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TODD STAFFORD, EXECUTIVE DIRECTOR
NECA

December 13, 2021

Mr. Ali Khawar
Acting Assistant Secretary
U.S. Department of Labor
Employee Benefits Security Administration
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210

Submitted online through www.regulations.gov

Re: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)

Dear Acting Assistant Secretary Khawar:

On behalf of the *electrical training ALLIANCE* ("Alliance"), we are providing the comments described in this letter with respect to the above-referenced proposed regulation ("Proposed Rule")[1] issued by the Department of Labor (the "Department" or "DOL"). The Alliance is a nonprofit organization founded in 1941 by the National Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers ("IBEW"). The Alliance is committed to developing and standardizing education in the electrical industry allowing apprenticeship and training funds to properly and effectively train members of NECA and the IBEW. Since its inception, more than 325,000 apprentices have completed Alliance training curriculum and become competent Journeymen.

We thank the DOL for not enforcing the "Financial Factors in Selecting Plan Investments" regulations ("2020 Final Rule")[2] published by the previous administration on November 13, 2020. We also appreciate the Department's willingness to re-examine

[1] DOL's Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 86 Fed. Reg. 57272 (October 14, 2021).
[2] Financial Factors in Selecting Plan Investments, RIN 1210-AB95, 85 Fed. Reg. 72846 (November 13, 2020).

and remedy issues within the 2020 Final Rule related to investment analyses under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). In particular, we welcome the Department acknowledging that environmental, social, and governance ("ESG") factors are often material when reviewing plan investments.[3]

We are supportive of the Proposed Rule and are hopeful that the final rule will take into account this comment letter.

I. Statement of Law

The origin of ERISA's fiduciary's obligations in regards to the investing of plan assets starts with the duties of loyalty and prudence. The DOL requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."[4] Plan fiduciaries are to also act "solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan."[5]

Further clarification was provided by the Department, in 1979, with respect to the application of the prudence standard when investing plan assets.[6] The preamble for the 1979 Regulation states unequivocally that, for purposes of ERISA's prudence standards, no specific investment or investment course of action can be considered prudent based on a single factor.[7] Rather, the prudence of any investment decision is to be determined on the basis of an analysis of all the pertinent facts and circumstances, including the requirements and characteristics of the plan and the role the investment strategy is to play in the plan's portfolio.[8] The DOL, later in 1994, expounded that when making investment decisions, consideration of collateral benefits may be consistent with the duties of prudence and loyalty under certain circumstances.[9] The Department further stated, in 2015, that ESG factors may be considered in investment analyses if the decision meets the "all things being equal" test.[10] In other words, the "all things being equal" test provides that ESG factors may be considered in investment decisions, when a determination has been made that the investment has a risk and return profile that is commensurate with available investment alternatives.[11]

Through the 2020 Final Rule, the Department shifted from its longstanding guidance regarding the "all things being equal" test and set new standards for the consideration of non-pecuniary factors in investment decisions, which includes

[3] 86 Fed. Reg. at 57287.
[4] Employee Retirement Income Security Act of 1974 § 404(a)(1)(B) (the "Duty of Prudence").
[5] Employee Retirement Income Security Act of 1974 § 404(a)(1)(A).
[6] 29 C.F.R. § 2550.404a-1 ("1979 Regulation").
[7] 44 Fed. Reg. 37221, 37222 (June 26, 1979).
[8] *Id*. at 37225.
[9] DOL Interpretive Bulletin 1994-1, 59 Fed. Reg. 32606 (June 23, 1994).
[10] DOL Interpretive Bulletin 2015-01, 80 Fed. Reg. 65135 (Oct. 26, 2015).
[11] 80 Fed. Reg. at 65137.

environmental, social, and governance factors.[12] Specifically, the 2020 Final Rule required that "plan fiduciaries select investments and investment courses of action based solely on financial considerations relevant to the risk adjusted economic value of a particular investment or investment course of action."[13]

However, on January 20, 2021, the Biden administration directed all agencies to review regulations promulgated, issued or adopted between January 20, 2017 and January 20, 2021 that may be inconsistent with the Administration's objectives.[14] On March 20, 2021, DOL announced that it intended to revisit the 2020 rule and that it would not enforce compliance with the rule until it publishes further guidance.[15] On May 20, 2021, the current administration, through the Executive Order on Climate-Related Financial Risk (E.O. 14030), ordered the Secretary of Labor to "consider publishing . . . for notice and comment a proposed rule to suspend, revise, or rescind the [2020 Final Rule]."[16] The DOL subsequently issued Proposed Rule addressing environmental, social, and governance considerations.[17]

II. The Alliance Generally Supports the Proposed Rule

The Proposed Rule is a significant improvement over the 2020 Final Rule. The Proposed Rule reaffirms the DOL's long-standing position that fiduciaries are permitted to consider non-economic, collateral benefits when choosing among otherwise prudent investments.[18] As the Department acknowledges, "a significant benefit of the [Proposed Rule] is that it clearly permits plan fiduciaries to consider climate change and other ESG factors that are often material."[19] We support the Proposed Rule and welcome it as a positive shift away from the counter-productive 2020 Final Rule.

A. Consideration of ESG Factors

We applaud the Department's thoughtfulness and efforts to publish a finalized rule which leaves no doubt that plan fiduciaries are allowed to consider ESG factors. If enforced, the 2020 Final Rule would have set new restrictive standards for the consideration of factors in investment decisions. The Proposed Rule permits plan fiduciaries to consider ESG factors when those factors are part of the financial determination of an investment. Specifically, the Proposed Rule provides that a fiduciary may consider any factor in the evaluation of an investment which includes "climate change-related factors," "governance factors," and "workforce practices."[20] We agree with the Department that "ESG issues should be considered by a prudent fiduciary along

[12] 85 Fed. Reg. at 72846
[13] 85 Fed. Reg. at 72880.
[14] "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (E.O. 13990), 86 Fed. Reg. 7037.
[15] DOL non-enforcement policy statement regarding the 2020 Final Rule (March 10, 2021).
[16] 86 Fed. Reg. at 27968.
[17] 86 Fed. Reg. at 57272.
[18] 86 Fed. Reg. at 57278.
[19] 86 Fed. Reg. at 57287.
[20] *Id*. at 57302.

with other relevant economic factors to evaluate the risk and return profiles of alternative investments."[21]

i. Investment in Workforce Training is a Financial Factor that Materially Affects Risk and Return When Choosing Investments

We further support the Department specifying within "workforce practices", the example of "investment in training to develop its workforce's skill."[22] A fiduciary should consider a business' investment in training when deciding to invest because it is a financial factor that directly affects the risk and return of an investment. A 2014 joint report by the Department of Labor, Department of Commerce, Department of Education and Department of Health and Human Services, noted that there is "evidence that firms that invest in education and training realize significant and positive returns to shareholders, suggesting the importance of training to successful businesses." (the "2014 Joint Report")[23] That report cites to a white paper which evaluated the effects of business' investment in training on their performance (the "Bassi White Paper").[24] The Bassi White Paper analyzes information about education and training investments by public corporations and their reported financial performance data in order to determine the effects of a firm's investment in training on its total return to shareholders ("TSR"). The findings including the following:

> • Using a sophisticated statistical model to take into account individual firm characteristics such as industry, company size, prior financial performance and earnings, as well as other financial factors, ASTD found that an increase of $680 in a firm's training expenditures per employee generates, on average, a six percentage point improvement in TSR in the following year, even after controlling for many other important factors.
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> • When ranked according to how much they spent on training, those firms in the top half of the study group had an average TSR in the following year of 36.9 percent. The TSR for those in the bottom half was only 19.8 percent. By comparison, the S&P 500 had an annual weighted return of 25.5 percent during the same period. Translation: firms in the top half had a TSR that was 86 percent higher than firms in the bottom half, and 45 percent higher than the market average.
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> • Knowing how much a firm invests in education and training

[21] *Id*. at 57274.
[22] 86 Fed. Reg. at 57277.
[23] US Department of Labor, US Department of Education, US Department of Commerce, US Department of Health and Human Services, July, 2014 "What Works In Job Training: A Synthesis of the Evidence" pg. 7
[24] J. Bassi, Jens Ludwig, Daniel P. McMurrer, and Mark Van Buren (2000), "Profiting From Learning: Do Firms" Investments in Education and Training Pay Off?" Research White Paper, ASTC and SABA; and Almeida, Rita and Pedro Carneiro (2008). The Return to Firm Investments in Human Capital. The World Bank Social Protection and Labor Discussion Paper No. 0822.

improved the power ability to predict a firm's future TSR by 50 percent. Without taking training into account, the other factors explained only 12 percent of the variation in TSR. This increased to 18 percent when training and education expenditures were added in.

- ASTD found other correlations when looking at other key measures of financial performance. For example, the firms in the top quarter of the study group, as measured by average per-employee expenditures on training, enjoyed higher profit margins (by 24 percent), higher income per employee (by 218 percent) and higher price-to-book ratios (by 26 percent) on average than firms in the bottom quarter.

While both the 2014 Joint Report and the Bassi White Paper note the need for additional standardization of data to provide more conclusive analyses, the information available supports the conclusion that fiduciaries should consider demonstrated commitment to training as a financial factor materially affecting risk and return when choosing investments. Thus, we strongly support including the examples in paragraph (b)(4) of the Proposed Rule and, especially, retaining the reference to investments in training as a financial factor to be considered by fiduciaries when making investment decisions.

B. Collateral Benefits of Workforce Training

In addition to investment returns, there are collateral benefits related to workforce training such as increased income. Some employers offer registered apprenticeships which the Department has noted are "comprehensive, formal, work-place-based training model[s] that involve[] close public-private partnership[s] of government, firms, unions, and training institutions."[25] Evidence shows that these training programs are "quite effective".[26] Indeed, in one study, the Department noted that trainees of registered apprenticeship programs were shown, on average, to earn $8,000 extra per year, and over $200,000 over their lifetime, against those who were not part of the programs.[27] Similarly, in a different study, registered apprenticeship participants "earned, on average, over $240,000 more over their careers than nonparticipants. Additionally, the study found that the social benefits outweigh the social costs by $49,000 over the career of an apprentice, justifying the investment of resources into such programs."[28]

Investments in training also provide significant benefits to apprentices and society as a whole. For example, registered apprenticeship programs provide increased benefits to apprentices and businesses in the form of increased income, increased productivity, increased job satisfaction, improved innovation, increased on-the-job safety, and

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[25] 2014 Joint Report, p.8.
[26] *Id*.
[27] *Id*.
[28] US Department of Commerce, "The Benefits and Costs of Apprenticeship: A business Perspective", p.86, November 2016.

decreased employee turnover. In its 2016 report, the Department of Commerce and Case Western University specifically noted that registered apprenticeship programs sponsored by the building trades unions in the United States "earn an ROI of between $1.30 and $3.00 for every $1.00 invested in craft training due to improved safety, increased worker productivity, and reduction of rework, absenteeism, and turnover."[29] These are all factors that a fiduciary should be able to consider when making investment decisions if the "all things being equal" test is considered.

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The Alliance appreciates the opportunity to provide these comments. We welcome the opportunity to further explain or answer any questions about our comments.

Sincerely,

Todd Stafford
Executive Director

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[29] Id. Pg. 66