



October 5, 2020

Submitted electronically

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, Fiduciary Duties Regarding Proxy Voting and
Shareholder Rights
RIN 1210-AB91

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 IUPAT Pension Fund to comment on the Department’s proposed regulations that will restrict plan fiduciaries, such as the IUPAT Pension Fund’s trustees, from participating or directing proxy voting as part of their fiduciary duties (“Proposed Rule”).

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 representative who jointly administer the IUPAT Industry Pension Plan, a defined benefit plan. As ERISA fiduciaries, the Trustees 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 families.

The IUPAT Pension Fund reviewed the Proposed Rule in light of the Department’s June 30th proposed rule to limit the ability of pension fund fiduciaries to select investments based on ESG factors (“ESG Proposed Rule,” RIN 1210-AB95). Similar to our comments to the ESG rule, the IUPAT Pension Fund is concerned that the Department is substituting its preferred outcome for all plans over plan fiduciaries’ discretion and prudence relating to their individual plans. This Proposed Rule, like the ESG proposed rule, creates “misplaced belief” where there is none and adds expensive regulatory burdens to force fiduciaries to take the Department’s preferred position – that ERISA plans not exercise their voting rights as owners of companies.

In creating a regulatory incentive *to not vote* proxies, the Department relies on faulty suppositions to turn DOL's historical guidance on its head. As the preamble notes, since the 1988 Avon Letter, ERISA plan fiduciaries such as the Pension Fund's Trustees have understood that voting proxies is part of their fiduciary act of managing plan assets. *See* 85 Fed. Reg. 55220. Simply put, there was no confusion among plan fiduciaries or asset managers as to including proxy voting as part of their general asset manager duties, and the Proposed Rule does not offer any examples of confusion.

In contrast, the Department asserts, without supporting evidence, that the Avon Letter "has resulted in a misplaced belief among some stakeholders that beneficiaries must always vote proxies, subject to limited exceptions in order to fulfill their obligations under ERISA." *Id.* But its citing references do not support that belief. 85 Fed. Reg. 55220 at n. 12. For example, Barbara Novick's cited comments refer to the Avon Letter to describe how asset managers have depended on DOL's consistent position on proxy voting *since the Avon Letter*. *Id.* The Department even cites to a press conference by then-Secretary Robert Reich in which he explicitly states that fiduciaries "have an obligation to vote proxies" unless the costs "substantially outweigh" the benefits. *Id.* These citations all undermine, rather than support, the Department's claim of any "misplaced belief" about fiduciaries' duties with regard to proxy voting. The Department is creating its own problem to solve.

It is evident from this Proposed Rule and the ESG Proposed Rule that the Department wants it set in stone that it does not want plan fiduciaries to spend time on fiduciary duties that have no or minimal impact on their retirement plans' bottom lines. But there has not been any misplaced belief about this aspect of fiduciaries' duties, and the Department again offers no concrete evidence to support its position. In fact, the Department's 1994 guidance in Interpretive Bulletin 94-2¹ states:

"The fiduciary duties described at ERISA § 404(a)(1)(A) and (B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives."²

Thus, the Department has always articulated the caveat that proxies need not be voted if the costs exceeded the expected benefits. This comports with fiduciaries' affirmative duties to evaluate each proxy vote. The primary change from existing guidance to this Proposed Rule is that the very act of voting must be justified based on a vote-by-vote cost-benefit analysis, creating more work and expense for sponsors, investment managers, trustees and trustee advisory firms. The Department expresses the view that "most, if not all plans, will adopt policies that utilizes the permitted practices and the activities described in the proposal already are reflected in

¹ 59 FR 38863 (July 29, 1994), available at <https://www.govinfo.gov/content/pkg/CFR-2001-title29-vol9/pdf/CFR-2001-title29-vol9-sec2509-94-2.pdf> (last accessed 9/28/20).

² *Id.* at 321.

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common practice and are best practices.” 85 Fed. Reg. 55232. To summarize, on the one hand, the Department thinks that fiduciaries have a common misperception about voting proxies to merit the Proposed Rule, but on the other hand, the Department does not think compliance with the Proposed Rule will be costly because most plans are already in compliance with it. This makes no sense. It is an illogical justification to a solution without a problem.

Ultimately, the Proposed Rule will be costly to plans like the IUPAT Pension Fund. One, the IUPAT Pension Fund will initially have to convene their fiduciaries, actuaries, investment advisors, and counsel to review existing investment and proxy voting 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. Then, if and when there are new proxy votes, the IUPAT Pension Fund will apparently have to engage economists just to study *whether to vote*. This will have the effect of chilling or suppressing institutional investors’ participation in corporate governance to avoid potential ERISA violations.

The IUPAT Pension Fund appreciates the Department’s efforts to clarify fiduciary obligations with regard to proxy voting. 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 IUPAT Pension Fund urges the Department to consider these comments to create a final regulation that better reflects historical guidance and current realities in ERISA proxy voting.

Sincerely,

A handwritten signature in blue ink that reads "Tim D. Maitland". The signature is written in a cursive, flowing style.

Tim D. Maitland
Fund Administrator
For the Trustees