Congress of the United States
Washington, DC 20510

October 2, 2020

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

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

Dear Acting Assistant Secretary Wilson:

We write to express our opposition to the Department of Labor's (the Department) proposal regarding a fiduciary's duties as they relate to proxy voting and shareholder rights in plans governed by the Employee Retirement Income Security Act of 1974 (ERISA).[1] The proposal would impose needless and arbitrary requirements on a plan fiduciary when it comes to proxy voting. Specifically, it would require a plan fiduciary to vote any proxy when the matter being voted upon would have an economic impact on the plan and prohibit the plan fiduciary from voting when it would not. In practice, this proposal does the opposite of protecting retirees—it decreases the value of retirement plans' investments by discouraging fiduciaries from using a key tool to fight for the financial interests of the workers and retirees they serve. Amid its summer regulatory "tsunami,"[2] the Department has once again overlooked its statutory and administrative obligations for rulemaking.[3] This blatant attempt at disenfranchising ERISA-governed plans is ill-advised, unjustified, and unnecessary. Accordingly, we urge the Department to withdraw its proposed rule and refocus its efforts on bolstering sorely needed protections for ERISA plan participants and beneficiaries.

---

[1] U.S. Dep't of Labor, Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55219 (Sept. 4, 2020) (to be codified at 29 C.F.R. pts. 2509 & 2550) (referred to hereinafter as Proxy Proposal). It is important to note also that this proposal covers "ERISA-covered pension, health, and other welfare plans that hold shares of corporate stock." Proxy Proposal at 55230.

[2] Jaclyn Diaz, *Retirement Industry Hustles to Keep Up With DOL's Rules Tsunami*, Bloomberg Law (Sept. 1, 2020), https://news.bloomberglaw.com/daily-labor-report/retirement-industry-hustles-to-keep-up-with-dols-rules-tsunami (highlighting EBSA's summer of regulations covering "fiduciary responsibilities, pooled employer retirement plans, benefit plans with environmental, social and corporate governance (ESG) focused funds, lifetime retirement income disclosures, and electronic disclosure requirements" and now proxy voting and shareholder rights). *See also* Exec. Order No. 12,866 §6(a)(1), 3 C.F.R. 638, 644 (1993) *reprinted as amended in* 5 U.S.C. § 601 (directing "each agency [to] afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

[3] *See generally* The Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1980) (requiring that agencies justify the collection of information by explaining the need for the information, the cost of the information collection, and a demonstration that collecting information in the proposed way is the least burdensome method).

Engagement with Management is Critical in Meeting ERISA's Fiduciary Obligations.

The Department suggests this proposal is intended to resolve "a misplaced belief among some stakeholders that fiduciaries must always vote proxies . . . in order to fulfill their obligations under ERISA."[4] The Department could have simply clarified this supposed misunderstanding, though it has not provided any evidence of confusion among fiduciaries about their duties. Instead, it went in the opposite direction by expressly prohibiting fiduciaries from voting proxies "in circumstances where plan assets would be expended on shareholder engagement activities that do not have an economic impact on the plan."[5]

With this proposal, the Department's stance on voting diminishes the value of ERISA plans' investments as "[t]he value of a financial security is determined not only by its claim on the company's future earnings but also by the rights associated with that security."[6] The rights appurtenant to stock include voting on executive compensation packages, electing board members, and proposing corporate changes, among other things.[7] Each of these votes has the potential for economic impact on the stock, but such impact may not be direct or immediate. Moreover, the suggestion that environmental and social matters should generally be considered non-pecuniary and left unvoted by ERISA fiduciaries completely misjudges the state-of-play regarding professional investment analysis. Such matters are critical to performing due diligence risk analysis and have become increasingly germane to assessing company strategy and long-term financial viability. Since the Department is effectively decreasing the value of shares owned by ERISA plans by limiting the rights associated with them, it is unclear how forced proxy abstention could possibly benefit the participants and beneficiaries of these plans.

Despite conventional wisdom that voting proxies is not only an important but also valuable exercise, the Department suggests few proxy votes have bearing on share value.[8] The proposal then imposes an onerous recordkeeping burden on fiduciaries to document the circular process required by the rule.[9] For a fiduciary to vote a proxy, the vote must have an economic impact on the plan, which requires the fiduciary to expend resources to make that determination at the outset, which may result in the use of plan assets to abstain from exercising a right that is associated with share ownership.[10] In fact, the Department suggests that "it would be better for the plan to simply refrain from voting rather than to incur even small costs making this determination."[11] By this logic, if a fiduciary refrains from making an economic impact

---

[4] Proxy Proposal at 55220. It should be noted that the proposal did not contain any data demonstrating how widespread this "misplaced belief" is nor did it provide any evidence of enforcement actions for fiduciaries breaching their duties with respect to proxy voting or shareholder engagement or even an actual example.
[5] *Id.* at 55221.
[6] CFA Institute, *The Corporate Governance of Listed Companies*, 49 (2018), https://www.cfainstitute.org/-/media/documents/article/position-paper/corporate-governance-of-listed-companies-3rd-edition.ashx.
[7] *Id.*
[8] Proxy Proposal at 55229.
[9] *Id.* at 55224 (requiring fiduciaries to engage in an extremely costly use of plan assets to calculate the economic impact of every vote on a proxy ballot).
[10] *Id.* at 55242 ("A plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering those factors described in paragraph (e)(2)(ii) and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote).").
[11] *Id.* at 55228.

determination and it is later determined that the vote, in fact, *had* such an impact, the fiduciary may be held liable for breaching his or her duties to the plan. This catch-22 makes it entirely unclear what the Department actually expects of fiduciaries to do—except perhaps nothing. The only clarity related to this proposal is its intended outcome—to disenfranchise ERISA plans.

This rule is incredibly short-sighted, as proxy voting is one way for shareholders – and ERISA plans in particular – to engage with corporate management on areas of concern with the goal of maximizing long-term shareholder value. Shareholder voting is the primary tool when management is not responsive to shareholder concerns. For example, shareholders can and do engage with management privately, and shareholders can band together to increase pressure and demand change.[12] While many of the shareholder votes are advisory and a vote may not even garner a majority, this engagement has been recognized as a critical part of corporate governance and sends an important signal to corporate management about shareholder views. Being engaged and focused on increasing value is a hallmark of responsible ownership. Shareholders must be able to raise issues to management before they potentially undermine shareholder value. Withholding the rights of ERISA plan shareholders to vote on issues at the annual meeting creates an unauthorized differential in voting power among shareholders.

This new restriction on exercising proxy rights is not only unfair to ERISA plans, but there are myriad of unintended consequences, which could also be detrimental to the economic interests of ERISA plan participants and beneficiaries. As noted above, proxies serve as a dialog between a company's investors and its management. ERISA plans are an important voice in that conversation, as they are generally focused on long-term growth and the long-term interests of a company. By silencing ERISA-governed plans, hedge fund investors will have an outsized voice and they may have motivations that are not in line with the long-term interests of the company. Additionally, if ERISA-governed plans refrain from voting rather than undertake the onerous cost benefit analysis in the proposal, companies will lack a full understanding of whether shares will be voted, creating uncertainty in achieving a quorum and impeding shareholder engagement.[13] Taken together, this could create more unpredictable proxy outcomes, which may not be in the economic interests of ERISA plan participants and beneficiaries.

The Proposal is Vague and Unworkable.

The Department is silent in its proposal about what constitutes "economic impact," yet determining its existence is a threshold question. Accordingly, fiduciaries will not have clarity as to execution of their duties. There are questions of whether the economic impact must be immediate or is permitted to happen over a certain (currently unstated) period of time, as well as whether the economic impact must exceed some unknown threshold or just simply be a positive economic impact. As drafted, the proposal is unworkable because it is impossible for a fiduciary to understand how to meet such a subjective standard. We believe, however, that is the intent. A

[12] *See generally* Comment Letter from Marcie Frost, CEO of CALPERS, to Vanessa Countryman, U.S. Sec. & Exch. Comm'n, re: Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8; Release No. 34-87458 (File No. S7-23-19) (Feb. 3, 2020) (on file with the author).

[13] *See* Dawn Lim, *How Investing Giants Gave Away Voting Power Ahead of a Shareholder Fight*, Wall St. J. (June 10, 2020), https://www.wsj.com/articles/how-investing-giants-gave-away-voting-power-ahead-of-a-shareholder-fight-11591793863.

fiduciary will not risk breaching his or her duties to the plan, so the end result will simply be to avoid voting proxies unless a fiduciary takes advantage of a "permitted practice" like supporting management recommendations.[14]

In order to avoid the Department's newly mandated analysis, which may "impose burdens on fiduciaries that are disproportional to any potential economic benefit,"[15] the Department provides a few "permitted practices."[16] Of note, the Department proposes a safe harbor for ERISA fiduciaries that wish to defer completely to management's recommendations.[17] This safe harbor is antithetical to ERISA's rigorous fiduciary standards, which require a prudent process.[18] This approach presumes that management is reliable and talented at increasing value, which cannot be said of all publicly-traded companies. Moreover, management is conflicted on many of the topics that are raised in proxy votes, such as executive compensation. The notion that management is beyond reproach when its interests are not always aligned with those of plan participants and beneficiaries is an unjustified and curious exception to the prohibition of voting proxies that the Department believes are unlikely to impact economic value. Finally, the proposal does not consider proxy advisors as a possible safe harbor, even though they are a low-cost solution to research on proxy votes, and have fewer and less severe conflicts than management.[19]

This Proposal Lacks Supporting Data and Justification.

The proposal lacks sufficient evidence to support its rulemaking. It has been twelve years since Secretary Scalia complained in *The Wall Street Journal* that "union pension funds" have outsized influence.[20] Yet, no data seems to have emerged in that time to support the Department's extreme measure to disenfranchise specific stock holders.

In fact, Secretary Scalia provided a roadmap to gather data that could shed light on what, if any, value a proposal like this might have. He suggested that "the Labor Department has a statutory

---

[14] Proxy Proposal at 55225.
[15] *Id.* at 55228.
[16] *Id.* at 55225-26.
[17] *Id.* at 55225.
[18] U.S. Dep't of Labor, Meeting your Fiduciary Responsibilities (2017), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf, at 2.
[19] *See*, *e.g.*, Comment Letter from the Council of Institutional Investors to Comm'rs, U.S. Sec. & Exch. Comm'n, re: File No. 4-725 Proxy Advisor Regulation (Oct. 15, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf ("Proxy advisors effectively serve as collective research providers for large numbers of institutional investors, providing these investors an affordable alternative to the high costs of individually performing the requisite analysis for literally hundreds of thousands of ballot proposals at thousands of shareholder meetings each proxy season."); Michael T. Cappucci, *The Proxy War Against Proxy Advisors*, Harvard Law School Forum on Corporate Governance (Nov. 27, 2019), https://corpgov.law.harvard.edu/2019/11/27/the-proxy-war-against-proxy-advisors/ (noting that "institutional investors believe that proxy advisory services are a critical, cost-effective part of the shareholder voting process and many of the proposed reforms, including giving issuers a mandatory right to review, would threaten proxy advisors' independence and increase costs without any real benefit").
[20] Eugene Scalia, *The New Labor Activism*, Wall St. J. (Jan. 23, 2008), https://www.wsj.com/articles/SB120105026345108353.

responsibility to conduct investigations and bring federal court actions when pension assets are misused."[21] Yet, this proposal did not contain any information regarding a single investigation or enforcement action taken upon a finding of such disregard by a fiduciary of their duties when exercising shareholder rights on behalf of a plan. Upon request for such information, the Department produced scant evidence of ongoing investigations or past enforcement actions where fiduciaries have voted proxies in such ways that increased plan expenses or were not in the best interest of a plan.[22]

Finally, we understand the Employee Benefits Security Administration ("EBSA") has contacted certain ERISA plans seeking information relating not only about the recipient plan's ESG investments but also proxy voting.[23] Though the Department has suggested it was gathering data to support both the ESG rule as well as this rulemaking, ERISA plans received these letters after the ESG proposal was submitted for review to the Office of Management and Budget[24] and this proposal was well under way. If the material EBSA requested was intended to inform these rulemakings, the information and data should have been collected and reviewed prior to the release of the proposals. Again, we reiterate our concern that these letters appear to inappropriately discourage ERISA plans from not only engaging in ESG investing but also potentially exercising their rights as stockholders before either proposal is finalized.

The Regulatory Impact Analysis is Woefully Inadequate.

A Regulatory Impact Analysis (RIA) is supposed to explain the need for the regulation, identify various regulatory approaches, and provide a quantitative and qualitative estimate of the costs and benefits of the proposal and the alternatives.[25] In this instance, the RIA fails on all accounts. There is no data to support the need for the regulation.

The RIA in this proposal serves as a request for information. It poses fundamental questions regarding the proposal, such as "whether, to what extent, and under what circumstances plans' proxy votes are likely or unlikely to increase the value of their shares or otherwise advance their participants' economic interest."[26] The "Benefits" section of the RIA consists of speculation that "[t]he proposed regulation *could* increase the investment return on plan assets."[27] Moreover, it does not contain a single citation to support any of its assertions.[28]

---

[21] *Id.*
[22] Email from Margie Almanza (Oct. 2, 2020) (on file with author) ("EBSA has investigated 51 cases targeting proxy voting practices since 1995. Ten additional cases identified proxy voting as the primary issue. All of these cases have closed. The Department is unable to comment on open and ongoing investigations.")
[23] *See* Nevin Adams, *UPDATE: EBSA Probing ESG Holdings, Policies*, National Tax-Deferred Savings Ass'n (June 15, 2020), https://www.ntsa-net.org/news-resources/update-ebsa-probing-esg-holdings-policies.
[24] *Id.*
[25] OMB Circular A-4, *Regulatory Analysis* (Sept. 17, 2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf; *see also* Office of Info. & Regulatory Affairs, *Regulatory Impact Analysis: A Primer*, https://www.reginfo.gov/public/jsp/Utilities/circular-a-4_regulatory-impact-analysis-a-primer.pdf.
[26] Proxy Proposal at 55229.
[27] *Id.* at 55232 (emphasis added).
[28] *See* Proxy Proposal at 55231-32.

While proclaiming "it expects that these costs would be minimal" in the RIA's "Costs" section, the Department does not provide any estimates.[29] In fact, it "requests comments and data it could use to quantify such costs."[30] As a predicate to rulemaking, the Department should gather this information rather than use the unreasonably short comment period to do so. An RIA must have data on which it can provide analysis; this proposal's RIA contains neither data nor analysis. Accordingly, the proposal should be withdrawn on this basis alone.

This Proposal is Another Thinly Veiled Attack on ESG Investing.

While the Department claims this proposal was motivated by the desire to protect the financial interests of ERISA plan participants, it clearly is directed by an Executive Order on Promoting Energy Infrastructure and Economic Growth.[31] This executive order called on the Department to "complete a review of existing Department of Labor guidance on the fiduciary responsibilities for proxy voting to determine whether any such guidance should be rescinded, replaced, or modified to ensure consistency with current law and policies that promote long-term growth and maximize return on ERISA plan assets."[32] However, as shown by the dearth of evidence in this proposal, the Department failed to complete the review and moved directly to the rulemaking.

If the Department wanted to enhance shareholder value and maximize returns on ERISA plan assets, it would have recognized it is prudent for pension fiduciaries to engage with management of companies they own, especially with respect to environmental risks like climate change and civil and criminal environmental liabilities.[33] In September, the United States experienced the blunt impact of climate change: the West Coast was ravaged by wildfires;[34] the Gulf Coast faced two major hurricanes in a three-week period;[35] five named tropical cyclones were simultaneously in the Atlantic Basin;[36] and two major glaciers in the Antarctic were breaking free of their restraints, thereby increasing the risk of rising sea levels[37] and threatening a number of coastal cities and communities.[38] Rather than acknowledge the inherent financial risks of climate

---

[29] *Id.* at 55232.
[30] *Id.*
[31] Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019), https://www.whitehouse.gov/presidential-actions/executive-order-promoting-energy-infrastructure-economic-growth/.
[32] *Id.*
[33] *See generally* John Colas, Ilya Khaykin & Alban Pyanet, *Climate Change: Managing a New Financial Risk*, Oliver Wyman (2019), https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2019/feb/Oliver_Wyman_Climate_Change_Managing_A_New_Financial_Risk_paper.pdf.
[34] Zusha Elinson & Alicia Caldwell, *West Coast Fires Fueled by Winds as Dangers Continue*, Wall St. J. (Sept. 15, 2020), https://www.wsj.com/articles/west-coast-fires-fueled-by-winds-as-dangers-continue-11600178797?mod=hp_lead_pos5.
[35] Chelsea Brasted & Rick Rojas, *As Hurricane Sally Looms, the Gulf Coast Braces Itself Yet Again*, N.Y. Times (Sept. 14, 2020), https://www.nytimes.com/2020/09/14/us/hurricane-sally-storm.html.
[36] Shel Winkley, *As Hurricane Sally bears down on the Gulf Coast, 2020 season continues at a record pace*, KBTX (Sept. 14, 2020), https://www.kbtx.com/2020/09/14/as-hurricane-sally-bears-down-on-the-gulf-coast-2020-season-continues-at-a-record-pace/.
[37] Chris Mooney, *Two major Antarctic glaciers are tearing loose from their restraints, scientists say*, Wash. Post (Sept. 14, 2020), https://www.washingtonpost.com/climate-environment/2020/09/14/glaciers-breaking-antarctica-pine-island-thwaites/.
[38] Michael Sauter & Thomas Frohlich, *These American cities will soon be under water*, USA Today (June 18, 2019), https://www.usatoday.com/story/money/2019/06/18/climate-change-american-cities-that-will-soon-be-under-water/39533119/ ("Across U.S. coastal cities, more than 300,000 homes worth a combined $117.5 billion are likely

change, the Department suggests that environmental proposals "have little bearing on share value or other relation to plan interests."[39]

The Administration and the Department continue to present a false choice between meeting fiduciary obligations for the "'exclusive purpose' of securing economic benefits for ERISA plan participants and beneficiaries"[40] and pursuing socially and environmentally conscious investments. This proposal, combined with the Department's proposal restricting ESG investing,[41] hurts the financial interests of ERISA plan participants and beneficiaries. Further, the Department's proposals represent a convoluted ruse to favor legacy energy companies, rather than allow the free market to make these decisions. This is not surprising given the rulemaking was directed by an executive order relating to energy rather than a directive to strengthen the financial futures of ERISA plan participants and beneficiaries. These anti-environmental, anti-social, and anti-governance stances are driving the Department to redefine ERISA's fiduciary functions in a way that subordinates the interests of plan participants and beneficiaries to the desires of corporate management and the Trump Administration.

Further, the Department's actions are inconsistent with recommendations from the U.S. Commodity Futures Trading Commission (CFTC).[42] In its recent report, "Managing Climate Risk in the U.S. Financial System," the CFTC's Market Risk Advisory Committee states that "regulatory concerns may discourage ERISA plan sponsors and managers from integrating climate-related factors into their investment approach . . . [as there are concerns regarding] the potential misperception of risk-return, worry about violating unclear standards (including those caused by conflicts or changes in regulatory guidance), and potential liability for the underperformance of investments being attributed to their sustainability features."[43] The CFTC Advisory Committee urges, "[r]egulatory efforts must not discourage the consideration of [ESG] factors, and instead should encourage their consideration."[44] The Department should heed the advice of these Trump Administration officials and abandon its recent, contradictory proposals.

Conclusion

For the reasons offered above, we implore you to withdraw this proposal immediately. Moreover, we urge the Department to discontinue its projected path of rapidly finalizing a number of highly consequential and controversial rules in the next two months as the country

---

to be at risk of chronic tidal flooding within 30 years, according to UCS analysis and projections. By the end of the century, that total could rise to 2.4 million homes and more than $1 trillion in property damage – and those estimates are based only on existing homes.").

[39] Proxy Proposal at 55229.

[40] *Id.* at 55223.

[41] U.S. Dep't of Labor, Financial Factors in Selecting Plan Investments, 85 Fed. Reg. 39113 (proposed June 30, 2020) (to be codified at 29 C.F.R. pt. 2550).

[42] U.S. Commodity Futures Trading Comm'n, *Managing Climate Risk in the U.S. Financial System*, Market Risk Advisory Comm., Climate-Related Market Risk Subcomm. (Sept. 2020), https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf.

[43] *Id.* at 111.

[44] *Id.*

continues to grapple with the ongoing pandemic. The Department should instead refocus its efforts on strengthening actual protections for ERISA plan participants and beneficiaries.

Sincerely,

PATTY MURRAY
Ranking Member, Senate Committee on Health, Education, Labor, and Pensions

ROBERT C. "BOBBY" SCOTT
Chairman, House Committee on Education and Labor

SHERROD BROWN
Ranking Member, Senate Committee on Banking, Housing, and Urban Affairs

MAXINE WATERS
Chairwoman, House Committee on Financial Services

TINA SMITH
United States Senator

ADAM SMITH
Member of Congress

TAMMY BALDWIN
United States Senator

FREDERICA S. WILSON
Member of Congress

ELIZABETH WARREN
United States Senator

SUZAN DELBENE
Member of Congress

RICHARD J. DURBIN
United States Senator

DAVID TRONE
Member of Congress

RON WYDEN
United States Senator

DENNY HECK
Member of Congress

MARIA CANTWELL
United States Senator

PRAMILA JAYAPAL
Member of Congress

BERNARD SANDERS
United States Senate

MARK DESAULNIER
Member of Congress

SHELDON WHITEHOUSE
United States Senate

MAZIE K. HIRONO
United States Senate

cc: The Honorable Paul Ray, Administrator, Office of Information and Regulatory Affairs (OIRA)