12-13-2021

Comment on Proposed Regulation: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

David Webber

Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215

David H. Webber
Professor of Law
Paul M. Siskind Research Scholar

T 617-358-6194 F 617-353-3077
E-mail*: dhwebber@bu.edu*

December 13, 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 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:

For identification purposes, I am Professor of Law and Paul M. Siskind Research Scholar at Boston University School of Law.[1] I write and teach on the subjects of socially-responsible investment, labor's capital, and corporate and securities law. I am grateful for the opportunity to comment on the proposed regulation.

In my view, while it is a significant improvement over its predecessor, the proposed rule's persistent relegation of job creation/preservation to the status of mere "collateral benefit" is a mistake and undermines ERISA's duty of loyalty. In reality, job creation and preservation are inextricably linked to fund financial health. Relegating that fact to a mere collateral benefit means trustees fail to consider the effect on a pension of investing in projects that eliminate the jobs of the fund's own participants, or ignore the benefit of creating new jobs and thereby new pension contributors. This runs counter to President Biden's executive order 14030 noting the importance of "creating well-paying job opportunities for workers." It also runs counter to the spirit and purpose of the duty of loyalty. I therefore urge the Department to designate job creation and preservation as an ESG factor

[1] This comment reflects my own opinion and not that of my employer, Boston University. I prepared these remarks for no client.

material to the risk-return analysis under §2550.404a-1(b)(4), or as one "relevant" to said analysis, should the Department adopt a relevance standard in lieu of materiality.[2]

First, considering job creation and preservation is consistent with trustees investing, "solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits..."[3] At least two courts have reached this conclusion either directly or implicitly. In *Brock v. Walton*, the Operating Engineers Local 675 Pension Fund created a home-loan program for fund participants carrying an interest rate that was 2 1/8 percentage points below market rates.[4] The Department of Labor sued, arguing that, "[t]he trustees established and operate the discount mortgage loan to provide collateral, non-retirement benefits in the form of subsidized housing for Plan participants. The program, therefore was not 'for the exclusive purpose of providing [retirement] benefits.'" [Brackets in original].[5] The Eleventh Circuit denied that the loan program violated the exclusive purpose rule. This supports the notion that ERISA fiduciaries may, in certain circumstances, trade off returns in favor of other tangible economic benefits to fund participants and beneficiaries.[6]

Similarly, in *Bandt v. Board of Retirement, San Diego County Employees Retirement System*, fund participants sued a public pension fund board of trustees for agreeing to reduce the employer's contribution to the fund.[7] The board agreed to an interim valuation that would reduce the employer's contribution because failure to do so would have resulted in the loss of 1,500 fund participant jobs. The California Court of Appeals for the Fourth District rejected the plaintiffs' contention that the trustees, by considering participant jobs, had breached their fiduciary duties under California's equivalent of the exclusive purpose rule. Neither *Brock* nor *Bandt* are the final word on the subject but they work to dispel the notion that considering jobs as more than a collateral benefit violates the exclusive purpose rule.

Nor should it be barred as a matter of logic. The revenues that generate pension benefits come from three sources: investment returns, employee contributions, and employer contributions. Given that employer and employee contributions are core to generating plan benefits, their relegation to the status of collateral investment

---

[2] See Boston Building Trades and Construction Council December 13, 2021 Comment Letter re Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210-AC03. See also AFL-CIO Comment Letter.
[3] 29 U.S.C. §1104(a)(1).
[4] *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986).
[5] Brief for the Appellant Secretary of Labor at 10, *Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986) (No. 85-5641) (alteration in original).
[6] For a more in depth discussion of *Brock v Walton*, and the duty of loyalty more generally, see David H. Webber, "The Use and Abuse of Labor's Capital," 89 N.Y.U. L. Rev. 2106, 2126-42 (2014).
[7] *Bandt v. Bd. of Ret. of the San Diego Cnty. Emps. Ret. Ass'n*, 136 Cal. App. 4th 140 (Ct. App. 2006).

benefit is troubling. Indeed, the Department's own Form 5500 multiemployer plans data show that annual income from contributions often exceeds investment income.[8] A legal standard that prevents trustees from considering the actual impact to the fund of an investment that attains good returns but also eliminates participant jobs, and thereby contributions, is not loyalty. It is a perversion of the duty of loyalty, in which a legal standard designed to protect worker pensions is twisted into one that actually serves the interests of investment managers who are compensated on returns alone.[9] That is not loyalty but disloyalty.[10]

The problem is not merely hypothetical. With a singular focus on returns, multiemployer plans often end up investing in jobs that violate community standards on hours, wages, and workplace conditions.[11] State, city, and county pension plans, which are not directly governed by ERISA but often apply DOL regulations and guidance to their own state pension codes, invest in privatization of public services. Teacher and school-employee pensions fund private companies providing public school services, firefighters fund private firefighting companies, and security guards fund private prison companies—all employing lower-wage, lower-benefit, nonunion labor and undermining the job security of their own investors. Workers are seeing their own pensions invested in projects that eliminate their own jobs, or in some instances get offered back their old jobs for humiliating pay cuts financed by their own retirement funds.[12] It's a form of self-financed outsourcing that reduces pension contributions, which can destabilize pensions even as they make solid returns. It similarly forces trustees to ignore documented benefits of local, job-creating investment that can create new fund participant-contributors.[13] The notion that this read of the duty of loyalty would convert pensions into nothing but local investment vehicles is a canard. Existing duties of prudence and diversification bar any such outcome.

[8] Boston Building Trades and Construction Council December 13, 2021 Comment Letter re Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210-AC03.
[9] David Webber, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON, Ch. 7 (Harvard University Press 2018).
[10] See, e.g., Benjamin Braun, "Fueling Financialization: The Economic Consequences of Funded Pensions," New Labor Forum, Dec. 4, 2021 (furnishing data showing that pensions have increasingly invested in businesses, "whose profitability has long been known to be achieved at the expense of worker wages, health, and safety.") https://journals.sagepub.com/doi/10.1177/10957960211062218.
[11] Boston Building Trades and Construction Council December 13, 2021 Comment Letter re Notice of Proposed Rulemaking: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210-AC03.
[12] For examples, see David Webber, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON, Ch. 7 (Harvard University Press 2018) and David H. Webber, "The Use and Abuse of Labor's Capital," 89 N.Y.U. L. Rev. 2106, 2157-59 (2014).
[13] 89 N.Y.U. L. Rev. at 2157-59. See also, NEBF and NEAP Economic Impacts of Real Estate Investments, (June 2021) https://www.nebf.com/assets/1/7/NEBF_and_NEAP_Economic_Impacts_of_Real_Estate_Investments_June_2021_FINAL.pdf.

I therefore urge the Department to permit the consideration of job creation and preservation as a material investment factor, one in which increases or decreases in fund contributions may be taken into account in providing the most accurate assessment of the economic effect of investments on the plan.

Very Truly Yours,

David H. Webber

Professor of Law
Paul M. Siskind Research Scholar