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July 30, 2020

Mr. Joe Canary, Director
Office of Regulations and Interpretation
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210
Submitted Electronically Through www.regulations.gov

Re: Notice of Proposed Rulemaking: Financial Factors in Selecting Plan Investments
Proposed Regulation
RIN 1210-AB95

Dear Mr. Canary:

These comments are submitted on behalf of the International Association Pension Plan ("IAPP"). The IAPP is a multi-employer defined benefit plan that serves employers across the country and in almost every state. I have over twenty-years of experience representing ERISA funds and currently represent approximately two dozen ERISA funds, including defined benefit pension plans, defined contribution retirement plans, and health and welfare Plans. I serve as the attorney for the IAPP and submit these comments on their behalf.

The Employee Benefits Security Administration ("EBSA"), U.S. Department of Labor ("the Department" or "DOL") issued the Notice of Proposed Rulemaking ("Notice"): Financial Factors in Selecting Plan Investments Proposed Regulation, published at 85 Fed. Reg. 39113 on June 30, 2020. The Notice proposes "amendments to the "Investment duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to confirm that ERISA requires plan fiduciaries to 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."

The Department has long taken the position that a fiduciary violates ERISA if he/she accepts reduced expected returns or greater risks to secure social, environmental or other

non-financial policy goals. 85 Fed. Reg. 39114. The only time non-pecuniary interests may be considered is when the expected return net of fees and adjusted for risk is expected to be equal or equivalent to alternative investments. "The EBSA issued Interpretive Bulletin clarifying that plan fiduciaries may invest in Economically Targeted Investments ("ETI") based, in part, on their collateral benefits so long as the investment is economically equivalent, with respect to return and risk to beneficiaries in the appropriate time horizon, to investments without such collateral benefits." 80 CFR 65135. There is no need for more regulations because current regulations sufficiently limit an ERISA fiduciary from making decisions based upon non-pecuniary considerations.

Economically Targeted Investments

The Department seeks to further regulate ESG investments. ESG investments are socially responsible investing, sustainable investing, and achieve collateral benefits in the environmental, social and corporate governance (ESG) areas. These definitions are vague and subject to different applications. This comment will address the ESG investments starting on page four. Not all ESG investments are the same. One particular type of ESG investment is quite different and should be treated separately because it has additional pecuniary benefits that the others do not. These are Economically Targeted Investments.

Economically Targeted Investments are investments that have collateral pecuniary benefits on top of the risk adjusted rate of return. For the past decade, ERISA Funds have invested in individual projects and real estate development funds in a wide variety of sectors such as energy, infrastructure, manufacturing, and real estate. These investments are focused on ensuring the best project economics and business certainty possible through different types of agreements such as Project Labor Agreements. The purposes of these agreements include (1) to provide the highly skilled labor required to successfully complete projects, (2) to develop and implement the localized apprenticeship training needed to support projects and to develop skilled workforces, and (3) to provide secure funding for the project(s) with a market rate of return. This offers significant value for both the asset owner and the ERISA investor.

The Department ought to distinguish between the different types of defined benefit pension plans and how pecuniary factors might differ between different types of ERISA plans. Specifically, multi-employer defined benefit pension plans are considerably different from single employer defined benefit pension plans. These differences include the source and nature of the plan contributions, the pecuniary impact of contributions on the plan, as well as the ability of the plan to make investments that advance, promote and support the pecuniary interests of the plan through contributions.

Multi-employer pension plans usually receive plan contributions based on the hours worked by an individual worker. Therefore, if an investment helps fund a project and puts a participant to work, the plan receives contributions that it would not have otherwise had. The Participant earns a pension benefit, and the plan receives contributions in addition to the investment return.

Multi-employer funds have a long track record of successfully investing in “Economically Targeted Investments” that provide competitive risk adjusted returns through investments that contribute to a well-diversified portfolio. Prior to the issuance of IB-94-1, the Department issued a number of letters that granted a variety of prohibited transaction exemptions to both individual plans and pooled investment vehicles involving investments that produce pecuniary and non-pecuniary benefits. Plan contributions resulting from an ETI must be considered pecuniary benefits. Multi-employer plans are able to make investments that earn competitive risk adjusted returns, and directly put plan participants to work that, in turn, generates new contributions to the plan. This is consistent with trustees acting solely in the interests of the participants.

As an example, infrastructure investments are considered ETI’s. These investments are vetted and the ERISA Fund proceeds in a prudent and reasonable manner. The DOL has cited no instance where these investments have failed or how plan participants would be better off without these investments. Furthermore, when public dollars in infrastructure spending have become more scarce, private investments have become more prevalent and the expected returns should rise. The Department would cut off a large and necessary source of potential funding for infrastructure projects should its proposed regulations be enacted.

All Things Being Equal Test

The DOL should retain the ‘all things being equal test’. This test allowed an ERISA fund to base a decision on non-pecuniary factors if the rate of return in light of the risk involved and expenses were otherwise equal. However, the Department indicates that things would only be equal in very rare cases. "The Department expects that true ties rarely, if ever, occur. Seldom, however, will an ERISA fiduciary consider two investment funds, looking only at objective measures, and find the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, but a different underlying asset composition." This causes concern and it appears the Department is keeping the test but trying to severely limits its application at the same time.

The Department invites comments on its decision to retain the test. The Department should retain the test but without any further restrictions or regulations. The DOL incorrectly assumes that all things are almost never equal and therefore seeks to require extensive documentation when an ERISA plan concludes that two investments are equal. The DOL cites no specific examples of why this should be required. The Department recognizes this deficiency in Section 1.6 when it admits that "It is unclear how many Plans use ESG and similar factors when selecting investments. Similarly, unclear is the total asset value of investments that were selected in this manner. This is particularly true for DB Plans." This is a regulation in search of a problem.

The Department incorrectly assumes that “ties” almost never occur. Ties do occur and they occur all the time. If we only measured past results, the answer as to which investment was better would be quite easy. Hindsight is always twenty-twenty. The key to investing is what return, net of expenses, can be expected in the future. In this regard, different

investors value certain data differently and investment consultants forecast different returns for the same funds. Historical data must be considered but it is not determinative of future results. Forecasting expected returns is both an art and a science, and is therefore not as simple as looking at past results.

The proposed requirement that a Plan rigorously document these ties prior to making a decision as to which investment is better and would increase the costs to the plan and chill investments in areas frowned upon by the Department. The current Proposal would require that for a tie to occur, the alternative investments must have:

the same target risk-return profile or benchmark, the same fee structure, the same performance history, same investment strategy, [and that it not] function differently in the overall context of the fund portfolio, and [not] perform differently based on external economic trends and developments. 85 Fed. Reg. 39117.

While purporting to retain the same test, the Department is really moving away from the *all things being equal test* to an *all things must be the exact same test*.

Participants in the financial markets produce both “ties” and widely differing views on the exact same securities all the time. Given the number of analysts and firms that provide all manner of analysis, this should not be surprising. As a result, we support the Department’s decision to retain the “all things being equal” test under the Department’s previously articulated standards, and encourage the Department to revisit the misguided assumption that these occurrences are rare.

Environment, Social, and Governance (“ESG”) Observations and Comments

The Department seeks to limit ERISA plans from making socially responsible investing, sustainable investing, based upon environmental, social, and corporate governance (ESG) issues. “The proposed rule elaborates upon the core principles provided in the “Investment duties” regulation by making clear that fiduciaries may never subordinate the interests of plan participants and beneficiaries in their retirement income to non-pecuniary goals.” 85 Fed. Reg. 39117. “Paragraph (b)(1) provides that the loyalty and prudence requirements of ERISA section 404(a)(1)(A) and 404(a)(1)(B) are satisfied in connection with an investment decision if, in addition to the requirements in the existing paragraph (b)(1), the fiduciary has selected investments and/or investment courses of action based solely on their pecuniary factors and not on the basis of any non-pecuniary factor.” 85 Fed. Reg. 39117.

“The Department is concerned, however, that the growing emphasis on ESG investing 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.” 85 Fed. Reg. 39116. Despite this concern, the Department cites no instance where this is the case. It appears that the Department is trying to regulate decision making that is not actually taking place.

In 2018, Harvard Business School professors conducted a survey of asset managers that showed that “more than 80% now consider ESG criteria when making investment decisions and do so not only because of growing client demand but also because they believe ESG information is material to investment performance.”¹ The Department hopes to insert its judgment over that of the industry and the managers who are actually making investment decisions.

The U.S. Government Accountability Office issued a report in May 2018² that, among other things, reviewed the academic research into the relationship between ESG factors and financial performance. The GAO concluded that 1). “[a]cademic research on the performance of investments incorporating ESG factors suggests such factors can be a valid financial consideration, both in the aggregate and as individual factors”, 2). “[t]he vast majority (88 percent) of the scenarios in studies we reviewed that were published in peer reviewed academic journals between 2012 to 2017 reported finding a neutral or positive relationship between the use of ESG information in investment management and financial returns in comparison to otherwise similar investments”, 3). “[w]hen considered independently, environmental, social, and governance factors were each found to have either a neutral or positive relationship with financial performance in over 90 percent of the scenarios”, 4). “a 2015 meta-analysis, which reported aggregate evidence from more than 2,000 empirical studies, similarly found that 90 percent of the studies reported finding a neutral, positive or mixed (i.e., non-negative) relationship between incorporating ESG factors and financial performance”, and 5). “a 2017 study commissioned by DOL also reported that while some investors may continue to perceive that incorporating ESG factors entails accepting lower investment performance, its review of academic literature suggests that incorporating ESG factors generally produced investment performances comparable to or better than non-ESG investments.”³

The DOL assumes that the presence of ESG means that the expected return will be lower. The DOL cites no study or data which show this to be true. When the vast majority of investment managers value ESG and ETI, why would the Department require ERISA fiduciaries to exclude or ignore their advice? At a time when the administration is fostering a policy of deregulation, the Department is needlessly regulating investments to fix a problem that does not exist. In fact, the evidence demonstrates that the opposite may be true. The DOL needs to study this issue more completely prior to issuing regulations on the subject.

¹ Jon Hale, *Sustainable Funds U.S. Landscape Report: Record Flows and Strong Performance in 2019*, February 14, 2020. See

https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_US_Landscape_021920.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=&utm_content=20871.

² U.S. Government Accountability Office, *Retirement Plan Investing: Clearer Information on Consideration of Environmental, Social, and Governance Factors Would Be Helpful*, May 2018. See <https://www.gao.gov/assets/700/691930.pdf>.

Recommended Changes to Proposed Regulations

We recommend that the DOL not enact any new regulations in this field. In the alternative, the Department should amend proposed section 2550.404a-1(f)(3) to recognize that contributions to an ERISA fund resulting from an ETI is a pecuniary benefit. Section 2550.404a-1(f)(3) would now read:

“(3) The term “**pecuniary factor**” means a factor that has a material effect on (i) 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, *and where relevant (ii) the contributions received by the plan as a result of the investment.*” (Emphasis Added)

Thank you for your consideration.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Frank Marco', written over the typed name.

Frank Marco
Counsel to the International
Association Pension Plan