International Painters and Allied Trades **Industry Pension Fund**

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Office of Regulations and Interpretations
Employee Benefits Security Administration
ATTN: Jason A. DeWitt
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments on Proposed Rule, Financial Factors in Selecting Plan Investments
RIN 1210-AB95

Dear Mr. DeWitt:

I am the Administrator of the International Painters and Allied Trades Industry Pension Fund ("IUPAT Pension Fund"), a multiemployer employee pension benefit plan as defined in Sections 3(2) and (37) of the Employee Retirement Income Security Act, as amended ("ERISA"). I write on behalf of the Board of Trustees of the Pension Fund to comment on the Department of Labor's Proposed Rule ("Proposed Rule") on when plan fiduciaries may consider certain investments based upon environmental, social, and governance factors. The IUPAT Pension Fund has concerns with the Proposed Rule and recommends specific changes to clarify and strengthen the proposal.

The IUPAT Pension Fund has more than 85,000 participants, most of whom are current or retired industrial and commercial painters, drywall finishers, wall coverers, glaziers, glass workers, floor covering installers, sign makers, display workers, and convention and show decorators. The Trustees of the IUPAT Pension Fund are comprised of Union and Employer representatives who jointly administer the IUPAT Industry Pension Plan, a defined benefit plan. The Trustees of the IUPAT Pension Fund, as ERISA fiduciaries, are responsible for maximizing investment returns and minimizing risk and volatility in the best interest of plan participants. The IUPAT Pension Fund has over $3 billion in assets that are providing and will continue to provide for secure retirements of IUPAT members and their families.

This letter comments on the proposed regulations that will restrict benefit plan fiduciaries, such as the IUPAT Pension Fund's trustees, from considering economic, social, and

governance ("ESG") factors in making investment decisions. These comments are divided into three sections:

1. The Department should clarify that fiduciaries have *affirmative* obligations to consider ESG factors based on current investment knowledge and research;

2. The Proposed Rule fails to account for fiduciaries' duty of impartiality by steering fiduciaries away from particular types of investments; and

3. The Proposed Rule creates a confusing and unnecessary regulatory burden.

Current Investment Knowledge Supports ESG Factors as Pecuniary Considerations.

The Proposed Rule clearly states that fiduciaries must make investment decisions based upon pecuniary considerations *only*. That is, unless ESG considerations are believed to have a material positive effect on the risk and/or return of an investment, they should not factor into the investment decision. However, for ESG funds, environmental, social, and governance risks are *real* – pecuniary – risks. *DOL should instead clarify and confirm that fiduciaries have affirmative obligations to consider ESG factors when they make investment decisions.*

The Proposed Rule seems to rely on obsolete thinking that ESG investments are almost always bad, and that they underperform non-ESG focused investments. The notion that ESG represents something other than financially-based (i.e., non-pecuniary) factors ignores the proliferation of asset managers that consider ESG factors to be pecuniary and the outperformance of ESG funds over "traditional" placements.

According to a 2018 survey of global asset managers, more than 80% already account for ESG factors in their investment decisions "because it is financially material to investment performance" and because of growing client demand.[1] Managers reported that ""ESG information is important to assessing investment risk", or "it helps us identify the risks and opportunities of the investments we make for our clients" and further "[ESG information] often can give insight into the 'Why' for some of the financial information", all statements that support the financial motive."[2] These asset manager anecdotes undermine the Proposed Rule's fretting assertions that the "upward trend in the use of ESG among institutional asset managers" and "an increase in asset flows into ESG funds" raise heightened ERISA concerns because fiduciaries must look "with an 'eye single' to maximizing the funds available to pay retirement benefits." *See* 85 Fed. Reg. 39115. In reality, ERISA fiduciaries *are* acting with an "eye single" when they consider ESG factors as pecuniary when making investment decisions. The Department has simply overlooked the fact that global investment trends favor ESG investments because it is the responsible (i.e., pecuniary), thing to do.

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[1] Amir Amel-Zadeh & George Serafim, *Why and How Investors Use ESG Information: Evidence from a Global Survey*, 74 Financial Analyst J. 87-103 (2018), available at https://ssrn.com/abstract=2925310.
[2] Id.

The market share of ESG assets is significant and growing. The Forum for Sustainable and Responsible Investment ("US SIF") measured U.S. assets in sustainable investing (i.e., ESG) just $639 billion in 1995 and grew to $11.7 trillion in 2018, reflecting a "compound annual growth rate of 13.6 percent."[3] The returns on sustainable or ESG investments support the investment experts' view that ESG factors are pecuniary. Far from the uncertain picture painted by the Department, "ESG" assets now generally outperform investments that do not account for or minimally account for ESG factors. Indeed, a recent BlackRock study found that in the midst of the coronavirus-induced market crash in the first quarter of 2020, over 90% of sustainable (ESG) indexes outperformed traditional indexes.[4] Put another way, taking ESG concerns into account in investments has proven to be financially rewarding and renders the Proposed Rule a solution in search of a problem. Morningstar's Jon Hale, who follows the ESG marketplace closely, has asserted "I don't know of a single case ever where plan fiduciaries have selected ESG investments they believe would underperform. No lawsuits have alleged such an event."[5]

Despite the significant role of ESG investing in the U.S., international investor advocates do not perceive the U.S. policy response as keeping up with market demands and the Proposed Rule likely will exacerbate that gulf. The Principles for Responsible Investment ("PRI") in late 2019 told its stakeholders that "[d]espite its dominant role in the global financial industry, the United States—at a federal level—remains a glaring outlier when it comes to the growing global policy consensus surrounding sustainable finance . . . In some cases, we've seen it embark on a rollback of positive features in the existing regulatory framework which support good governance, transparency and consideration of ESG factors in investment processes."[6] The Proposed Rule constitutes such a rollback.

In the experience of the Pension Fund's Trustees, over the past decade investment managers and private placement prospectuses increasingly include discussion that ESG factors are considered as part of overall assessment of assets, in relation to the inherent risks and potential rewards of the investment. Whether an asset manager oversees a bond portfolio or a private vehicle focuses on transportation and infrastructure, investment professionals are keenly aware of the impact that ESG factors have on their bottom line and they are making strides to educate their multiemployer plan investors. According to Morningstar, even where funds do not explicitly market themselves as sustainable, almost 500 funds added ESG language to their prospectuses.[7] The Proposed Rule does not account for the possibility of a benefit plan evaluating investment

[3] *Report on US Sustainable, Responsible and Impact Investing Trends 2018*, US SIF (2019), https://www.ussif.org/files/Trends/Trends%202018%20executive%20summary%20FINAL.pdf.
[4] *Sustainable investing: resilience amid uncertainty*, BLACKROCK (2020), https://www.blackrock.com/corporate/literature/investor-education/sustainable-investing-resilience.pdf.
[5] Jon Hale, *Sustainable Funds U.S. Landscape Report: Record flows and strong performance in 2019*, MORNINGSTAR (Feb. 14, 2020), https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_US_Landscape_021920.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=20871.
[6] Paul Verney, *Principles for Responsible Investment ramps up its US policy engagement*, RESPONSIBLE INVESTOR (Oct. 17, 2019), https://www.responsible-investor.com/articles/pri-us-policy.
[7] Jon Hale, *The ESG Fund Universe is Rapidly Expanding*, MORNINGSTAR (March 19, 2020), https://www.morningstar.com/articles/972860/the-esg-fund-universe-is-rapidly-expanding.

assets with differing or overlapping ESG priorities. Accordingly, from the fiduciary perspective, it is imperative to evaluate ESG factors of prospective investments and this reality should be acknowledged by the Department when revising the Proposed Rule.

The Proposed Rule Substitute's DOL's Judgment for all Plans in Lieu of Fiduciaries' Duties to their Individual Plans.

The Pension Fund agrees with the Department to the extent that "[t]here is no consensus about what constitutes a genuine ESG investment, and ESG rating systems are often vague and inconsistent, despite featuring prominently in marketing efforts," as noted in the preamble to the Proposed Rule. A lack of consensus, though, has not impeded the ability of multiemployer pensions such as the IUPAT Pension Fund to make investment decisions that comport with their fiduciary responsibilities. In our view, the Proposed Rule misconstrues consensus to turn the entire ERISA fiduciary scheme on its head.

The Department states that "true ties rarely, if ever, occur. To be sure, there are highly correlated investments and otherwise very similar ones. Seldom, however, will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition." *See* 85 Fed. Reg. No. 126 at 39117. That being said, the Department must surely recognize the true fluidity of factors available when making investment decisions at any particular moment in time. But by creating a preference for *non*-ESG investments at those moments, by essentially telling fiduciaries to "prove it," the Department is merely substituting its own preferred outcome *for all plans* over a fiduciary's discretion and prudence relating to their *own* plans. This is inconsistent with ERISA's fiduciary model. By imposing a regulatory burden *only* for plan selections of an ESG investment, the proposed rule explicitly and improperly directs fiduciaries *not* to pick an ESG investment. Whether or not it is intended, this is the outcome predicted by most professionals in response to the Proposed Rule.[8]

By forcing fiduciaries to justify ESG investment selections, DOL is steering fiduciaries away from numerous investment options that will perform better than DOL's "preferred"

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[8] *See, e.g., EBSA Proposal Pours Some Cold Water on ESG Enthusiasm*, ASPPA, (June 24, 2020), https://www.asppa.org/news/ebsa-proposal-pours-some-cold-water-esg-enthusiasm; Ira Bogner, Russell Hirschhorn, Seth Safra, Steven Weinstein, Adam Scoll & Kyle Hansen, *Department of Labor Proposal Would Curtail ESG Investing*, ERISA PRACTICE CENTER (July 1, 2020), https://www.erisapracticecenter.com/2020/07/department-of-labor-proposal-would-curtail-esg-investing; *DOL Proposes Rule to Crack Down on ESG Investing*, GROOM LAW GROUP, (June 25, 2020), https://www.groom.com/wp-content/uploads/2020/06/DOL-Proposes-Rule-to-Crack-Down-on-ESG-1.pdf; Robert Powell, *Labor Dept. Putting the Kibosh on ESG Funds in Retirement Accounts*, THE STREET (July 2, 2020), https://www.thestreet.com/retirement-daily/saving-investing-for-retirement/labor-dept-putting-the-kibosh-on-esg-funds-in-retirement-accounts-wUWDm3dL4kyHMj5CIJJBbQ.

investments, as described herein. This hurts, rather than helps, plan participants' bottom lines. The field of investment options and vehicles is constantly evolving and fiduciaries like the IUPAT Pension Fund's trustees fulfill their fiduciary obligations through education and due diligence, as ERISA intends.

The "All Things Being Equal Test" Works. The Department's Clarification Adds Unnecessary Regulatory Burden on Plan Investors.

The Department's existing guidance recognized the developing landscape of investment products and utilized the "all things being equal" test. We support the Department's decision to retain this test. It has worked well since its inception in Interpretive Bulletin 94-1.[9]

However, the Proposed Rule creates regulatory burdens that the Department has not considered. For example, sophisticated investors like the IUPAT Pension Fund will convene their fiduciaries, actuaries, investment advisors, and counsel to review existing investment policies and revise them in accordance with the Proposed Rule. Updates to plan documents may, in turn, necessitate notices to plan participants of those changes. However, the Proposed Rule makes clear that any policy that would subordinate financial interests to "non-pecuniary" (which, by the Department's framing means ESG) violates the fiduciary's duty to the plan. The time and cost to update a plan investment policy is not considered in the Proposed Rule, and there is likewise no safe harbor to account for the time and expense of updating those policies. The Proposed Rule also alludes to, but does not clearly establish, whether or how quickly plan fiduciaries might revisit existing *investments*. If a unique ESG investment with a ten-year lockup is already among a plan's thoroughly-vetted investments, what are the fiduciaries' obligations to revisit it?

DOL estimates that "plan fiduciaries and clerical staff will each expend, on average, 2 hours of labor to maintain the needed documentation" in the event of an "economically indistinguishable" tie. This estimate is not based in reality. Based upon our experience, we expect investment managers, fiduciaries, counsel, and clerical staff will expound a significant amount of time and plan assets to evaluate and apply this new rule. As noted above, the market is already flush with ESG options and many plans have existing ESG investments.

[9] "The preamble to IB 94–1 explained that the requirements of sections 403 and 404 of ERISA do not prevent plan fiduciaries from investing plan assets in ETI investments 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. Some commentators have referred to this as the ''all things being equal'' test or the ''tie-breaker'' standard." *See* 85 Fed. Reg. 39114 (June 30, 2020).

The IUPAT Pension Fund appreciates the Department's efforts to clarify fiduciary obligations with regard to economic, social, and governance-related investments. However, at this time when multiemployer pension plans such as the Pension Fund face substantial challenges to fulfill their obligations, the Department's Proposed Rule only adds regulatory and fiscal burdens that are contrary to the responsibilities envisioned by Congress in 1974. The Pension Fund urges the Department to consider these comments to create a final regulation that better reflects the current investment landscape and benefits of ESG investing.

Sincerely,

Tim D. Maitland
Fund Administrator
For the Trustees