



November 29, 2021

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: Proposed Rule Regarding “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights” (RIN 1210-AC03)

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. The 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 on any funding shortfalls.

The CEA welcomes the opportunity to provide comments on the Department’s proposed rule regarding “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights”¹ (Prudence and Loyalty Proposal or Proposal) and related impacts on construction industry multiemployer plans.

¹ Proposed Rule Regarding “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,” 86 Fed. Reg. 57272 (Oct. 14, 2021) [hereinafter “the Proposal”].

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

The CEA previously submitted comments in July 2020² addressing the Trump Administration's rulemaking regarding "Financial Factors in Selecting Plan Investments" (Financial Factors Rule) which, when finalized in November 2020, generally required plan fiduciaries to select investments and investment courses of action based solely on consideration of "pecuniary factors." Specifically, paragraph (c)(1) of the Financial Factors Rule addressed consideration of pecuniary vs. non-pecuniary factors and focused on investments that promote public policy, political, and other non-pecuniary goals. The rule implied that an ERISA plan's investment in construction projects requiring 100% union labor on those projects could be classified as an Environment, Social, Governance (ESG) investment that raised concerns about fiduciaries considering non-pecuniary interests in violation of what the last Administration viewed as the plan fiduciaries' obligations under ERISA. Because this union labor requirement generates participant contributions for collectively bargained plans that invest in these funds, the CEA explained why this interpretation is incorrect for a collectively bargained plan and requested that the Financial Factors Rule be modified to remove any question about a fiduciary's ability to deem participant contributions to a collectively bargained plan as a pecuniary factor. The CEA continues to believe that concept of "pecuniary factors" in the Financial Factors Rule is ill-suited to defining appropriate considerations for a fiduciary in selecting plan investments and that the prior Administration's interpretation of this construct was too narrow.

Funds that make housing, building, and infrastructure investments and require 100% union labor to be used on the projects are valuable investment opportunities for collectively bargained plans that produce rather unique benefits that the Financial Factors Rule at best discouraged and at worst disqualified from consideration by fiduciaries in their investment selection process. Construction industry multiemployer pension plans have successfully invested billions of dollars in such projects over the past several decades. Those investments have produced not only competitive investment returns, but also participant contributions to the plans that made those investments, thereby greatly benefitting participants of the plans.

CEA supports the Proposal abandoning the "pecuniary factors" construct from the Financial Factors Rule. We also support the proposal's reinstatement of the Department's longstanding interpretation of ERISA's duty of loyalty providing that a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives and may not sacrifice investment return or take on additional investment risk to promote goals unrelated to the plan and its participants and beneficiaries. CEA also believes the Proposal properly explains ERISA's duty of loyalty by providing fiduciaries *should* consider economically material ESG factors (by cross reference to a series of sample factors).

While the CEA supports the Proposal as a marked improvement over the Financial Factors Rule, we also believe that a clarification in the Proposal is warranted concerning a fiduciary's consideration of union work hours and associated plan contributions an investment generates for a collectively bargained plan. Industry activity that results in contributions to a pension plan is a

² Available at <http://www.constructionemployersofamerica.com/letters/2020/7/24/cea-letter-re-financial-factors-in-selecting-plan-investments-proposed-regulation-rin-1210ab95>.

key factor in determining a plan's funding status. 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 plan's 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. Accordingly, we respectfully request that the Department explicitly state that a union labor requirement generating plan contributions is a proper component of a collectively bargained plan fiduciary's primary analysis of the economic merits of competing investment choices.

II. The "Tie-Breaker" Standard

Paragraph (c)(2) of the Financial Factors rule transformed the well-established "tie-breaker" standard by raising the standard to an unrealistic "indistinguishable" that the DOL acknowledged could rarely if ever be met. In our comments on the Financial Factors Rule, the CEA expressed concern that fiduciaries of construction industry multiemployer plans would be required under the Rule to demonstrate that an investment requiring union labor and generating plan contributions is indistinguishable to alternatives before they would be permitted to make such an investment. As we noted, this would prompt fiduciaries to forgo such investment despite their dual benefits to plan participants. The CEA expressed confusion over a requirement that would compel 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 CEA support's the Proposal's elimination of the special documentation requirement under the "tie-breaker" standard as articulated in the Financial Factors Rule. As we explained in our prior

³ 29 USC 1085(b)(3)(B)(iii).

comments, it is unnecessary given that fiduciaries are subject to a general prudence obligation and commonly document and maintain records about their investment selections.

Prior to the Financial Factors Rule, the “tie-breaker” standard generally permitted a fiduciary to consider collateral factors that were not primary factors in a fiduciary’s analysis of the economic merits of two investment options if they were economically equivalent. The Financial Factors Rule transformed that standard by requiring a fiduciary to determine the competing investments are indistinguishable based on considerations of risk and return and to document specifically the basis for such a determination.

The CEA supports the Proposal’s restatement of the tie-breaker standard as applying when a fiduciary prudently concludes that two competing investments or investment courses of action “equally serve the financial interests of the plan.” In addition to clarifying when the tie-breaker standard applies, this formulation does not unduly limit the collateral benefits that may be considered by a fiduciary to break a tie or impose heightened duties to assess and document decisions beyond the very high standards ordinarily required of a fiduciary. In its discussion of the Proposal’s “Benefits,” the Department states that “the proposal thus permits fiduciaries to consider an investment’s potential collateral effects, including potential increases in plan contributions, to break a tie.”⁴ The CEA appreciates this statement, as well as the Department’s shift away from a focus on whether competing investments are “indistinguishable.”

The Proposal asks whether the rule should require “that any collateral benefit relied upon as a tie-breaker be based upon an assessment of the shared interests or views of the participants, above and beyond their financial interests as plan participants, such as the investment’s likely impact on participants’ jobs or plan contribution rates.”⁵ As noted above CEA believes that a fiduciary *should* consider union jobs created by an investment and the associated plan contributions they generate when assessing the economic value of such an investment to the plan. We think it beyond argument that when two investments or investment courses of action are economically equivalent, the fact that one investment creates union jobs and plan contributions is clearly a permissible basis for breaking the tie between the two investments.

The CEA appreciates that the Department has taken steps to address our concerns with the Financial Factors Rule by returning the “tie-breaker” standard to a framework that is comparable to and commensurate with its prior guidance in Interpretive Bulletin (IB) 94-1 and IB 2015-1. While the rigidity and burdensome documentation requirements under the Financial Factors Rule were likely to dissuade fiduciaries from pursuing what are often economically superior investments, the Proposal provides the flexibility for plan fiduciaries to focus on the collateral benefits of an investment once the fiduciary determines that competing alternative investments equally serve the plan’s financial interests. The CEA supports this approach to the extent that it confirms fiduciaries’ ability to consider an investment’s creation of union jobs and the associated participant contributions to a plan that may be generated, particularly in the context of the tie-breaker standard.

⁴ Prudence and Loyalty Proposal, *supra* note 1, at 57289.

⁵ *Id.* at 57279.

Conclusion

The CEA agrees with the fundamental principle that fiduciaries must act with a single-minded focus on the interests of beneficiaries and must not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives. We support the Prudence and Loyalty Proposal because it is consistent with these principles and allows fiduciaries the flexibility to consider a broader array of factors when evaluating investments. We also appreciate that the Proposal allows fiduciary to consider collateral benefits when evaluating competing choices that equally serve the financial interests of the plan even if they are not “economically equivalent.”

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