July 24, 2020

Office of Regulations and Interpretations, Employee Benefits Security Administration
Room N–5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Submitted via the Federal eRulemaking Portal at http://www.regulations.gov

RE: Financial Factors in Selecting Plan Investments Proposed Regulation (RIN 1210–AB95)

To Whom it May Concern:

The Construction Employers of America (CEA) is a coalition of seven leading, national construction employer associations that collectively represent thousands of businesses employing more than 1.4 million skilled construction industry trades employees. CEA works to strengthen the construction industry and advocates for the interests of construction employers that provide the best value to project owners through a highly productive, highly skilled workforce that earns fair wages and benefits.

Introduction

Nearly all CEA member employers and their employees participate in multiemployer pension plans. Our employer members serve as trustee fiduciaries of those plans. In this capacity, they oversee the investment of many billions of dollars in retirement assets. Our members have a deep interest in ensuring that those assets are invested appropriately in the best interest of the plan participants and to ensure the resources are there to pay beneficiaries. Our members must make good any funding shortfalls.

The CEA respectfully submits the following comments focusing on the impact the Department's proposed rule, Financial Factors in Selecting Plan Investments, would have on construction industry collectively bargained multiemployer plans.

I. The Pecuniary Benefit of Investing in Jobs that Create Plan Contributions

The CEA's primary concern with the proposed rule is that it would dissuade plan investments in funds that make housing, building, and infrastructure investments and require 100% union labor to be used on the projects. These funds are valuable investment opportunities for collectively bargained plans that produce rather unique pecuniary benefits that the proposed rule would at best discourage and at worst disqualify from consideration by fiduciaries in their investment selection process.

Construction industry multiemployer pension plans have successfully invested billions of dollars in such funds over the past several decades, and those investments have produced not only competitive investment returns *but also participant contributions to the plans that made those investments*. The participants of the plans that made these investments have benefited greatly from this investment structure. The CEA urges the Department to preserve fiduciaries' ability to make investments in such funds without establishing a new standard or burden.

There are numerous investment funds and vehicles that invest in construction projects and require 100% union labor. Two primary examples are the AFL-CIO Housing Investment Trust and the AFL-CIO Building Investment Trust. Both examples generate competitive investment returns and significant work hours for plan participants that result in participant contributions to the collectively bargained plans investing in these funds.

The AFL-CIO Housing Investment Trust, in its March 31, 2020 Project Impacts Report, notes that it has created more than 178.3 million construction work hours since 1984.[1] The AFL-CIO Building Investment Trust notes in its 2019 Annual Report that its investments have generated approximately 80 million construction work hours in its 31 year history.[2] Because these funds require 100% union labor on all on-site construction of the projects they finance, the more than 250 million hours work hours generated by these funds were performed by participants in the very plans that made the original investment. If each work hour represent just a $4.00 pension plan contribution – a figure that is most certainly below the average rate – it can be said that these two funds alone have collectively generated more than $1 billion in participant contributions to collectively bargained construction industry pension plans. These participant contributions are of significant pecuniary value to those plans and their participants.

Paragraph (c)(1) of the proposed rule addresses consideration of pecuniary vs. non-pecuniary factors. The proposed rule focuses on investments that promote public policy, political, and other non-pecuniary goals. The proposed rule implies (but does not state) that a fund that invests in construction projects and requires 100% union labor on those projects, could be classified as an Environment, Social, Governance ("ESG") investment. Because this requirement generates participant contributions for collectively bargained plans that invest in these funds, such classification would be inappropriate for a collectively bargained plan. The proposed rule should be modified to remove any question about a fiduciary's ability to consider participant contributions to a collectively bargained plan as a pecuniary factor.

It could be argued that contributions made to a defined benefit pension plan are net neutral because those contributions generate new benefits that are offset by new liabilities. This argument is incorrect. Industry activity that results in contributions to a pension plan is a key

[1] https://www.aflcio-hit.com/wp-content/uploads/2019/09/Project-Impacts-1Q2020-Final.pdf
[2] https://aflcio-bit.com/wp-content/uploads/2020/05/2019-AFL-CIO-BIT-Annual-Report.pdf (page 6)

factor in determining a plan's funding status and, in many cases, has a direct impact on funding previously accrued benefits without accruing new benefit liabilities.

Projected industry activity – the hours worked in the industry that will generate contributions to the plan – is a key factor in an actuary's determination of a defined benefit pension plan's funding status under the Pension Protection Act (PPA), as reflected at ERISA Section 305.[3] A pension plans' funded status has an obvious impact on its ability to provide future benefits to participants, and a plan that falls below certain levels may be forced to cut future benefits pursuant to the PPA.

More directly, investments that generate participant contributions to a defined benefit pension plan frequently fund benefits *already accrued* by active and retired participants. Defined benefit pension plans use various formulas to determine participant benefit accruals. A plan that uses a credit-based accrual formula is unlikely to establish a perfect relationship between the contributions made to a plan on a participant's behalf and the benefits accrued by that participant. Instead, benefits are accrued as the participant earns a "credit" for achieving certain activity thresholds. Contributions received that exceed a credit threshold but fail to reach the next credit threshold may not result in any newly accrued benefits. Instead, those excess contributions fund participants' and beneficiaries' benefits broadly but without establishing a new, distinct benefit liability.

Moreover, the use of "supplemental" or non-accruing contributions has become more common among multiemployer defined benefit pension plans since the 2008 recession. A non-accruing contribution is a contribution to the plan for which a benefit is not accrued. Non-accruing contributions fund *previously accrued* benefits that are not fully funded because of prior shortfalls. Thus, an investment that generates contributions to a plan can have a direct, positive impact on funding participants' and beneficiaries' *existing* benefits by generating supplemental contributions that do not accrue new benefits.

In the background provided for the proposed rule, the Department notes that pension plans covered by ERISA are statutorily bound to a narrow objective: management with an "eye single" to maximize the funds available to pay retirement benefits. This is precisely the objective of the AFL-CIO Housing Investment and Building Investment Trusts, and similarly designed investment funds. They generate competitive investment returns <u>and</u> participant contributions to the collectively bargained plans that invest in them.

Because a union labor requirement generates participant contributions for collectively bargained plans that invest in these funds, such a requirement is a pecuniary factor and not only a collateral benefit. That is, a union labor requirement is a proper component of a collectively bargained plan fiduciary's primary analysis of the economic merits of competing investment choices. However, the proposed rule's definition of pecuniary factor is too narrow to clearly permit fiduciaries of collectively bargained plans to consider a union labor requirement as a pecuniary

[3] 29 USC 1085(b)(3)(B)(iii)

factor in making an investment decision. The CEA recommends that the Department remedy this concern by adding a new paragraph in section (c) as follows:

> *A fiduciary's evaluation of an investment may take into consideration, as a pecuniary factor for purposes of this regulation, participant contributions to the plan that may be generated by the investment.*

II. The Final Rule Should Preserve the "Tie-Breaker" Standard Unchanged.

Paragraph (c)(2) of the proposed rule would transform the well-established "tie breaker" standard by raising the standard to an unrealistic threshold based on the Department's belief that the likelihood two investments will be economically indistinguishable is rare. The proposed rule would practically destroy the tie-breaker standard to the detriment of plans and participants. Because *perfect* equivalence between investment choices is a notional concept, it is necessary to retain the current "tie-breaker" standard to preserve fiduciaries' ability to consider collateral benefits that may be derived from certain investments.

Under current regulation, the "tie-breaker" standard generally permits a fiduciary to consider non-pecuniary environmental, social, and corporate governance (ESG) factors where two investment options are economically equivalent. The proposed rule would transform that standard by requiring a fiduciary to determine that the investment options are economically *indistinguishable* and, to a skeptical Department's satisfaction, document specifically why that determination was made.

The Department states its belief that the likelihood two investments will be economically indistinguishable is rare. And certainly, given the litany of pecuniary factors that are considered in distinguishing two investments, this is a legitimate belief on its face. But the Department's belief implies that a fiduciary's analysis of investment alternatives is rigidly quantitative, and that one investment will virtually always be revealed as the winner. If that were true, investment choices would be much easier for fiduciaries.

For the same reason that two investments will rarely be economically *indistinguishable*, a requirement that a fiduciary document specifically why two or more investments are indistinguishable is unrealistic. It cannot be done unequivocally because economically *indistinguishable* is a notional standard. Such a requirement will naturally chill fiduciaries' investment in any vehicle that requires such documentation.

The Department stresses that the historic returns of an investment are a pecuniary factor. At the same time, virtually every investment prospectus includes a disclaimer to the effect of, "Past performance is not indicative of future results." In fact, the Securities and Exchange Commission Rule 156 requires such a disclaimer in investment company sales literature.[4]

If all pecuniary factors for two hypothetical investment options are identical with the exception of historic returns, and those historic returns are *nearly* identical, it would be unreasonable to

---

[4] 17 CFR § 230.156

argue that ERISA would *require* the plan fiduciaries to select the investment option with insignificantly higher historic returns given that historic returns are not indicative of future results. Yet the Department implies that fiduciaries must not only consider past performance in making an investment decision but also that fiduciaries are duty bound to select the investment with better past performance over an otherwise equivalent alternative.

"Economically indistinguishable" is an untenable standard as to the review of investment options. Under this proposed standard, unless 1) a union labor requirement is clearly recognized as a pecuniary factor for collectively bargained plans, or 2) the tie-breaker standard is maintained as articulated in previous guidance, fiduciaries of construction industry multiemployer plans would arguably have to demonstrate that a building investment fund requiring union labor is at least economically indistinguishable as compared to alternatives before the proposed rule would permit them to invest in such a fund. This requirement could cause fiduciaries to forgo investment in a fund that would not only produce competitive investment returns but also deliver participant contributions to the fund. Knowing that participant contributions are a pecuniary benefit to the participants, it is difficult to understand the logic in compelling fiduciaries to invest in an alternative vehicle that might have, for example, insignificantly better historic returns but does not deliver participant contributions to the plan.

The preamble to Interpretive Bulletin 94-1 explained that the requirements of ERISA 403 and 404 do not prevent fiduciaries from investing plan assets in economically targeted investments (ETIs) if the investment has an expected rate of return commensurate to rates of return of available alternative investments with similar risk characteristics, and if the investment vehicle is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan. In other words, if the ETI investment is *economically equivalent* (but not *economically indistinguishable*) a fiduciary would not be prevented from selecting the ETI investment over a non-ETI alternative. *Economically equivalent* is the appropriate standard as to fiduciaries consideration of ETIs and ESG investment factors vs. non-ESG alternatives and should be maintained by the Department.

The Department expressed its belief in Interpretive Bulletin 2015-01 (IB 2015-01) that Interpretive Bulletin 2008-01 (IB 2008-01), which required fiduciaries to document their decisions to invest in ETIs "in a manner that demonstrates compliance with ERISA's rigorous fiduciary standards," had unduly discouraged fiduciaries from considering ETIs and ESG factors. IB 2015-01 went on to describe the Department's concern that IB 2008-01 may have dissuaded fiduciaries from pursuing "economically superior investments" and even investing in ETIs that were "economically equivalent."

The proposed rule would raise the bar higher than IB 2008-01 by requiring fiduciaries to document "specifically why the investments were determined to be economically indistinguishable." Because *economically indistinguishable* is a notional concept, this documentation requirement is unrealistic and is likely to have a harsher effect on fiduciaries' ETI/ESG investment decisions than IB 2008-01. And in the case of collectively bargained plans that stand to receive participant contributions on the basis of investments in funds that the

Department might classify as ETIs, it is likely to dissuade fiduciaries from pursuing what are often – at least in the case of collectively bargaining plans – economically superior investments.

Conclusion

It is clear in law and current regulation that fiduciaries must act with a single-minded focus on the interests of beneficiaries. The duty of prudence prevents a fiduciary from choosing an investment alternative that is financially less beneficial than an available alternative. And plan fiduciaries, when making decisions on investments and investment courses of action, must be focused solely on the plan's financial risks and returns. The proposed rule implies that these legal requirements establish a bright line standard for investment selection. The concept of a bright line standard for investment selection is as unrealistic as the notion of perfect economic equivalence between two investment choices.

The CEA agrees that fiduciaries must not subordinate investment risk and returns to non-pecuniary objectives. Yet, the analysis of pecuniary objectives is not always straightforward exercise that clearly identifies a correct choice. If the purpose of this rule truly is to maximize funds available to pay benefits to plan participants, any final rule should deem contributions an investment generates to a collectively bargained plan as a pecuniary consideration. Additionally, the tie-breaker standard articulated in IB 2015-01 and clarified in Field Assistance Bulletin 2018-01 should be maintained by the Department. The final rule should not raise the bar by requiring plan fiduciaries to document why the investments were determined to be *economically indistinguishable*. Rather, the economic equivalence standard should be maintained for the tie-breaker test.

We urge the Department to incorporate these comments into its efforts toward the laudable goal of ensuring that fiduciaries make investment decisions based solely on financial considerations relevant to the risk adjusted economic value of a particular investment or investment course of action.

Thank you for your consideration and the opportunity to submit these comments.

Sincerely,

The Construction Employers of America

FCA International
International Council of Employers of Bricklayers and Allied Craftworkers
Mechanical Contractors Association of America
National Electrical Contractors Association
Sheet Metal & Air Conditioning Contractors National Association
Signatory Wall and Ceiling Contractors Alliance
The Association of Union Constructors