at* <https://bit.ly/2ST0HNP>; Statement on Continued Dialogue with Audit Firm Representatives on Audit Quality in China and Other Emerging Markets; Coronavirus – Reporting Considerations and Potential Relief (Feb. 19, 2020), *available at* <http://www.sec.gov/news/public-statement/statement-audit-quality-china-2020-02-19>; Press Release, SEC Chairman Clayton, PCAOB Chairman Duhnke, and Members of SEC Staff Meet With Auditing Firm Representatives to Discuss Audit Quality in Emerging Economies and Markets (Nov. 4, 2019), *available at* <http://www.sec.gov/news/press-release/2019-228>.

constituted Board, impaneled with the advice and consent of the Senate, to decide what index—if any—should be selected to replace the current I Fund index.

Chairman Kennedy, please confirm by close of business Wednesday that the Board will take the steps described above. And thank you again for your service, which I appreciate has extended much longer than you and your colleagues originally expected.

Very truly yours,



Eugene Scalia

Cc: Dana K. Bilyeu, Member of the Board
Bill S. Jasien, Member of Board
David A. Jones, Member of Board
Ron D. McCray, Member of the Board
Ravindra Deo, Executive Director
Lawrence A. Kudlow, Assistant to the President for Economic Policy and
Director of the National Economic Council
Robert C. O'Brien, Assistant to the President for National Security Affairs

THE WHITE HOUSE

WASHINGTON

July 7, 2020

Erhard R. Chorlé
Chairman
U.S. Railroad Retirement Board
William O. Lipinski Federal Building
844 North Rush Street
Chicago, IL 60611-1275

Dear Chairman Chorlé:

We write to you in the interest of protecting American investors, as it has come to our attention that the Railroad Retirement Board (RRB) is permitting hundreds of millions of dollars of railroad workers' retirement assets to be invested in companies from the People's Republic of China (PRC).ⁱ The RRB's retirement dollars are being managed through the National Railroad Retirement Investment Trust (NRRI Trust), which has decided to invest in companies from the PRC that present a national security risk to our country.

The NRRI Trust's investment in the PRC exposes the retirement funds of railroad workers to significant and unnecessary economic risk. Such investment also channels American worker funds into PRC companies that raise significant national security and humanitarian concerns. Many of these PRC companies operate in violation of U.S. sanction laws and assist the PRC's efforts to build its militaryⁱⁱ and oppress religious minorities. The list of companies that receive NRRI Trust investment funds includes military contractors that provide military aircraft, missiles, and telecommunications support to the People's Liberation Army, companies like Hikvision that manufacture surveillance equipment that China uses to oppress religious minorities,^{iv} and at least one company, ZTE, engaged in a multi-year conspiracy to supply, build, and operate telecommunications networks in Iran using U.S.-origin equipment in violation of the U.S. trade embargo, and committed hundreds of U.S. sanctions violations involving the shipment of telecommunications equipment to North Korea.^v

Another key reason why the NRRI Trust's investments in PRC companies expose American railroad retirees to substantial economic risk is because the Chinese Government currently prevents companies with Chinese operations listed on U.S. exchanges from complying with applicable U.S. securities law, leaving investors without the benefit of important protections.^{vi} According to the Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB), Chinese authorities have impeded the PCAOB's ability to oversee PCAOB-registered audit firms in mainland China and Hong Kong who serve mainland Chinese companies. This has prevented the PCAOB from conducting inspections of those firms' audits of Chinese companies in violation of U.S. law. PRC law prevents the PCAOB from directly conducting its oversight function inside Chinese territory. This adds to the significant legal and practical obstacles to the SEC and PCAOB obtaining information needed for investigations or

enforcement actions.

Further, the NRRI Trust is investing in the PRC during a time of mounting uncertainty concerning the PRC's relations with the rest of the world. Such concerns include the possibility of future sanctions or boycotts that may arise from a wide range of issues, including the culpable actions of the Chinese Government with respect to the global spread of the COVID-19 pandemic, the suppression of Hong Kong's democracy, the purchase of Iranian oil in contravention of U.S. sanctions, gross human rights violations in the Xinjiang region, the militarization of the South China Sea, and threats to freedom of navigation.

The financial impacts of all these risks are significant and raise serious fiduciary issues. Scandals involving Chinese companies in recent years have cost investors billions of dollars.^{vii} The NRRI Trust has available alternatives that avoid the risks of Chinese equities.

In light of these economic, national security, and humanitarian concerns, we ask that you and your board carefully consider whether the NRRI Trust is currently acting as an appropriate fiduciary for those hardworking Americans and retirees the RRB serves. If you also believe that investment in the PRC using American retiree dollars to fund China's military industrial complex and human rights violations is inappropriate, or that such investment may violate the prudent person rule under the Employee Retirement Income Security Act, we ask that the RRB immediately inform the NRRI Trust of its concerns and further demand that the NRRI Trust take swift action to protect RRB members.

We would appreciate a response regarding the RRB's intentions by July 15, 2020.

Respectfully,



Robert C. O'Brien
Assistant to the President for National Security Affairs



Lawrence Kudlow
Director, National Economic Council

ⁱ https://www.rrb.gov/sites/default/files/2020-04/FY2019_Report_with_Auditors_Report.pdf

ⁱⁱ <https://web.archive.org/web/20121120094356/http://www.flightglobal.com/news/articles/airshow-china-avic-proposes-stealth-fighter-for-export-378944/>

^{iv} <https://www.federalregister.gov/documents/2019/10/09/2019-22210/addition-of-certain-entities-to-the-entity-list>

^v <https://www.commerce.gov/news/press-releases/2018/06/secretary-ross-announces-14-billion-zte-settlement-zte-board-management>

^{vi} <https://pcaobus.org/International/Pages/China-Related-Access-Challenges.aspx>

^{vii} See, for example: <https://fortune.com/2020/05/20/luckin-coffee-stock-lk-shares-valuation-china-nasdaq-delisting/>