



The Forum for Sustainable and Responsible Investment

ERISA – Proxy Voting Rulemaking Toolkit

SEPTEMBER 2020 - REVISED

Bryan McGannon

DIRECTOR OF POLICY AND PROGRAMS | BMCGANNON@USSIF.ORG

NOT FOR SHARING OUTSIDE US SIF MEMBER ORGANIZATIONS

Contents

[Overview](#)

[Key components of the proposed rule](#)

[Talking points](#)

[Sample letter](#)

[Selected research reports to consider referencing in your letter](#)

Recommended Action

- Submit a comment letter to the US Department of Labor by **October 5th**
- Contact your member of Congress

Overview

On August 31st, the Department of Labor [announced](#) a new proposed rule on proxy voting by fiduciaries of ERISA-governed retirement plans, “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” (proposal [text](#)).

A rule is significantly different than a guidance bulletin issued by the Department. Rules give the Department a broader set of enforcement tools. In addition, reversing a rule requires a new notice and comment process, unlike a bulletin, which can be rescinded by Department action alone.

The proposed rule intends to reduce proxy voting, especially on environmental and social issues. It sets up a dynamic where ERISA funds will be encouraged not to vote most proxies or to defer to corporate management recommendations when they do vote, out of fear of becoming subject to regulatory investigations and DOL “harassment.”

While purporting to clarify duties pertaining to proxy voting, the proposal 1) establishes onerous obligations on fiduciaries to demonstrate a proxy vote’s “expected economic benefit” to the plan for any vote that departs from management’s recommendations, and 2) includes an explicit ban on proxy voting where economic benefit cannot be demonstrated or when the economic benefit is too small to impact plan performance (“sufficiently small” in DOL’s words.)

From 2008 through 2016, US SIF successfully advocated for and supported DOL guidance ([IB-2016-01](#)) that stated that voting proxies and shareholder engagement were consistent with fiduciary duty, assuming that the practices had a reasonable expectation of positive impact on the plan after taking into account expenses. The new Proposal would override the 2016 guidance.

As with the Department’s ESG proposal announced on June 23rd, the proxy voting proposal relies on scant evidence and a fundamental misunderstanding of how financial professionals consider ESG criteria in their investments and proxy voting practices. DOL states the rule is needed because of “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...”

Additionally, DOL asserts, without substantiation, that “[the 2016 guidance] has caused plans to expend assets unnecessarily and without economic benefit to plan beneficiaries.”

Key Components of the Proposed Rule

The proposed rule sets out the following conditions when considering whether or not to cast a proxy vote.

- A plan fiduciary must consider the likely impact that voting has on the investment performance of the plan based on such factors as the relative size of the plan’s holdings and the costs involved.
- The fiduciary may not subordinate the financial interests of the participants and beneficiaries to any “non-pecuniary objective,” or “sacrifice investment return or take on additional investment risk to promote goals unrelated to those financial interests of the plan’s participants and beneficiaries or the purposes of the plan.”
- The fiduciary must “investigate material facts” that form the basis of a proxy vote, and may not simply follow proxy advisory recommendations “without appropriate supervision and a determination that the service provider’s proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries.”
- The fiduciary must maintain records regarding proxy voting activities and exercise prudence and diligence in monitoring individuals who are selected to advise or assist in proxy voting.

The Proposal includes three examples of “permitted practices” policies that a fiduciary may use to determine a voting policy:

- Vote in accordance with management’s recommendation on proposals that the fiduciary has determined are unlikely to have a significant impact on the value of the plan’s investment;
- Focus on particular types of proposals that the fiduciary has prudently determined are likely to have a significant impact on the value of the plan’s investment; and
- Refrain from voting on proposals or types of proposals where the plan investment is small.

Talking Points

- **It is wrong for the DOL to tell a fiduciary they should not exercise their right to vote.** Owning shares comes with three primary rights: the right to sell the share, the right to a dividend and the right to vote a proxy. Disenfranchising fiduciaries from their right to vote a proxy is fundamentally inappropriate.

Proxy voting is one of the most visible and verifiable ways in which investors can practice responsible ownership. A key element is to allow shareholders to raise issues before a crisis that erodes shareholder value arises.

- **The DOL presents no data that shows plan fiduciaries are using excessive plan resources to research and vote proxies.** The Proposal relies on the Business Roundtable's comment letter to the SEC's Rule 14a-8 rulemaking and the Washington Legal Foundation. Neither of these can be considered independent sources of research or data.
- **The Proposal will lead to an extreme concentration of voting power among a few very large firms whose proxy votes are large enough to "make an economic impact on the plan's investment."** The onerous requirements to justify proxy votes and the threat of a regulatory investigation into voting practices will likely dissuade many plans from voting. This will leave the fiduciaries of the largest plans with outsized influence. Such concentration is not good for healthy markets.

In addition, when proxy proposals pass by as little as one percent, smaller shareholders' votes matter.

- **The Proposal misses the materiality of longer-term systemic risks, like climate change, to investor returns limiting voting rights to issues that can be demonstrated to produce short-term value generation.** The proposal is dismissive of environmental and social issues on the proxy ballot stating, "It is likely that many of these proposals have little bearing on share value or other relation to plan interests."
- **The absence of a cost-benefit analysis should disqualify the proposed rule.** The DOL provides no data to quantify the purported benefits: "The societal resources freed for other uses due to voting fewer proxies (minus potential upfront transition costs) would represent benefits of the rule."
- **The Proposal's obligation on fiduciaries to document the calculations behind each vote is onerous and unworkable.** The Proposal will require fiduciaries to calculate the economic impact of every vote on the proxy ballot, including directors, independent auditors, say on pay and shareholder proposals. This is costly and imprudent use of plan assets – the exact thing DOL should be protecting against.
- **The Proposal states that blanket voting policies are not cost-justified unless they favor management.** DOL states that the 2016 guidance allowed blanket voting policies leading some plans to vote on too many proposals and thus expended assets unnecessarily. However, the Proposal's "permitted practices" allow for three scenarios

where fiduciaries can set blanket voting policies and avoid the arduous economic analysis if they agree to vote in favor of management. This directly contradicts the Proposal's core premise that fiduciaries must not vote on matters not economically relevant to the plan.

Moreover, the Proposal presumes that management is always right and that investors are insignificant. If this were the case, we would not have any bankruptcies or losses of value.

- **The Proposal ignores the value of collective voting among like-minded shareholders.** Proxy voting not only allows shareholders to communicate their views with management; it also allows them to communicate with fellow shareholders. DOL denies the opportunities for smaller voters to join like-minded shareholders to earn a significant vote level to get management's attention.
- **DOL's concerns of excessive costs due to increased number of environmental and social shareholder proposals are unfounded.** The DOL posits that "voting costs sometimes exceeding attendant benefits has been amplified by the recent increase in the number of environmental and social shareholder proposals introduced." In reality, on average, only 13 percent of Russell 3000 companies received a shareholder proposal in any one year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a proposal once every 7.7 years.

The Rulemaking Process

1. The proposed rule has a 30-day comment period. The comment period ends on October 5. Many organizations, including US SIF, have written the Department of Labor (DOL), requesting that they extend the comment period to 90 days. We do not expect they will extend it.
2. Anyone can submit a comment. Submitted comments are **public** and posted on the DOL website under the rulemaking comment file.
3. On October 5, when the 30-day comment period ends, the DOL is obligated to review and consider each submission.
4. The DOL considers the comments and writes the final rule. There is no deadline for completing this step.
5. When it has completed writing the rule, the DOL will publish the final rule. This specific rule states that it becomes effective 30 days after the final rule is published.
6. Legal challenges can occur once the rule becomes final, which may delay the implementation of the rule.

How to Submit Your Comment

Comments may be submitted online at www.regulations.gov. You may find the proposed rule [here](#) and the summary [here](#):

- Open the comment page [here](#).
- You may upload your comment file or paste the text in the text box.
- Follow the prompts to complete the submission.
- Comments submitted to the record may be viewed [here](#). DOL may not post comments until the comment period closes.
- The sample letter below includes information about where to direct the letter.

Contact Your Member of Congress

Share your concerns about the Proposal with your members of Congress.

- Find your representatives: [House](#) | [Senate](#)
- Email your DOL letter with a short note explaining your opposition and that the Member of Congress should contact the DOL.
- You may also call the US Capitol Switchboard at (202) 224-3121; they'll direct you to your Senator's or Representative's office. Remember to be courteous, and if you don't get through, try looking up the phone number for your nearest district office instead.
- When you are connected, identify yourself as a constituent and, if appropriate, where you work. Tell them you are concerned with the Department of Labor's "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" rulemaking. Succinctly explain why you oppose the rulemaking. Then ask for the member of Congress to contact DOL to express concern or opposition to the proposed rule.

SAMPLE LETTER

[firm letterhead]

Submitted via regulations.gov

DATE

Office of Regulations and Interpretations
US Department of Labor
Room N-5655
200 Constitution Avenue NW
Washington, DC 20210

RE: Proposed rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

To whom it may concern:

I write to provide comments in response to the Department of Labor's proposed rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (RIN 1210-AB91) (the "Proposal"). The Proposal does not describe a problem that needs to be "fixed" and thus should be withdrawn.

[insert paragraph about your firm. Consider including what your firm does, your AUM (if you have AUM), what type of clients you serve, etc.]

The Proposal's obligation on fiduciaries to document the calculations behind each vote is onerous and unworkable. The Proposal will require fiduciaries to calculate the economic impact of every vote on the proxy ballot, including directors, independent auditors, say on pay and shareholder Proposals. This is costly and imprudent use of plan assets – the exact thing DOL should be protecting against.

As with the Department's ESG Proposal announced June 23rd, the proxy voting Proposal relies on scant evidence and a fundamental misunderstanding of the importance fiduciaries and other investors place on voting proxies in order to communicate their preferences to company management. Without it, the investor voice is greatly diminished.

DOL states the rule is needed because of "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..." Yet, no data is provided to support this. In reality, on average, only 13 percent of Russell 3000 companies received a shareholder Proposal in any one year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a Proposal once every 7.7 years. ¹

¹ CII Letter to Senators Michael Crapo and Sherrod Brown (Dec. 4, 2018), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%205%202018%20Letter%20to%20Senate%20Banking.pdf

Further, the focus on environmental and social proposals being a particular problem does not align with the direction of the financial markets where the practice of sustainable investment, including engaging in the shareholder process, is increasing rapidly.

[Raise the concerns you have with rule here. You may refer to the talking points above.

Where possible, include supporting data or reports.]

I respectfully request that the Proposal be withdrawn.

Thank you for your consideration of these comments.

Sincerely,

Selected Research Reports to Consider Referencing in Comment Letters

[Blog: I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired](#), Professor Ann Lipton, Tulane Law School. (September 2020)

“Upshot: 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. DOL is trying to turn back the clock to the corporate governance ecosystem that existed in oh, the 1980s or so.”

[Managing Climate Risk in the U.S. Financial System](#), Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (September 2020).

“The central message of this report is that U.S. financial regulators must recognize that climate change poses serious emerging risks to the U.S. financial system, and they should move urgently and decisively to measure, understand, and address these risks. Achieving this goal calls for strengthening regulators’ capabilities, expertise, and data and tools to better monitor, analyze, and quantify climate risks. It calls for working closely with the private sector to ensure that financial institutions and market participants do the same.”

[Competing for Votes](#), Nili, Yaron and Kastiel, Kobi, (August 26, 2020). 10 Harvard Business Law Review 287 (2020), Univ. of Wisconsin Legal Studies Research Paper No. 1605.

“Shareholder voting matters. It can directly shape a corporation’s governance, operational and social policies. But voting by shareholders serves another important function—it produces a marketplace for votes where management and dissidents compete for the votes of the shareholder base. The competition over shareholder votes generates ex-ante incentives for management to perform better, to disclose information to shareholders in advance, and to engage with large institutional investors.”

[The ESG premium: New perspectives on value and performance](#), McKinsey & Company (February 2020)

In a new survey, executives and investment professionals largely agree that environmental, social, and governance programs create short- and long-term value—though perceptions of how have changed over the past decade.

[FACT SHEET: Shareholder Proposal Trends](#), Sustainable Investments Institute (Si2), (January 2020).

A concise report on filing trends, 2010-19, and support levels for social and environmental shareholder Proposals, their outcomes, with a closer look at how rising support breaks down.

[ESG Investing: Can You Have Your Cake and Eat It Too?](#), Gautam Dhingra, PhD, CFA, and Christopher J. Olson, CFA (September 2019)

“So do companies with high ESG ratings outperform their lower-ranked counterparts? For insight on this, we created a High ESG Portfolio composed of S&P 500 companies that score above the median and a Low ESG Portfolio made up of firms that rate below it. We found that the High ESG Portfolio outperformed the Low ESG Portfolio by 16 basis points (bps) per year...Additional testing of the Quality factor suggests an association of high ESG scores with higher quality. Anecdotally, the High ESG Portfolio adds value more often during stock market declines. The correlation between stock market returns and the value added by the High ESG Portfolio over the Low ESG Portfolio is -0.27 . This is statistically significant, with a t-statistic of

3.16. The phenomenon was most pronounced during the global financial crisis (GFC) in 2008 and the sharp recovery of 2009.”

[ESG And Financial Performance: Aggregated Evidence From More Than 2000 Empirical Studies](#), Gunnar Friede, Timo Busch, Alexander Bassen, *Journal of Sustainable Finance & Investment* (Volume 5, 2015 – Issue 4)

“The study combines the findings of about 2200 individual studies. Hence, this study is by far the most exhaustive overview of academic research on this topic and allows for generalizable statements. The results show that the business case for ESG investing is empirically very well-founded. Roughly 90 percent of studies find a nonnegative ESG–CFP relation. More importantly, the large majority of studies report positive findings.”

Selected Research Reports to Consider Referencing in Comment Letters

[Blog: I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired](#), Professor Ann Lipton, Tulane Law School. (September 2020)

“Upshot: 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. DOL is trying to turn back the clock to the corporate governance ecosystem that existed in oh, the 1980s or so.”

[Managing Climate Risk in the U.S. Financial System](#), Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (September 2020).

“The central message of this report is that U.S. financial regulators must recognize that climate change poses serious emerging risks to the U.S. financial system, and they should move urgently and decisively to measure, understand, and address these risks. Achieving this goal calls for strengthening regulators’ capabilities, expertise, and data and tools to better monitor, analyze, and quantify climate risks. It calls for working closely with the private sector to ensure that financial institutions and market participants do the same.”

[Competing for Votes](#), Nili, Yaron and Kastiel, Kobi, (August 26, 2020). 10 Harvard Business Law Review 287 (2020), Univ. of Wisconsin Legal Studies Research Paper No. 1605.

“Shareholder voting matters. It can directly shape a corporation’s governance, operational and social policies. But voting by shareholders serves another important function—it produces a marketplace for votes where management and dissidents compete for the votes of the shareholder base. The competition over shareholder votes generates ex-ante incentives for management to perform better, to disclose information to shareholders in advance, and to engage with large institutional investors.”

[The ESG premium: New perspectives on value and performance](#), McKinsey & Company (February 2020)

In a new survey, executives and investment professionals largely agree that environmental, social, and governance programs create short- and long-term value—though perceptions of how have changed over the past decade.

[FACT SHEET: Shareholder Proposal Trends](#), Sustainable Investments Institute (Si2), (January 2020).

A concise report on filing trends, 2010-19, and support levels for social and environmental shareholder Proposals, their outcomes, with a closer look at how rising support breaks down.

[ESG Investing: Can You Have Your Cake and Eat It Too?](#), Gautam Dhingra, PhD, CFA, and Christopher J. Olson, CFA (September 2019)

“So do companies with high ESG ratings outperform their lower-ranked counterparts? For insight on this, we created a High ESG Portfolio composed of S&P 500 companies that score above the median and a Low ESG Portfolio made up of firms that rate below it. We found that the High ESG Portfolio outperformed the Low ESG Portfolio by 16 basis points (bps) per year...Additional testing of the Quality factor suggests an association of high ESG scores with higher quality. Anecdotally, the High ESG Portfolio adds value more often during stock market declines. The correlation between stock market returns and the value added by the High ESG Portfolio over the Low ESG Portfolio is -0.27 . This is statistically significant, with a t-statistic of 3.16. The phenomenon was most pronounced during the global financial crisis (GFC) in 2008 and the sharp recovery of 2009.”

[ESG And Financial Performance: Aggregated Evidence From More Than 2000 Empirical Studies](#), Gunnar Friede, Timo Busch, Alexander Bassen, *Journal of Sustainable Finance & Investment* (Volume 5, 2015 – Issue 4)

“The study combines the findings of about 2200 individual studies. Hence, this study is by far the most exhaustive overview of academic research on this topic and allows for generalizable statements. The results show that the business case for ESG investing is empirically very well-founded. Roughly 90 percent of studies find a nonnegative ESG–CFP relation. More importantly, the large majority of studies report positive findings.”