

MetroBTC

Building & Construction Trades Council of the Metropolitan District

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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 Electronically Through www.regulations.gov

Re: Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210-AC03

To Whom It May Concern:

The Boston Building Trades and Construction Council (BBT) is an umbrella group of 20 local construction unions representing 35,000 working families in the Metropolitan Boston region. These construction union members participate in multiemployer defined benefit (DB) and contribution (DC) plans that provide retirement benefits to workers and their families. We greatly appreciate the opportunity to comment on the proposed regulation.

The regulatory guidance leading up to the proposed rule expressly prioritized the creation of well-paying jobs as a feature of a revised ESG rule. On January 20, 2021, the President signed Executive Order 13990 directed to combating the environmental crisis and recognizing certain priorities necessary to accomplishing this end, including: “[the nation’s] abiding commitment to empower our workers and communities. . . and prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.” Pursuant to this Executive Order, the Department of Labor suspended enforcement of the previous ESG regulation issued under the Trump Administration. The President then signed Executive Order 14030, which directed the promulgation of the proposed regulation and again recognized the importance of “creating well-paying job opportunities for workers,” among others.

While in many real respects the proposed regulation is a significant improvement from the Trump rule, it curiously excludes the creation and preservation of well-paying jobs as a priority in investment decisions. Instead, it characterizes them merely as “collateral benefits” available only to break ties between otherwise equal investment options. In so doing, the Agency severely restricts the ability of multiemployer plans to consider the creation of good jobs and the financial solvency of a fund in its investment selections. The Agency provides no

analysis or data to support this conclusion. The Agency should reconsider this position. There is indeed significant evidence to suggest that it is logically unsound and inconsistent with the positions the Agency takes elsewhere in the proposed regulation. We therefore respectfully request that the Agency expressly include job creation, job preservation, and plan contribution rates as “material factors” under the rule.

I. Summary

The proposed regulation currently fails to acknowledge the vital impact investments in job creation and preservation can have on the financial wellbeing of multiemployer plans, and the direct impact they have on the plans’ participants and beneficiaries. The following is a real world example:

For twenty-two years, Rick Thorne worked as a custodian in the public schools of Chelmsford, Massachusetts. He earned \$20 an hour “cleaning floors, cutting grass, and setting up for assemblies,” and made biweekly payments to his retirement fund, the Middlesex County Retirement System (Middlesex). Middlesex’s assets were (and still are) invested through the Massachusetts Pension Reserves Investment Trust (MassPRIT). In December 2007, Thorne’s retirement assets, along with those of his fellow Chelmsford school employees, and other public employees across the state, were directed by MassPRIT to fund the acquisition of Aramark Corp. (Aramark) by a private equity pool. Aramark is a “global food-service and facility-management company” that focuses on, among other businesses, servicing public school districts. In March 2011, Aramark won the custodial contract for the Chelmsford school district after underbidding Thorne’s union. Aramark offered Thorne and his fellow custodians their jobs back for \$8.75 an hour—a fifty-six percent salary cut—equal to what Thorne earned when he started at Chelmsford in 1989. Thorne declined the offer and was fired. He now collects a substantially reduced pension from Middlesex, diminished by his abbreviated career.¹

In this case, the failure to consider job growth and preservation lead directly to a deterioration in the participants’ benefits, and financial health of the plan. Similar examples abound in the construction industry in which union pension and benefit funds are forced to invest in projects that do not meet our community standards wages, hours, and working conditions. In doing so, these projects deprive our affiliates and their funds of critical opportunities to maintain the livelihoods of our affiliates’ members, increase contributions to the funds by active members, and expand access to projects meeting community standards to more construction workers.

Plans with less active (or working) participants receive lower contributions, and benefit payments increase as the number of retirees increase. This combination often results in the plan distributing more money than it receives in contributions, leading eventually to financial insolvency. A plan’s investment choices can also have a direct consequence on a participant’s employment, their benefits, and overall financial wellbeing—as the above example

¹ David H. Webber, *The Use and Abuse of Labor’s Capital*, 89 N.Y.U. Law Review 2106, 2108 (2014).

demonstrates. The financial impact of job creation, job preservation, and plan contribution rates is particularly acute for multiemployer plans since plan funding comes entirely from employer contributions based on participant hours worked.²

Thus, while investment returns are a critical part of a plan’s financial wellbeing, they are not the only part. A prudent multiemployer plan must be allowed to consider job creation, job preservation, and plan contribution rates as material factors. Yet the proposed regulation characterizes these factors merely as “collateral benefits” or “collateral effects,” which a fiduciary can only consider in the event two investment options have the same risk/return profile.³

To rectify this issue, we propose the regulation recharacterize job creation, job preservation, and plan contribution rates from “collateral benefits” or “collateral effects” considered during a tiebreaker under § 2550.404a-1(c)(3) to ESG factors material to the risk-return analysis under § 2550.404a-1(b)(4).

II. Contributions on Behalf of Active Members are the Main Source of Multiemployer DB and DC Plan Funding.

Contributions are the most important source of multiemployer DB and DC plan funding for current benefits. Multiemployer plans are different than single employer plans in this respect because they are primarily funded by contributions from signatory employers based on hours worked by plan participants. Data from the DOL Form 5500 information below supports this conclusion:

Multiemployer Pension Data (Source: U.S. Department of Labor, Form 5500)

Plan Year Ending	2015	2016	2017	2018
Number of Multiemployer Plans	1,296	1,242	1,231	1,220
Assets (\$ Billions)	\$474.5	\$480.9	\$527.6	\$523.3
Benefits Paid (\$ Billions)	\$41.0	\$42.0	\$45.5	\$43.9
Plan Contributions (\$ Billions)	\$27.9	\$28.3	\$30.0	\$32.3
Contributions as a Percent of Assets	5.9%	5.9%	5.7%	6.2%
Net Investment Income (\$ Billions)	\$2.0	\$20.5	\$70.0	\$9.0
Contributions as a Percent of Net Investment Income	1,393.0%	138.0%	42.9%	358.9%

Thus, contributions in multiemployer plans can significantly eclipse investment income as a source of plan funding.

The number of retirees and older workers relative to younger workers is an important issue for multiemployer contributions. A plan with less active participants receives less contributions, and benefit payments increase as the number of retirees increases. “With a large

² The analysis in this letter is most readily applicable to multiemployer DB plans, but applies as well to DC plans.

³ As an aside, the regulation seems to consider “labor relations” as a material factor but does not resolve the tension with the preamble’s statement that job creation is collateral.

percentage of retirees, benefits exceed contributions; as that percentage increases over time, the source of contributions begins to disappear.”⁴

Most multiemployer DB plan participants are older and inactive workers:

In 1975, inactive participants represented 17 percent of total participants across multiemployer plans; by 2014, this share had increased to 61 percent. That is, most of today’s participants are older individuals who have accumulated substantial benefits under the plan and are now retired or close to retirement.⁵

If the ratio between active and inactive participants becomes too imbalanced, these issues can lead to a plan being designated as “critical and declining.” Critical and declining red zone plans more often have materially fewer active members and more inactive members, relative to critical red, yellow, and green zone plans. Based on 2017 data, inactive participants account for 84% of the total members of critical and declining red zone plans, compared to 65% or less for critical red, yellow, and green zone plans.⁶ In sum, these plans are unlikely to survive absent additional contributions. As a result, current participants and beneficiaries will likely receive significantly reduced benefits and may lose their jobs. Further, the number of critical and declining red zone and critical red zone plans is increasing. In 2008, 9% of multiemployer plans were in the red zone, 13% were in the yellow zone, and 78% were in the green zone.⁷ In 2017, 24.7% of multiemployer plans were in the red zone, 10.7% were in the yellow zone, and 64.6% were in the green zone.⁸

Certain plan investments can increase contributions to multiemployer plans. An investment by a building and construction trades fund in a local construction project that commits to utilize unionized building and construction trades labor will create jobs for its active plan participants.⁹ In turn, the plan will receive contributions for each of those hours worked by plan participants. The participant receives gainful employment and the contributions pay for current and future benefits.

⁴ A. Munnell, J. Aubry, and C. Crawford, *Multiemployer Pension Plans: Current Status and Future Trends*, Center for Retirement Research at Boston College, pg. 18 (Dec. 2017), available at https://crr.bc.edu/wp-content/uploads/2017/12/multiemployer_specialreport_1_4_2018.pdf.

⁵ *Id.* at pg. 10.

⁶ A. Munnell, J. Aubry, and C. Crawford, *Multiemployer Pension Plans: Current Status and Future Trends*, at pg. 19; IMPAQ International, *Multiemployer Plans: Their Current Circumstances in Historical Context*, pg. vii (Sept. 29, 2017), available at <https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/multiemployer-plans-their-current-circumstances-in-historical-context.pdf>.

⁷ IMPAQ International, *Multiemployer Plans: Their Current Circumstances in Historical Context*, at pg. 19.

⁸ Congressional Research Service, *Data on Multiemployer Defined Benefit (DB) Pension Plans*, pg. 7 (Updated May 22, 2020), available at <https://sgp.fas.org/crs/misc/R45187.pdf>.

⁹ For instance, the AFL-CIO Housing Investment Trust and the AFL-CIO Building Investment Trust have created more than 185.9 million and 80 million construction work hours respectively. These trusts require 100% union labor for all on-site construction in the projects they finance. See AFL-CIO HIT 2021 Semi-Annual Report, available at <https://www.aflcio-hit.com/wp-content/uploads/2021/08/2021-HIT-Semi-Annual-Report.pdf>; AFL-CIO Building Investment Trust 2019 Annual Report, available at <https://aflcio-bit.com/wp-content/uploads/2020/05/2019-AFL-CIO-BIT-Annual-Report.pdf>.

This is not to say that every plan investment must present an opportunity to create jobs for plan participants, or that a multiemployer plan trustee should select investments primarily with an eye towards job creation. However, job creation and preservation, and the associated increase in plan contributions, are clearly material and important factors that affect funding levels and participants' jobs. They should thus be considered an investment option within the plan's broader strategy, similar to the ESG factors already identified in the proposed regulation. Indeed, while environmental and other ESG factors are vital for the nation and world, job creation and preservation arguably may have a more direct and immediate financial impact on the economics of a plan than such other factors.¹⁰

However, the proposed regulation ignores the importance of these factors for multiemployer plans. The regulation simply concludes that job creation and plan contribution rates are collateral benefits.¹¹ There is no data, analysis, or citation for this conclusion anywhere in the rule. Further, although the proposed regulation seems to consider "labor relations" as a material factor, such that plan trustees may consider whether an investment will utilize union labor, it does not resolve the tension with the preamble's previous proclamation that job creation (including union job creation) is collateral.

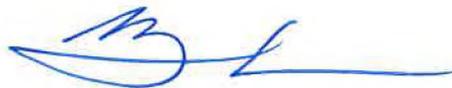
III. Recommended Changes to Proposed Regulation

For the reasons discussed above, we recommend (1) the rule not characterize job creation and plan contributions as "collateral benefits" or such similar reference, and (2) § 2550.404a-1(b)(4)(iii) be amended to include reference to job creation, job preservation, and plan contribution rates as "material factors" to consider in the risk-return analysis.

IV. Conclusion

We thank you again for the opportunity to comment on this critical issue for the nation, its workers, and their families. For the reasons discussed, we respectfully request the proposed regulation remove job creation, job preservation, and plan contribution rates from "collateral benefits" or "collateral effects" considered during a tiebreaker under § 2550.404a-1(c)(3) and include them as material ESG factors to be considered in the analysis under § 2550.404a-1(b)(4).

Sincerely,



Brian Doherty, General Agent/Secretary-Treasurer
Boston Building Trades and Construction Council

¹⁰ Plan investments that create and preserve jobs immediately impact the overall economic health of the communities in which plan participants live and provide workforce development opportunities through fund apprenticeship programs. Notably, fund apprenticeship programs are the second largest provider of post-secondary education in the nation (second only to the armed forces).

¹¹ "For instance, should the rule 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?" 86 Fed. Reg. 57279.