

# INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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Employee Benefits Security Administration  
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200 Constitution Avenue, NW  
Washington, D.C. 20210

**Attn: Prudence and Loyalty in Selecting Plan Investments and  
Exercising Shareholder Rights Proposed Regulation (RIN 1210-AC03)**

Ladies and Gentlemen:

The International Brotherhood of Teamsters (the “Teamsters”) is pleased to submit the following comments on the proposed rule (the “Proposal”), which was published in the Federal Register on October 13, 2021, 86 Fed. Reg. 57272, available at: <https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf>. The proposal would make important changes in two “midnight regulations” that were adopted in the waning days of the prior Administration, *i.e.*, *Financial Factors in Selecting Plan Investments* (“*Financial Factors*”) and *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights* (“*Proxy Voting*”).

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 addresses important issues regarding the retirement security and financial security of Teamster members and their families.

The *Financial Factors* rule focused on requiring plan fiduciaries to pursue investments and investment strategy based solely on “pecuniary” factors. The stated objective was to address perceived confusion about the implications of the Department’s existing guidance with respect to environmental, social and governance (“ESG”) considerations, economically targeted investments (“ETIs”), shareholder rights, and proxy voting. That rule also prohibited adding or retaining any investment fund, product, or model portfolio as a “qualified default investment alternative” (“QDIA”) if the fund, product, or model portfolio reflected non-pecuniary objectives. The *Proxy Voting* rule established standards for ERISA fiduciaries when voting proxies and exercising other shareholder rights in connection with plan investments.

The Teamsters’ position, in brief and as expressed during last year’s rulemaking process, was the 2020 rules were not in the best interest of plan participants and beneficiaries because they were unnecessary and rested on flawed assumptions. The 2020 rules relied on an unduly narrow form of cost/benefit analysis that placed a premium on being able to identify a short-term economic benefit, without adequate consideration of longer-term costs or benefits. In addition, the 2020 rules needlessly sought to restrict proxy voting and the exercise of other rights enjoyed by shareholders.

We are pleased that the Department has decided to revisit these issues and to pare back on changes that do not serve the interest of plan participants and beneficiaries. We offer the following specific comments.

1. ESG investing. We agree with the Proposal insofar as it treats the *Financial Factors* rule as an unwarranted departure from the Department’s long-standing guidance indicating that ESG factors may be relevant to a plan’s investment decisions. Indeed, it has been more than 25 years since the Department issued Interpretive Bulletin 94-1, which stated that ETIs may be appropriate investments so long as the plan is not sacrificing investment returns or incurring greater risk. Ironically, the *Financial Factors* rule, while purporting to end confusion in this area, ended up creating new confusion about how plan fiduciaries should operate.

The Proposal recognizes, as we and others argued last year, that ESG investing has long been a “mainstream” element of a plan’s investment strategies. A November 2021 survey of institutional investors disclosed that 49% of respondents incorporated ESG factors into their investment decision-making process, and that 40% of the other

respondents were considering doing so. Callan, *2021 ESG Survey*, available at: <https://www.callan.com/blog-archive/2021-esg-survey/>.

There are sound reasons for allowing fiduciaries to consider ESG factors, which can have a direct effect on the long-term health of a plan's assets. As noted in our comments last year, the Teamsters in recent years have sought to engage drug distributors and manufacturers about their role in one of the leading problems in this country, the national opioid crisis. To that end, the Teamsters co-founded the Investors for Opioid and Pharmaceutical Accountability, an investor coalition that has worked to engage companies about their role in this crisis, using shareholder proposals and dialogues with individual companies.<sup>1</sup>

Some observers might try to pigeonhole the opioid crisis as just a "social issue" of no concern to shareholders. They would be wrong. The opioid crisis is a shareholder issue and an important one at that. The wayward marketing and distribution of opioids destroyed billions of dollars in shareholder value, and companies in the supply chain now collectively face billions of dollars in legal liabilities and settlement costs.

Shareholder engagement on this type of issue is essential for the long-term health of ERISA plans. The Proposal advances that goal by removing the need for fiduciaries to focus on any short-term "pecuniary" benefit and allowing fiduciaries to consider all relevant factors that inform decisions about whether to invest in a particular company or how to vote on shareholder proposals or for a director who served on the board of a company deeply involved in such a crisis

Similarly, we are pleased to see that the Proposal includes the following factor that a plan fiduciary may consider in conducting the requisite risk/benefit assessment. Under proposed section 2550.404a-1(b)(4)(iii), a plan fiduciary would be able to consider:

Workforce practices, including the corporation's progress on workforce diversity, inclusion, and other drivers of employee hiring, promotion, and retention; its investment in training to develop its workforce's skill; equal employment opportunity; and, labor relations.

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<sup>1</sup> The work of this coalition is summarized at <https://www.iccr.org/program-areas/health/investors-opioid-and-pharmaceutical-accountability>

The 2020 rules deleted references to such practices, which had been mentioned in various Interpretative Bulletins dating back to 1994. Re-establishing this factor as a proper subject for shareholder concern is particularly important, given the recent focus on gender and racial equity in the workplace, as well as the decision by the Securities and Exchange Commission to require companies to make more disclosures regarding a company's human capital management.

2. The “all things being equal” principle. We welcome the decision to revise the “all things being equal” or “tie-breaker” principle, to bring that principle back in line with principles first enunciated over 20 years ago. As first formulated in Interpretative Bulletin 94-1, this principle was that ERISA does not prevent plan fiduciaries from investing plan assets in ETIs if the investment has an expected rate of return at least commensurate to rates of return of available alternative investments, and if the ETI is otherwise an appropriate investment for the plan in terms of such factors as diversification and the investment policy of the plan.

As the Proposal notes, the *Financial Factors* rule modified this principle to focus on whether the competing investments are indistinguishable based on consideration of risk and return with the emphasis on “pecuniary” factors. 86 Fed. Reg. at 57278. We agree with the assessment in the Proposal that “this formulation could be interpreted too narrowly,” noting that:

. . . two investments may differ on a wide range of attributes, yet when considered in their totality, can serve the financial interests of the plan equally well. These investments are not indistinguishable, but they are equally appropriate additions to the plan's portfolio. Similarly, a fiduciary may prudently choose an investment as a hedge against a specific risk to the portfolio, even though the investment, when considered in isolation from the portfolio as a whole, is riskier or less likely to generate a significant positive return than other investments that do not serve the same hedging function.

*Id.* We thus support the formulation in proposed section 2550.404a-1(c)(3) that a fiduciary may prudently select an investment or investment course of action if the fiduciary concludes the competing items “equally serve the financial interests of the plan over the appropriate time horizon.” *Id.* at 57303.

3. QDIA changes. With respect to participant-directed pension plans, the 2020 amendments barred allowing a specific fund from serving as the “qualified default investment alternative” in a participant’s account if the fund’s investment objectives, goals or principal investment strategy included or considered the use of one or more “non-pecuniary factors.” We support deleting the concept of “non-pecuniary” factors, which was introduced in the 2020 amendments, but which do not add clarity to this area. When a plan fiduciary selects the funds to be offered to plan participants as investment options, each of those funds was presumably selected consistent with ERISA’s prudence standard, so we see little reason to differentiate as to the QDIA.

4. Proxy voting. Ever since the 1988 “Avon Letter,” the Department has viewed proxy voting rights as plan assets to which that a fiduciary’s duties of loyalty and prudence apply. Thus, the exercise of those voting rights can benefit participants and beneficiaries by helping to ensure that a company’s board and management are accountable to their shareholders.

For many years the default rule was that a fiduciary should vote proxies, although there may be exceptions, as the Department recognized in Interpretative Bulletin 2016-1, which stated that “in some special cases, voting proxies may involve out of the ordinary costs or unusual requirements, for example in the case of voting proxies on shares of certain foreign corporations.”

The 2020 *Proxy Voting* rule inflated this limited exception to state that “the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.” The Proposal rightly observes that this “statement could be misread as suggesting that plan fiduciaries should be indifferent to the exercise of their rights as shareholders, particularly in circumstances where the cost is minimal as is typical of voting proxies, “adding that in general, fiduciaries should take their rights as shareholders seriously, and conscientiously exercise those rights to protect the interests of plan participants.” 86 Fed. Reg. at 57281.

5. Eliminating proxy voting “safe harbors.” We also favor abolition of the two safe harbor provisions in the *Proxy Voting* rule, which are intended to protect plan

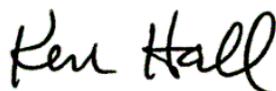
fiduciaries against a charge of an improper proxy voting policy.<sup>2</sup> There does not appear to be any foundation for such provisions in ERISA's conceptions of prudence and loyalty. In addition, the safe harbors switch the default assumption with respect to proxy voting because they say, in effect, that a fiduciary should *not* vote a plan's shares unless the plan adopts a limited set of circumstances in which shares will be voted. That is a radical change that the Proposal rightly eliminates.

6. Proxy voting recordkeeping. The Proposal would eliminate the recordkeeping requirements adopted in the *Proxy Voting* rule, which provides that when deciding to exercise shareholder rights and when exercising shareholder rights, plan fiduciaries must maintain records on proxy voting activities and other exercises of shareholder rights.

When this requirement was proposed last year, we saw no valid reason to single out proxy voting as an area that required detailed paperwork requirements. The final rule did not provide any clarity on that point, and this requirement can be safely omitted.

In conclusion, 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](mailto:lmalizia@teamster.org) or by telephone at: 202.497.6924.

Sincerely,



Ken Hall  
General Secretary-Treasurer

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<sup>2</sup> The safe harbors apply if a plan has a policy of (a) voting only on "particular types of proposals that . . . are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment;" or (b) not voting the plan's holdings of the company involved exceeds threshold of the plan's holdings, perhaps five percent.