

Submitted Electronically

September 24, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

Dear Acting Assistant Secretary Wilson:

I write on behalf of the Council of Institutional Investors (CII), a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds and defined contribution plans with more than 15 million participants – true “Main Street” investors through their funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management.¹

The purpose of this letter is to provide you with our perspectives on the rule proposed by the Department of Labor (DOL) related to fiduciaries’ duties in the context of proxy voting and shareholder rights (Proposed Rule)² under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA).³ As discussed in more detail below, CII believes the Proposed Rule demonstrates an unwarranted prejudice against fiduciaries’ exercise of shareholder rights and would impose such burdensome obligations on fiduciaries that ERISA plans would be effectively disenfranchised. As that would negatively impact plan participants and beneficiaries, CII opposes the Proposed Rule and respectfully urges DOL to withdraw it.

¹ For more information about CII, including its board and members, please visit CII’s website at <http://www.cii.org>.

² Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210-AB91, 85 Fed. Reg. 55,219 (Sept. 4, 2020), <https://www.federalregister.gov/documents/2020/09/04/2020-19472/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights>.

³ Employee Retirement Income Security Act §§ 2-1052, 29 U.S.C. §§ 1001-1191c (1974), *available at* <https://www.law.cornell.edu/uscode/text/29/chapter-18>.

I. The rationale for the Proposed Rule is flawed.

The Proposed Rule is a material departure from prior proxy voting guidance and would impose significant new compliance costs on ERISA plan fiduciaries. There are certainly instances in which the benefits of a new regulation justify imposing new obligations on ERISA-covered plans and fiduciaries. However, DOL has not provided a persuasive rationale for the Proposed Rule. In fact, the Proposed Rule is premised on fundamentally flawed assumptions about shareholder proxy voting, fiduciaries' understanding of their duties, and the investment marketplace.

A. Evidence demonstrates the value of proxy voting.

CII views the voting of proxies as an economically important mechanism for shareholders to monitor and hold corporate managements accountable and to create and protect long-term value.⁴ We note that shareholder votes on the election of directors, which represent a majority of proxy votes, convey important information about shareholder views and can and do effect companies' decisions about who should serve as corporate directors.⁵ In addition, over the past three decades in particular, shareholder votes on proposals – including proposals seeking majority voting for directors, declassified boards and proxy access – led to widespread voluntary adoption of these measures across a large swath of the market.⁶

Despite the importance of shareholder proxy voting, DOL concludes – without documenting a thorough review of the research – that the evidence on the effectiveness of proxy

⁴ See, e.g., Letter from Amy Borrus, Executive Director, Council of Institutional Investors et al., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Sept. 4, 2020), [https://www.cii.org/files/Group%20Comment%20Letter%20on%20Improperly%20Exclusion%20of%20Evidence%20on%20Impact%20on%20Retail%20Investors\(1\).pdf](https://www.cii.org/files/Group%20Comment%20Letter%20on%20Improperly%20Exclusion%20of%20Evidence%20on%20Impact%20on%20Retail%20Investors(1).pdf) (“proxy voting [is an] . . . economically important mechanism[] for shareholders to monitor and hold corporate managements accountable to create and protect long-term value.”).

⁵ See, e.g., Nichol Garzon, Blog, Regulatory Matters, Disenfranchising Shareholders and Reducing Corporate Accountability: Comments Due on DOL Proposal to Limit Shareholder Voting by October 5, Glass Lewis (Sept. 21, 2020), <https://www.glasslewis.com/disenfranchising-shareholders-and-reducing-corporate-accountability-comments-due-on-dol-proposal-to-limit-shareholder-voting-by-october-5-2020/>

⁶ See Ann Lipton, I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired (from typing) (Sept. 4, 2020), https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html (“Shareholders at a f]ew companies, for example, cast ballots for majority voting, and declassifying boards, and proxy access, and it led to widespread and voluntary adoption of these measures across a large swath of the market [and so] . . . the value of a vote goes well beyond that particular contest and that particular company, in ways that can broadly impact a portfolio.”); see also Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to The Honorable Michael Crapo, Chairman, Committee on Banking, Housing, and Urban Affairs 5 (Dec. 5, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%205%202018%20Letter%20to%20Senate%20Banking.pdf (describing the many improvements in U.S. corporate governance practices that has resulted from shareholder voting on their proxies).

voting is “mixed.”⁷ In that regard, we call DOL’s attention to the following findings, all of which indicate that shareholder proxy voting can, in fact, enhance shareholder value:

- Shareholder resolutions can offer additional insight into emerging material risks and externalities for issues, as well as management responsiveness;⁸
- Shareholder adoption of governance-related shareholder proposals was found to trigger positive short-term returns as well as long-term performance improvements;⁹
- Adoption of majority voting was associated with positive abnormal returns and an increase in boards implementing majority-supported resolutions;¹⁰
- “Say on pay” was shown to lead to increases in companies’ market value and improvements in long-term profitability,¹¹ and
- Competition over shareholder votes generates ex ante incentives for management to perform better.¹²

Even if it were true that the research on proxy voting is mixed, that does not lend support for a new rule that effectively discourages proxy voting by plan fiduciaries. Instead, fiduciaries should be afforded the flexibility to make their own prudent determinations about the efficacy of proxy voting overall and in particular circumstances.

B. Fiduciaries are not “confused” about their proxy voting duties.

One of DOL’s primary justifications for the Proposed Rule is a concern that there may be “a persistent misunderstanding among some stakeholders that ERISA fiduciaries are required to vote all proxies”¹³ and that “some fiduciaries and proxy advisory firms – in part relying on . .

⁷ 85 Fed. Reg. at 55,222; *see, e.g.*, Nichol Garzon (“The proposal is also laced with unwarranted and unsupported skepticism about the value of proxy voting.”).

⁸ Derrek R. Bingham et al., Shareholder Engagement in the Age of Transparency, Goldman Sachs Equity Research (June 12, 2019), available at <https://www.eticanews.it/wp-content/uploads/2019/06/Shareholder-engagement-in-the-age-of-transparency-1.pdf>.

⁹ Vicente Cuñat et al., The Vote is Cast: The Effect of Corporate Governance on Shareholder Value, 67(5) J. of Fin. 1,943 (Oct. 2012), available at <https://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2012.01776.x>.

¹⁰ Yonca Ertimur et al., Does the Director Election System Matter? Evidence from Majority Voting, 20 Rev. of Acct. Stud. 1 (2015), available at <https://link.springer.com/article/10.1007/s11142-014-9284-9>.

¹¹ Vicente Cuñat et al., Say Pays! Shareholder Voice and Firm Performance, 20(5) Rev. of Fin., Eur. Fin. Ass’n 1,799 (2016), available at <https://ideas.repec.org/a/oup/revfin/v20y2016i5p1799-1834.html>.

¹² Yaron Nili & Kobi Kastiel, Competing for Votes, 10 Harv. Bus. L. Rev. 287 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541; *see generally* Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of Regulations and Interpretations, Employee Benefits Security Administration 4-5 (July 28, 2020), https://www.cii.org/files/issues_and_advocacy/correspondence/2020/July%2028%202020%20DOL%20letter.pdf (listing of empirical research finding that corporate governance can have a material impact on the return or risk of an investment).

¹³ 85 Fed Reg. at 55,220.

. [the DOL opinion letter issued in 1988 to Avon Products, Inc. (the “Avon Letter”)] – may be acting in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments”¹⁴

In our experience, plan fiduciaries generally understand that voting proxies is a fiduciary obligation that must be carried out taking into consideration the costs and benefits to the plan.¹⁵ DOL offers no data, oversight experience, or other evidence that fiduciaries are voting proxies inappropriately. Presumably, in the more than three decades since the Avon Letter, DOL would have come across some actual evidence if a problem existed. The only support DOL provides for its position is a small set of advocacy documents that pronounce, without evidence, that fiduciaries believe they must vote all proxies.¹⁶

Moreover, DOL’s reference to “environmental, social, or public policy agendas” evidences a continuing and unjustified skepticism about ERISA plans’ environmental, social and governance (ESG) investing practices.¹⁷ The preamble to the Proposed Rule states that DOL has

*[c]oncerns about plans’ voting costs sometimes exceeding attendant benefits has been amplified by the recent increase in the number of environmental and social shareholder proposals introduced. It is likely that many of these proposals have little bearing on share value or other relation to plan interests.*¹⁸

As we explained at length in a prior comment letter, ESG considerations are often relevant to the financial performance on an investment.¹⁹ DOL appears to believe – without citing evidence – that proposals to improve corporate “disclosure, risk assessment, and oversight” are

¹⁴ *Id.* at 55,222.

¹⁵ *See, e.g.*, Examining the Market Power and Impact of Proxy Advisory Firms: Hearing Before the H. Comm. on Fin. Serv., 112th Cong. (July 5, 2013) (statement of Ann Yerger, Executive Director, Council of Institutional Investors at 4-5).

https://www.cii.org/files/publications/misc/06_05_13_cii_proxy_advisor_hearing_submission_ann_yerger.pdf (testifying that a 2003 rule of the Securities and Exchange Commission indicates that fiduciary obligations of investment advisers requires that proxy voting be carried out taking into consideration the costs and benefits to the client and that in 2008 the Department of Labor adopted “language [that] is very similar . . .”).

¹⁶ *See* 85 Fed. Reg. at 55,220 n.12; Ann Lipton (“The DoL’s entire body of evidence is in footnote 12 of the release, and as far as I can tell, the only people who are arguing that ERISA fiduciaries believe they must always vote their shares are *commenters* representing organizations like the Business Roundtable and the Washington Legal Foundation.”). CII has observed that advocates who support the disenfranchisement of shareowners have long promoted the myth that fiduciaries believe they are required to vote all proxies. That advocacy, in part, led the Securities and Exchange Commission to explicitly ask and answer the question in 2014. *See* Proxy Voting; Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms, Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014), <https://www.sec.gov/interps/legal/cfs1b20.htm> (**Question 2.**)

¹⁷ 85 Fed. Reg. at 55,222.

¹⁸ *Id.* at 55,229 (emphasis added).

¹⁹ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of Regulations and Interpretations, Employee Benefits Security Administration at 3-7.

not relevant to investors' pecuniary interests.²⁰ However, that contention is at odds with findings by the Government Accountability Office that fiduciaries seek such disclosure to "enhance their understanding of risks that could affect companies' value over time."²¹

DOL acknowledges that the agency has "tried to convey in its prior sub-regulatory guidance that fiduciaries need not vote all proxies,"²² but is apparently concerned that fiduciaries have not been aware of, or understood, the guidance. However, DOL's three Interpretative Bulletins on the subject and its recent Field Assistance Bulletin have all been widely distributed in the retirement industry and analyzed extensively by fiduciaries.²³ If DOL now believes that fiduciaries are unaware of that guidance, the solution is to better educate fiduciaries, not propose a new regulation with burdensome new requirements.

C. Changes to the financial marketplace and proxy voting practices are irrelevant.

A second justification for the Proposed Rule is that "[t]he financial marketplace and the world of shareholder engagement have changed considerably" because there has been (i) an increase in the plan assets managed by institutional investors, (ii) broader diversification of plan assets, and (iii) changes in proxy voting behavior.²⁴ These three assertions in no way support the Proposed Rule.

First, it is not clear why it is relevant for purposes of the Proposed Rule that more plan assets are managed by institutional investors. Even if true, a large portion of those institutional investors are, themselves, ERISA fiduciaries. In fact, there has been a long-term trend for ERISA plans, particularly defined contribution plans, to shift their investments from non-plan asset vehicles (*e.g.*, mutual funds) to plan asset vehicles subject to ERISA (*e.g.*, collective investment trusts).²⁵ This consolidation of plan assets within pooled vehicles does not "dilute" the effect of a single holding,²⁶ as DOL contends, but rather it amplifies the effect by allowing a single fiduciary (*e.g.*, an investment manager or trustee of a collective investment trust) to vote on behalf of many plans.

²⁰ 85 Fed. Reg. at 55,229.

²¹ U.S. Gov't Accountability Off., GAO-20-530, Public Companies, Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them 9 (July 2020), <https://www.gao.gov/assets/710/707949.pdf>.

²² 85 Fed. Reg. at 55,221.

²³ Interpretive Bulletin 94-2, 59 Fed. Reg. 38,860 (July 29, 1994), *available at* <https://www.govinfo.gov/app/details/CFR-2007-title29-vol9/CFR-2007-title29-vol9-sec2509-94-2> ; Interpretive Bulletin 2008-01, 29 C.F.R. § 2509.08-2 (Oct. 17, 2008), <https://www.federalregister.gov/documents/2008/10/17/E8-24552/interpretive-bulletin-relating-to-exercise-of-shareholder-rights>; Interpretive Bulletin 2016-01, 81 Fed. Reg. 95,879 (Dec. 29, 2016), <https://www.federalregister.gov/documents/2016/12/29/2016-31515/interpretive-bulletin-relating-to-the-exercise-of-shareholder-rights-and-written-statements-of>; FAB 2018-01 (Apr. 23, 2018), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01>.

²⁴ 85 Fed. Reg. at 55,221.

²⁵ *See, e.g.*, Robert Steyer, CITs Outpacing Growth in Mutual Funds, P&I (May 12, 2020), <https://www.pionline.com/defined-contribution/cits-outpacing-growth-mutual-funds-morningstar>

²⁶ 85 Fed. Reg. at 55,225.

Second, it is irrelevant for purposes of the Proposed Rule whether ERISA plans are more “diversified” than they were 30 years ago.²⁷ DOL contends that there has been an increase in alternative investments since 1990,²⁸ which would presumably result in fewer proxy voting decisions. But there is no logical connection between the number of proxy votes and the Proposed Rule because a fiduciary’s obligations under ERISA do not depend on the number of decisions that must be made.

Third, the changes in proxy voting behavior referenced by DOL²⁹ are not indicative of a problem with proxy voting that needs to be solved. Rather, they are a clear indication that rational private actors in the marketplace are learning from experience and taking action to enhance the value of their investments. If profit-seeking investors have adopted more complex proxy voting policies, they have done so based on a rational decision that such policies are necessary and appropriate to protect their investments. DOL has provided no evidence to the contrary.

II. The Proposed Rule would effectively silence ERISA plan investors.

The Proposed Rule would create an overly burdensome and unjustified process for the consideration of voting proxies that would, in many cases, effectively prohibit ERISA plans from exercising their shareholder rights. Under the Proposed Rule, *every single proxy vote* would require a fiduciary to not only analyze the importance of the vote to the economics of the investment but also conduct a second layer of detailed analysis to determine how the vote impacts the plan as a whole. This second layer of analysis would be complex, difficult to conduct, and often be based on indeterminable facts. And it essentially tells fiduciaries for the first time that, in many cases, they *cannot* act to protect their investments and enhance long-term value.

Importantly, the Proposed Rule would require a fiduciary to consider the size of the plan’s ownership interest. Presumably, DOL believes that a fiduciary should not vote proxies if the plan’s vote has a lower probability of affecting the outcome of the overall vote. However, this is not a workable standard as fiduciaries will not know in advance whether their vote could impact the outcome, either because they cast the deciding vote or because their vote is needed for a quorum. Moreover, the Proposed Rule fails to take into account the fact that several related plans may together own a significant stake in a company and that a single fiduciary may exercise voting authority over several unrelated ERISA and non-ERISA accounts that together own a significant stake in a company.

The practical impact of the Proposed Rule’s strong prejudice against proxy voting would be to effectively silence and disenfranchise ERISA plans.³⁰ The Proposed Rule creates such a high bar for a fiduciary to determine that it is permissible to vote proxies that it will be difficult for fiduciaries to ever exercise their shareholder right, even if they determine that the vote is economically relevant to their investment.

²⁷ *Id.*

²⁸ *See id.* at 55,222 (“For example, alternative investments like hedge funds, private equity, and venture capital firms have grown dramatically since 1990.”).

²⁹ *Id.* (describing alleged changes in proxy voting behavior).

³⁰ *See, e.g.,* Ann Lipton (“The fairly transparent goal of these rules is to take ERISA plans out of the voting and engagement business, except for things in the mergers/spinoffs/contests category.”).

III. The Proposed Rule’s “permitted practices” require refinement.

DOL fully acknowledges that the Proposed Rule would increase compliance costs and attempts to mitigate those increased costs by allowing fiduciaries to establish “permitted practices” for proxy voting (*i.e.*, standing proxy voting policies).³¹ Some fiduciaries already have such policies, and if prudently adopted and administered, they can help reduce proxy voting costs. However, if DOL is going to create a new rule that expressly allows fiduciaries to adopt permitted practices, DOL should clarify the extent of fiduciary protection being provided.

In that regard, it is unclear how and to what extent the permitted practices operate to limit the voting fiduciary’s liability in connection with determinations to vote or not vote proxies. Generally, fiduciary safe harbors under ERISA clearly state that a fiduciary is deemed to satisfy his or her fiduciary duties when acting in a manner consistent with the safe harbor. However, the Proposed Rule does not say that. In fact, the preamble to the Proposed Rule specifically states a plan fiduciary may be required to ignore a permitted practice in certain circumstances (*e.g.*, to help an issuer achieve a quorum). If that is the case, the permitted practices provide virtually no protection for plan fiduciaries and do not reduce compliance costs because a fiduciary must still conduct a robust analysis of each vote.

Additionally, CII strongly opposes the proposed permitted practice that would allow “voting proxies in accordance with the voting recommendations of management of the issuer on proposals or particular types of proposals that the fiduciary has prudently determined are unlikely to have a significant impact on the value of the plan’s investment.”³² DOL’s rationale for this permitted practice is that ERISA fiduciaries can assume management is acting in the best interest of the shareholders because management owes a fiduciary responsibility under state law to shareholders.³³ In no other scenario does DOL permit a fiduciary to simply assume that another fiduciary is acting prudently. DOL has always taken the position that a fiduciary has an obligation to prudently monitor both fiduciary and non-fiduciary plan service providers. In fact, the Proposed Rule itself would specifically impose a heightened monitoring obligation on fiduciaries who delegate proxy voting to another fiduciary. Therefore, CII urges DOL not to include this permitted practice in any final rule.

IV. The Proposed Rule’s monitoring obligations are unreasonable.

CII is concerned that the Proposed Rule suggests that fiduciaries have more of an obligation to monitor those voting proxies than other plan fiduciary activities. Specifically, the Proposed Rule would require that a “responsible plan fiduciary shall require such investment manager . . . to document the rationale for proxy voting decisions or recommendations sufficient

³¹ *See, e.g.*, 85 Fed. Reg. at 55,225.

³² *Id.* at 55,242 (Proposed Rule § 2550.404a-1(e)(3)(A)).

³³ *See id.* at 55,225 (“Under this permitted practice, a fiduciary may, consistent with its obligations set forth in ERISA section 404(a)(1)(A) and (B), maintain a proxy voting policy that relies on the fiduciary duties that officers and directors owe to a corporation based on state corporate laws.”); *see also* Nichol Garzon (“The DOL offers no rational explanation of why routinely voting for the proposals of someone with divergent interests than plan participants, including on matters like executive pay, would be consistent with a fiduciary’s duties of loyalty and prudence, let alone why ERISA should favor it.”).

to demonstrate that the decision or recommendation was based on the expected economic benefit to the plan, and that the decision or recommendation was based solely on the interests of participants and beneficiaries in obtaining financial benefits under the plan.”³⁴ The preamble to the Proposed Rule explains that requirement by stating that “ERISA requires fiduciaries to monitor proxy voting decisions made by their investment managers”³⁵ This explanation suggests that a responsible plan fiduciary must review all proxy voting decisions, but that is inconsistent with ERISA’s general rules related to the delegation of fiduciary responsibility.³⁶ Additionally, it is far in excess of what DOL has required in other circumstances. For example, DOL has opined in the context of participant investment advice that a fiduciary plan sponsor does not have to “monitor the specific investment advice given by a fiduciary adviser to any particular recipient of the advice.”³⁷

V. DOL has failed to provide support for a new proxy policy review mandate.

The Proposed Rule would require that fiduciaries review their proxy voting policies at least once every two years. DOL states that it “understands that this provision is consistent with industry practices”³⁸ However, DOL’s only authority for this proposition does not come from the industry at all. Instead, DOL refers to policies put in place by the Pension Benefit Guaranty Corporation, which is an agency “under” DOL for which the Secretary of Labor serves as chair of the board.³⁹

In our experience, fiduciaries do periodically review their proxy voting policies, but they do so based on a reasonable determination of how often such a review is necessary and appropriate, taking into consideration a number of factors. CII supports DOL making it clear to fiduciaries that they should conduct periodic reviews. But codifying a rule that would mandate fiduciaries review their proxy voting policies every two years is not necessary. In fact, it may actually be counterproductive because it could send the message that a two-year review cycle is always appropriate, thereby discouraging fiduciaries from more frequent reviews. To the extent DOL believes it is important to mandate the timing of a proxy voting policy review cycle, DOL should, at the very least, conduct a more thorough study of the issue to determine whether there is a standard industry practice.

³⁴ 85 Fed. Reg. at 55,242 (Proposed Rule § 2550.404a-1(e)(2)(iii)).

³⁵ *Id.* at 55,224.

³⁶ *See, e.g.*, Liability for Breach of Co-Fiduciary, 29 U.S. Code § 1105(d) (Sept. 2, 1974), *available at* <https://www.law.cornell.edu/uscode/text/29/1105> (stating that an appointed fiduciary shall not be liable for the acts or omissions of an investment manager or be under an obligation invest or manage the assets managed by an investment manager).

³⁷ FAB 2007-01 (Feb. 2, 2007), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2007-01>; *see also* FAB 2004-03 (Dec. 17, 2004), <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2004-03> (a directed trustee does not have an obligation to duplicate or second-guess the work of plan fiduciaries that have discretionary authority over the management of plan assets).

³⁸ 85 Fed. Reg. at 55,226.

³⁹ *See id.* n.64 (“stating that PBGC Board must review the Corporation’s Investment Policy Statement at least every two years and approve the Investment Policy Statement at least every four years”).

For all of the above reasons, CII opposes the Proposed Rule and respectfully urges DOL to withdraw it. Thank you for considering our views on this matter. Please contact me with any questions.

Sincerely,

A handwritten signature in black ink that reads "Jeff Mahoney". The signature is written in a cursive style with a large, stylized "J" and "M".

Jeffrey P. Mahoney
General Counsel