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Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room # N5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

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

Dear Director Canary:

The International Brotherhood of Teamsters (the "Teamsters") is pleased to submit the following comments on the proposed rule (the "Proposal") to amend the ESBA's "investment duties" regulation under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") (85 Fed. Reg. 39113 (June 30, 2020)). For the reasons set out below, we respectfully request that the Administration withdraw the proposed rule. As an alternative, the Administration may wish to re-propose a rule, but only after first analyzing public comments on the current Proposal and conducting a public hearing on the issues raised in the Proposal.

The International Brotherhood of Teamsters represents 1.4 million hardworking men and women in North America. Teamster-affiliated benefit plans hold approximately $100 billion in assets on behalf of Teamster members and their families, who are participants and beneficiaries in these plans. In addition, some Teamster members participate in defined contribution plans offered by their employer. The Proposal raises serious issues for the retirement security and financial security of Teamster members and their families.

The Proposal states a proposition with which we can readily agree: "Providing a secure retirement for American workers is the paramount, and eminently-worthy, 'social' goal of ERISA plans." However, the specifics of the Proposal are contrary to that goal. The Proposal claims that it seeks to "reiterate and codify" existing guidance, but the Proposal would make significant changes in existing practices without any demonstration that there is a need for rulemaking.

The Proposal offers a solution in search of a problem. For almost 30 years ESBA has issued a series of bulletins providing guidance to fiduciaries regarding their obligations when it comes to selecting investment options for plan participants. That guidance has emphasized ERISA's goal that pension funds be managed with an "eye singular" to maximizing funds available to pay retirement benefits. That guidance has also addressed issues raised by what were termed "economically targeted investments" or "ETIs," stating in Interpretive Bulletin 94-1 that ETIs were not necessary incompatible with ERISA's fiduciary obligations if the investment has an expected rate of return commensurate with the rates of return or available alternative investments with similar characteristics.

This became known as the "all things being equal" or "tie-breaker" test. ESBA provided further guidance in Interpretative Bulletins 2008-01 and 2015-01, the latter cautioning that fiduciaries would violate ERISA if they administer the "all things being equal test" in a manner that accepts reduced returns or greater risks in order to secure social, environmental or other policy goals.

Where then is the problem? The Proposal offers no examples that existing guidance, as refined and clarified over the years, is inadequate. There are no examples of enforcement actions in which ESBA believes it has identified any clear examples of fiduciaries pursuing an agenda unrelated to the best interest of plan participants. The most that the Proposal offers is that there "may" be a problem. (85 FR at 39116)

Specifically, the Proposal points to a "growing emphasis on ESG investing," which "may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan." *Id.* The concern is also expressed that "some investment products *may* be marketed to ERISA fiduciaries on the basis of purported benefits and goals unrelated to financial performance." *Id.* (emphasis added) (footnote omitted)

Of course, saying that there "may" be a problem is another way of saying that one has no evidence that there is, in fact, evidence of a problem. Any perception on ESBA's part that there "may" be a problem would seem to warrant nothing more than perhaps a notice by ESBA reminding fiduciaries of the need to honor their existing obligations. To jump from a perception that a problem "may" exist to full-fledged rulemaking would seem to be overkill.

The Proposal fails to define ESG investing or an ESG investment. The Proposal is an oddity in that it proposes to regulate something that it cannot define. The Proposal accurately points out that there "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." (85 FR at 39115) But if there is no "consensus" or regulatory definition, how can fiduciaries know whether they are staying on the right side of the line?

The problem is exacerbated because the Proposal indicates that there are times when ESG investing, or consideration of ESG issues, are properly considered "without regard to their pecuniary impact." (*Id.* at 39116). Cited as examples are a company's failure to comply with certain environmental regulations, which can pose business risks that investment professionals would consider material. Also cited are examples of dysfunctional corporate governance, which can "present pecuniary risk that a qualified investment professional would appropriately consider on a fact-specific basis." *Id.*

In other words, there are times when ESG investing can be important and can advance a fiduciary's obligations to plan participants and beneficiaries. Why then is ESBA lumping all such investment activity into a single whole?

The Proposal says that its goal is "to assist ERISA fiduciaries in navigating these ESG investment trends and to separate the legitimate use of risk-return factors from inappropriate investments . . ." *Id.* Of course, it is difficult to navigate without a compass, and ESBA has provided none.[1]

In addition, the text of the proposed rule is contradictory. Paragraph (c)(1) states: "A fiduciary's evaluation of an investment must be focused only on pecuniary factors." Paragraph (c)(3)(iii), in prescribing rules for constructing a Qualified Default Investment Alternative ("QDIA") for direct contribution plans, states that "environmental, social, corporate governance, or similarly oriented investment mandate alternatives is not added as, or is a component of" such as QDIA.

This makes no sense. As noted, the Proposal acknowledges that some forms of ESG investing may benefit participants in terms of risk/return calculations. Indeed, they may be superior to some non-ESG investments that qualify for inclusion in the QDIA. However, fiduciaries would be forbidden from including these funds in the default investment option for DC participants.

[1] The professed concern about marketing materials in an inadequate reason for ESBA to undertake rulemaking for several reasons. Apart from the lack of any examples of a problem, the Securities and Exchange Commission is currently considering public comments about whether Commission's current "names rule" is adequate or needs revision to address fund names that tout ESG factors may be misleading. Among the questions on which the Commission sought comment are:

> Are investors relying on these terms as indications of the types of assets in which a fund invests or does not invest (e.g., investing only in companies that are carbonneutral, or not investing in oil and gas companies or companies that provide substantial services to oil and gas companies)? Or are investors relying on these terms as indications of a strategy (e.g., investing with the objective of bringing value-enhancing governance, asset allocation or other changes to the operations of the underlying companies)? Or are investors relying on these terms as indications that the funds' objectives include non-economic objectives?

Request for Comments on Fund Names, IC-33809, 85 FR 13221, 13224 (March 6, 2020). We see no reason for ESBA to tackle this issue at a time when the SEC is actively examining the issue and, one presumes, will propose concrete regulatory action that addresses specific problems that are identified in response to the request for comments. If at that time ESBA perceives a need for better regulatory guidance, there would be more of a factual record on which to proceed.

ESG investment can be particularly important to pension fund investing. If there is one thing that all participants and beneficiaries can agree on, it is that they want their money to be available when the time comes that they will need it. Operating on this basis is fundamental for benefit plans. ESG investing dovetails well with this goal, as ESG investment practices may identify issues that will not have an immediate impact on a company's stock price, but address issues that are important in assuring that an investment in a given company is a sound basis for achieving long-term investment goals.

But you need not take our word for it. Large, publicly traded asset managers – with fiduciary obligations to both their shareholders and their investors -- are committed to what BlackRock calls "accounting for environmental, social and governance (ESG) risks and opportunities," to help "provide sustainable value to our clients." *(BlackRock ESG Investment Statement* (May 19, 2020) at 2, available at https://www.blackrock.com/corporate/literature/publication/blk-esg-investment statement-web.pdf. Similarly, State Street views ESG as "a value-driven imperative, not a values driven agenda." *Stronger Together* (2020), at 44. https://www.statestreet.com/content/dam/statestreet/documents/State_Street_2019_Stakeholder_Report.pdf)

The Proposal seems to proceed, at least in part, on the notion that ESG investing inevitably requires the investor to sacrifice some measure of shareholder return in order to achieve some intangible, non-pecuniary psychic benefit. This is a caricature of what is happening in the marketplace, however. Academic studies have found that a non-negative connection between the use of ESG benchmarks and company performance, with a majority finding a positive relationship. (Friede, Busch and Bassen, *ESG and financial performance: aggregated evidence from more than 2000 empirical studies*, Journal of Sustainable Finance & Investment, Vol. 5, No. 4, 210-233 (2015), available at: https://www.tandfonline.com/doi/full/10.1080/20430795.2015.1118917?scroll=top&needAccess=true)

The Proposal's cost/benefit assessment suffers from serious defects. ESBA's cost/benefit analysis inflates the perceived benefits while underestimating the costs. Turning first to benefits, the Proposal posits to the extent that "ESG investing sacrifices return to achieve nonpecuniary goals," investment returns are being reduced and that given the increase in ESG investing, rulemaking is needed because otherwise there is a threat that plan participants and beneficiaries would suffer a "considerable" loss of higher investment returns. (85 FR 39121)

Of course, this is all supposition and surmise, particularly in light of the evidence of the sort cited above. Indeed, ESBA undermines its own analysis when, after citing these perceived costs, the agency says that it "seeks information that could be used to quantify the increase in investment returns," as well as "comments addressing the benefits that would be associated with the proposed rule" – in other words, "Someone please give us some factual basis to adopt this rule." That is not the sort of "reasoned agency decision-making" that courts expect of federal agencies when they set out to adopt binding regulations. (E. Scalia, *Cost-Benefit Analysis and Reasoned Agency Decision-Making,* The Regulatory Review (Sept. 26, 2017), available at: https://www.theregreview.org/2017/09/26/scalia-cost-benefit-analysis-reasoned-agency-decision-making/)

The Proposal's analysis of costs is no less flawed. For example, the Proposal assumes – without evidence – that examples of "all things being equal" situations are "rare" (85 FR at 39118, 39122), and thus documenting those instances should impose little or no costs on plan sponsors.

I respectfully submit these comments for consideration of EBSA. If you would like to discuss this matter further, you may contact Louis Malizia, Assistant Director, Capital Strategies Department, by email at: lmalizia@teamster.org or by telephone at 202.497.6924.

Sincerely,

Ken Hall

Ken Hall
General Secretary-Treasurer

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