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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210  
Attention: Financial Factors in Selecting Plan  
Investments Proposed Regulations

Re: Department of Labor, Employee Benefits Security Administration-  
RIN 1210-AB95--Comments of Local 176 IBEW Union

Gentlemen:

These comments are presented on behalf of the Union, Local 176 of the International Brotherhood of Electrical Workers, who is the Union Settlor of the NECA-IBEW Local 176 Pension and the NECA-IBEW Local 176 Welfare Fund. The Local opposes the adoption of the Proposed Rule regarding Financial Factors in Selecting Investments. The Local believes that the current Department of Labor guidance on this subject, found in Interpretative Bulletin 2015-01, 29 CFR § 2509.2015-01 appropriately sets forth the legal and ethical standards applicable to prudent fiduciary investment decisions governing ERISA Funds.

**ERISA Prudent Investments**

Neither the fiduciary duty of prudence nor the fiduciary duty of loyalty justify the sweeping prohibition of fiduciary consideration of any "non-pecuniary" factors found in the Proposed Rule. Initially, there is nothing in the Rule or the Supplementary Information explaining how the Department's Guidance found in Interpretative Bulletin 2015-01 is inconsistent with the applicable fiduciary standards under ERISA that govern fiduciary investment decisions. The Department noted there, as here, that ERISA's fiduciary provisions should be construed "as prohibiting a fiduciary from subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives." Interpretative Bulletin 2015-01, 29 CFR § 2509.2015-01. That Guidance appropriately recognized that:

an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

Interpretative Bulletin 2015-01, 29 CFR § 2509.2015-01. The Department went on to conclude:

The fiduciary standards applicable to ETIs [Economically Targeted Investments] are no different than the standards applicable to plan investments generally. Therefore, if the above requirements are met, the selection of an ETI, or the engaging in an investment course of action intended to result in the selection of ETIs, will not violate section 404(a)(1)(A) and (B) and the exclusive purpose requirements of section 403.

Interpretative Bulletin 2015-01, 29 CFR § 2509.2015-01. As long as an investment decision is a reasonable investment decision, it makes no difference that it also furthers other desirable goals.

### **Flaws in Proposed Rule**

The rationale for the Proposed Rule found in the Supplementary Information, Section A, Background and Purpose of Regulatory Action, fails to provide any specific information documenting loss to ERISA plans from "environmental, social and corporate governance (ESG) investing." 85 Fed. Reg. at 39114. Rather there is only a recognition that there is a greater amount of assets being invested in ESG funds. Conspicuously absent from this analysis is any evidence, beyond mere speculation, that such investments have had any adverse effect upon "the interests of plan participants and beneficiaries in their plan benefits," 85 Fed. Reg. at 39114, which the sweeping changes found in the Proposed Rule are purportedly designed to protect.

There are several specific flaws with the Proposed Rule and the analysis which underlies it. In paragraph (c)(1) of the Rule, the Department departs from the approach it took in Interpretative Bulletin 2015-01 and requires that "a fiduciary's evaluation of an investment must be focused only on pecuniary factors." Proposed Rule § 2550.404a-1(c)(1), 85 Fed. Reg. at 39127.

A "Pecuniary Factor" is narrowly defined to mean only "a factor that has a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and the funding policy established pursuant to section 402(a)(1) of ERISA.

Proposed Rule § 2550.404a-1(f)(3), 85 Fed. Reg. at 39128. This narrow requirement makes it effectively a per se breach of fiduciary duty to consider any other factors even if, as recognized under the Department's previous analysis in Interpretive Bulletin 2015-1, such factors could be appropriately recognized as long as they did not supplant considerations of matters involving the risk and return of various investments. The Department presents no justification for why such a sweeping prohibition of consideration of "non-pecuniary" factors in an investment decision is necessary to protect applicable ERISA fiduciary considerations.

### **Change In Standard Unnecessary**

The narrow definition of "pecuniary factors" also fails to give proper consideration of all of the factors fiduciaries must consider in maintaining the plan funding level necessary for a defined benefit plan to provide retirement benefits to participants and beneficiaries. The Proposed Rule and the Supplementary Information explaining the Rule do contain a recognition that ordinarily non-pecuniary considerations could be pecuniary, but only if

they present economic risks or opportunities that qualified investment professionals would treat as material economic considerations under generally accepted investment theories.

Proposed Rule § 2550.404a-1(c)(1), 85 Fed. Reg. at 39127. In the Supplementary Information the limitation of these factors to the economic viability of the investment itself rather than to other relevant economic considerations is emphasized as the Department notes:

The weight given to pecuniary ESG factors should reflect a prudent assessment of their impact on risk and return -- that is, they cannot be disproportionately weighted.

85 Fed. Reg. at 39117.

In essence, the Department has concluded that the only time a factor can be material is if it affects the economic characteristics of the particular investment, not if it affects other elements relevant to the "interests of plan participants and beneficiaries in their plan benefits." 85 Fed. Reg. at 39114.

### **Construction Industry Plans and Real Estate Investing**

In determining the actuarial health of a multiemployer construction industry pension plan, which is central to the "interests of plan participants and beneficiaries in their plan benefits," investment return and volume of work are the key components which are analyzed. However, the Department's restriction of the "interests of plan participants and beneficiaries" to investment return considerations eliminates the ability of fiduciaries to consider the effect of an investment upon volume of work. This is a very real "pecuniary consideration" for multiemployer construction industry plans, particularly in choosing investments in the real estate sector. There are a number of real estate investment Funds, such as the Multi-Employer Property Trust, the AFL-CIO Building Investment Trust, the ASB Allegiance Real Estate Fund and ULLICO J for Jobs, which generally utilize Union employees in projects in which they invest. The NECA-IBEW Local 176 Plans have invested in this type of Fund. The job opportunities provided by projects financed by these Funds to participants and beneficiaries represent a factor increasing the level of contributions to the Plans which provides an additional basis for the Plans' ability to meet its obligations to provide plan benefits to participants and beneficiaries. But, because the provision of jobs to unionized employees does not represent a factor which impacts upon the risk and return of the investment, fiduciaries would not be able to legitimately consider these benefits as "pecuniary" factors under the Department's analysis, even though they represent a benefit impacting the "pecuniary" Plan interest in the ability to provide benefits to participants and

beneficiaries and the Unions' ability to provide jobs and income to its members/Plan participants.

As the real estate investments described in the previous paragraph are generally competitive with possible other available Plan real estate investments, they have appropriately been made under the standards set forth in Interpretative Bulletin 2015-01, 29 CFR § 2509.2015-01. They were materially identical to other available real estate investments and the Plan's fiduciaries were able to "break ties" in favor of these investments based upon their favorable effect upon plan funding. However, the Department has reversed course and indicates that it now expects that in the investment selection process "true ties rarely, if ever, occur" between investment choices. 85 Fed. Reg. at 39117. It has been the experience of the Trustees and fiduciaries of the NECA-IBEW Local 176 Pension and Welfare Funds that these "ties" are actually quite common in the investment process.

Ordinarily when a Plan's professional investment consultants present investment manager candidates to the Trustees, some will clearly be superior to others. However, there are quite frequently three or four Investment Managers who have provided relatively comparable returns with similar risk factors. Some may have better recent returns. Others may have provided a more sustained return over a longer period despite less stellar returns in the past few years. There may be differences in the type of investments or projects in which the entities invest. In the real estate sector, some may emphasize residential development while others may be more invested in sectors such as office, hotel or retail areas. Some will have had a consistent set of investment professionals making the investments while others may have had some change in this personnel. It is rare that there will be a manager who is superior in all regards. When confronted with these choices, between managers who are generally similar, but exhibit some divergence with respect to pecuniary factors, policies, such as the commitment to use of Union labor, can prove to be a consideration which would lead the fiduciary to choose one of these generally similar managers over another.

### **Chilling Effect of Documentation Requirements**

While the Department has indicated some willingness to maintain an "all things being equal" test, 85 Fed. Reg. at 39117, it has added a documentation requirement in Proposed Rule, § 2550.404a-1(c)(2), 85 Fed. Reg. at 39127, that places a burden on fiduciaries choosing such investments and entities marketing such investments which will effectively "chill" the ability of fiduciaries to choose these investments. As a practical matter, the only time documentation of an investment choice will be required under the rules is when an investment choice is made in favor of an investment with an ESG component. Fiduciaries would be free to invest in a non-ESG investment without any form of documentation of their choice for governmental authorities. While they may maintain a basic substantiation of their choice in order to demonstrate fiduciary responsibility, they would not face the mandate for detailed documentation that is required in the case of an ESG investment. It would be extremely likely that documentation would be required any time an ESG investment is chosen, even if its selection would be justified on the basis that it was superior to competitive choices grounded purely on "pecuniary" factors without consideration of the investment's ESG component. Faced with a choice between an investment decision for a non-ESG investment, which will have very limited governmentally required documentation and scrutiny, and an ESG investment which, even if superior, will almost

certainly be required to be carefully documented and subject to later review in a Department of Labor audit, it would be likely that fiduciaries will elect the path of least resistance and choose the non-ESG investment. If the Department wishes all fiduciary investment choices to be documented, it can do so. But, requiring only a fiduciary's ESG investments to be documented results in a situation where a fiduciary will simply opt not to make ESG investment choices to avoid the documentation requirements and governmental scrutiny which would result if it ever chose such an investment.

### **Effect on Current ESG Investments**

The Proposed Rule is completely silent regarding the manner in which existing ESG investments, made pursuant to the terms of Interpretive Bulletin 2015-01, 29 CFR § 2509.2015-01 or earlier regulatory guidance, should be handled under the Proposed Rule. Do its terms affect only new ESG investments? Or would Plans be required to immediately divest any investment which was not made in compliance with the terms of the Proposed Rule? The assertion that there has been no change in the underlying statutory law does not answer this question as a strong argument can be made that the terms of the current regulatory guidance under Interpretive Bulletin 2015-01, 29 CFR § 2509.2015-01 better reflects the intent of the statute than the terms of the Proposed Rule. In any event divestment could present significant hardships to affected plans, particularly if a large number of plans were required to divest ESG investments to comply with the terms of the Proposed Rule. In the case of the Real Estate Funds discussed in this letter, several of these Funds had redemption queue's during the 2008 financial crisis when economic concerns with respect to these Funds led many fiduciaries to seek divestment of their investments. The regulatory change, if it would apply to current investments, together with the economic uncertainties related to the COVID-19 pandemic, could result in similar difficulties which could either require the Plans to engage in an economically unwise decisions to divest these assets or render it impossible for them to comply with these provisions due to liquidity limitations imposed by the Funds in which they are invested. Accordingly, we would urge that if the Proposed Rule is adopted, it apply solely on a prospective basis and not apply to current Plan ESG investments.

### **Conclusion**

In short, there is no need for the Department to modify the terms of Interpretive Bulletin, 2015-01, 29 CFR § 2509.2015-01, which have provided a workable framework guiding fiduciaries in determining their legal responsibilities under ERISA in making choices involving ESG investments. Therefore, the Local as the Union Settlor of the NECA-IBEW Local 176 Pension and the NECA-IBEW Local 176 Welfare Fund urges the Department of Labor to continue to utilize the standards set forth in Interpretive Bulletin, 2015-01, 29 CFR § 2509.2015-01 and not to implement the Proposed Rule.

Sincerely,



Steven F. McDowell