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Via Electronic Submission (www.regulations.gov)

October 5, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

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

Dear Acting Assistant Secretary Wilson:

On behalf of the United Food and Commercial Workers International Union ("UFCW"), I am writing to provide comments on the U.S. Department of Labor's notice of proposed rulemaking entitled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (the "Proposed Rule"). [1] UFCW is a labor organization that represents 1.3 million working people in a range of industries, with the majority working in retail food, meat packing and poultry, food processing and manufacturing, and retail stores. We are north America's neighborhood union and UFCW is about workers helping workers improve working and living standards through better wages, benefits, and working conditions. The majority of our members and retirees participate in private-sector pension and employee benefit plans that will be negatively affected by the Proposed Rule if it is adopted.

As discussed in more detail below, the UFCW believes the Proposed Rule demonstrates an unwarranted intrusion against fiduciaries' exercise of shareholder rights and would impose such burdensome obligations on fiduciaries that ERISA plans would be effectively disenfranchised from utilizing proxy voting to enhance long term value of plan assets. Because of the negative impact on plan participants and beneficiaries, UFCW opposes the Proposed Rule and respectfully urges DOL to withdraw it and allow the current sub-regulatory guidance (Interpretive Bulletin 2016-01) to remain in place. At a minimum, the Department should correct the deficiencies

[1] 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.

Anthony M. Perrone, *International President*
Shaun Barclay, *International Secretary-Treasurer*

United Food & Commercial Workers International Union, AFL-CIO, CLC
1775 K Street, NW • Washington DC 20006-1598
Office (202) 223-3111 • Fax (202) 466-1562 • www.ufcw.org

described herein and re-propose the rule with sufficient time for comment and a public hearing followed by a post-hearing comment period.

I. The Department's Stated Rationale for Adopting the Proposed Rule Lacks Merit

Proxy voting is the practice of voting shares of corporate stock by authorizing a representative to vote on the shareholder's behalf. Proxy voting is therefore a cost-efficient means for shareholders to vote on corporate actions without having to actually attend shareholder meetings. Proxy voting by shareholders is an integral part of state corporate law,[2] and includes voting on a variety of corporate actions as required by federal law, state law, stock exchange listing standards, and company charters and bylaws. These include votes on boards of directors, executive compensation, auditor ratification, and shareholder resolutions. The solicitation of proxy votes has been subject to federal regulation by the U.S. Securities and Exchange Commission (the "SEC") since passage of the Securities Exchange Act of 1934, and since the Reagan Administration, the Department has taken the view that under the Employee Retirement Income Security Act of 1974 ("ERISA"), the fiduciary duties of loyalty and prudence apply to proxy voting by pension and employee benefit plans ("ERISA plans").

A. Evidence demonstrates the value of proxy voting.

UFCW views the voting of proxies as an economically important mechanism for shareholders to monitor and hold corporate managements accountable and to create and enhance long-term value of plan assets. 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.[3] 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 large segments of the marketplace.[4]

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[2] See e.g., Delaware General Corporation Law § 212.

[3] *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/

[4] *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 few 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%20

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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 voting is "mixed."[5] 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;[6]

- Shareholder adoption of governance-related shareholder proposals was found to trigger positive short-term returns as well as long-term performance improvements;[7]

- Adoption of majority voting was associated with positive abnormal returns and an increase in boards implementing majority-supported resolutions;[8]

- "Say on pay" was shown to lead to increases in companies' market value and improvements in long-term profitability;[9] and

- Competition over shareholder votes generates ex ante incentives for management to perform better.[10]

Senate%20Banking.pdf (describing the many improvements in U.S. corporate governance practices that has resulted from shareholder voting on their proxies).

[5] 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.").

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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).

There is absolutely no support for a new rule that effectively discourages proxy voting by plan fiduciaries. Rather, than recognize the numerous studies supporting the long-term shareholder value from proxy voting, the DOL Proposed Rule is a search for a problem in which to craft an outcome-based solution – vote with management or don't vote at all. Instead, fiduciaries should be afforded the flexibility to make their own prudent determinations about the efficacy of proxy voting overall and in particular circumstances, recognizing that the associated costs for plan fiduciaries to vote proxies is minimal.

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 . . ."[11] and that "some fiduciaries and proxy advisory firms – in part relying on . . . [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 . . . ."[12]

In our experience, plan fiduciaries understand that voting proxies is a fiduciary obligation that must be carried out taking into consideration the costs and benefits to the plan. DOL offers no data, oversight experience, or other evidence that fiduciaries are voting proxies inappropriately or expending resources that do not support the voting of proxies. Presumably, in the more than three decades since the Avon Letter, DOL would have come across some 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.[13]

The Department's view that ERISA plans are incurring increased proxy voting costs due to "the recent increase in the number of environmental and social shareholder proposals" is factually incorrect. To the contrary, the total number of shareholder resolutions going to a vote has fallen dramatically in recent years.[14] Moreover, the Department itself acknowledges that

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[11] 85 Fed Reg. at 55,220.

[12] *Id.* at 55,222.

[13] *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."). *See also* 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/cfslb20.htm (***Question 2***.)

[14] U.S. Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Proposed Rule Release No. 34-87458, November 5, 2019, ("The average number of proposals submitted to S&P 500 companies has decreased from 1.85 in 2004 to 1.24 in 2018, representing a 33
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shareholder resolutions makeup only 2 percent of all proxy votes. In addition, the SEC has also recently adopted new rules that it estimates will further reduce the total number of shareholder resolutions by 35 percent.[15] Finally, the Department ignores the fact that shareholder resolutions are value-enhancing.[16] According to a majority of peer-reviewed academic studies, there is a positive relationship between shareholder resolutions and investment returns.[17]

We note that the Department does not cite a single enforcement action where the Department has alleged that an ERISA plan fiduciary imprudently or disloyally voted proxies.

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."[18] These three assertions in no way support the Proposed Rule.

First, the fact that more plan assets are managed by institutional investors is an argument against the need for the Proposed Rule. The vast majority of those institutional investors are, themselves, ERISA fiduciaries and have adopted proxy voting policies that are voted uniformly on behalf of all of their client employee benefit plans. 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).[19] This consolidation of plan assets within pooled vehicles does not "dilute" the effect of a single holding,[20] 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

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percent decrease during our sample period, and the average number of proposals submitted to Russell 3000 companies has decreased from 0.38 in 2004 to 0.28 in 2018, representing a 26 percent decrease during our sample period."), *available at* https://www.sec.gov/rules/proposed/2019/34-87458.pdf.

[15] U.S. Securities and Exchange Commission, Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8, Final Rule Release No. 34-89964, September 23, 2020, (PRA Table 1), *available at* https://www.sec.gov/rules/final/2020/34-89964.pdf.

[16] *See* Letter from the AFL-CIO to the U.S. Securities and Exchange Commission regarding shareholder proposals, February 3, 2020, available at https://www.sec.gov/comments/s7-23-19/s72319-6744323-207881.pdf.

[17] Matthew Denes, et. al., "Thirty Years of Shareholder Activism: A Survey of Empirical Research," Journal of Corporate Finance, Vol. 44, June 2017, pp. 405-424 (Figure 1 presents unweighted average findings from 35 studies that shareholder resolutions are associated with a 0.06 percent increase in share price valuation).

[18] 85 Fed. Reg. at 55,221.

[19] *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

[20] 85 Fed. Reg. at 55,225.

plans in a cost effective manner. The Trustees responsibility is then limited to monitoring the managers' policies as well as adherence to the proxy voting policies for consistency.

Second, it is irrelevant for purposes of the Proposed Rule whether ERISA plans are more "diversified" than they were 30 years ago.[21] DOL contends that there has been an increase in alternative investments since 1990,[22] 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 DOL[23] 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 prudent decision that such policies are necessary and appropriate to protect their investments. DOL has provided no evidence to the contrary.

The Department's concern about the use of proxy advisory firms is also unwarranted. The Department's own analysis of Form 5500 filings identified only 64 ERISA plans that had made any direct payments to a proxy service provider, and the average fees paid totaled just 0.2 basis points (0.002%) of plan assets. ERISA plan service providers that use proxy advisory firms are likely to incur similarly immaterial costs compared with the overall administration expenses of ERISA plans. Even if one accepts the faulty arguments that new regulations are needed for proxy advisory firms,[24] the SEC adopted a rule to address these purported concerns on July 22, 2020.[25] We note that the SEC's newly adopted proxy advisor rules will apply to all proxy advisory firms, and therefore there are no proxy advisory firms that will fall outside of the SEC's jurisdiction.

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

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[21] Id.

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

[23] *Id.* (describing alleged changes in proxy voting behavior).

[24] *See* Letter from the AFL-CIO to the U.S. Securities and Exchange Commission regarding proxy voting advice, February 3, 2020, available at https://www.sec.gov/comments/s7-22-19/s72219-6744333-207884.pdf.

[25] U.S. Securities and Exchange Commission, Exemptions from the Proxy Rules for Proxy Voting Advice, Final Rule Release No. 34-89372, July 22, 2020, *available at* https://www.sec.gov/rules/final/2020/34-89372.pdf.

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 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 a large number of 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.[26] 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 the overall investment in a portfolio.

If adopted, the Proposed Rule will repeal the Department's longstanding sub-regulatory guidance that recognizes the importance of proxy voting as a plan asset and replace it with new and burdensome regulation of proxy voting by ERISA plans. While the Proposed Rule reaffirms that the right to vote proxies is subject to the fiduciary duty to manage plan assets, it disregards that status under ERISA by creating new barriers for proxy voting. Specifically, paragraph (3)(ii) of the Proposed Rule states that "[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." Furthermore, this cost-benefit analysis for each proxy vote that is cast by an ERISA plan will be subject to an onerous recordkeeping requirement by paragraph (2)(ii)(E).

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).[27] Some fiduciaries already have such policies, and if prudently adopted and administered, they can help reduce proxy voting costs.

[26] *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.").

[27] *See, e.g.,* 85 Fed. Reg. at 55,225.

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, UFCW 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."[28] 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.[29] In no other scenario does DOL permit a fiduciary to simply assume that another fiduciary is acting prudently. Importantly, the fiduciary standard applicable under state law to shareholders is different than the heightened standard of care imposed under ERISA and this new rule is contrary to the longstanding DOL 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. In fact, this proposed practice openly invites ERISA plan fiduciaries to violate their ERISA section 404(a)(1)(A) fiduciary duty of loyalty to their plan participants and beneficiaries. Therefore, UFCW urges DOL not to include this permitted practice in any final rule.

The second "permitted practice" contained in paragraph (e)(3)(iii)(B) would authorize ERISA plans to vote only on a pre-approved laundry list of proposals that the Department has deemed to be "substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment." In any case, this "permitted practice" fails to consider that a myriad of other proxy votes are of equal importance to the value of ERISA plan investments. Moreover, the Department fails to provide any economic analysis as to why these particular proxy votes are more material to shareholders than other issues.

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

[29] *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.").

The third and final "permitted practice" described by paragraph (e)(3)(iii)(C) encourages ERISA plan fiduciaries to refrain from proxy voting altogether if the plan holds a sufficiently small percentage of a company's stock. This "permitted practice" to refrain from proxy voting is a violation of the "prudent expert" rule that is required by ERISA section 404(a)(1)(B). The prudent expert rule requires that ERISA plan fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters." The overwhelming majority of prudent experts – i.e., the expert professionals who make up the investment management community – have determined that proxy voting is in their clients' interests. To ignore this reality would invite ERISA plans to buck the standard of care that has been widely adopted by investment managers for their clients. In that regard, as plan fiduciaries, investment managers are able to vote the interests of common clients in a cost-effective uniform way which redounds to the benefit of those plans with relatively small holdings in a particular security.

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

UFCW 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 states that a "responsible plan fiduciary shall require such investment manager . . . to document the rationale for proxy voting decisions or recommendations sufficient 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."[30] 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 . . . ."[31] 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 where the "named fiduciary" has a duty to monitor the acts of the delegated fiduciary.[32] In that regard, 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."[33] The oversight of proxy voting should not be the subject of any different standard.

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[30] 85 Fed. Reg. at 55,242 (Proposed Rule § 2550.404a-1(e)(2)(iii)).

[31] *Id.* at 55,224.

[32] *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).

[33] 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).

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 . . ."[34] 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.[35]

In our experience, fiduciaries periodically review their proxy voting policies based on a reasonable determination of how often such a review is necessary and appropriate, taking into consideration several factors. UFCW supports DOL making it clear to fiduciaries that they should conduct periodic reviews but a strict rule that would mandate fiduciaries review their proxy voting policies every two years is not necessary. In fact, the DOL should not adopt a rule that a two-year review cycle is always appropriate, thereby discouraging fiduciaries from more frequent reviews that may be appropriate given the size of the investment and reporting that is produced by underlying managers on a regular basis. 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.

VI. The Department's Notice of Proposed Rulemaking Is Procedurally Deficient

We request that the Department extend this rulemaking comment period from 30 days to 120 days and hold a public hearing on the Proposed Rule. Executive Orders 12866 and 13563 state that federal agencies should generally provide a comment period of at least 60 days.[36] Paragraph (g) of the Proposed Rule proposes an effective date of just 30 days after publication of the final rule. We also note that the Proposed Rule has been classified as "economically significant" and a "major rule" by the Office of Information and Regulatory Affairs of the Office Management and Budget. Given the significant economic impact of the Proposed Rule, a 30-day effective date will be highly disruptive to both ERISA plans and their service providers right as they enter into the 2021 proxy season. Moreover, a brief comment period combined with a short effective date effectively deprives the public of reasonable notice and a meaningful opportunity to comment on the Proposed Rule.

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[34] 85 Fed. Reg. at 55,226.

[35] *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").

[36] Executive Order 12866, 58 FR 51735, October 4, 1993, and Executive Order 13563, 76 FR 3821, January 21, 2011.

We question the Department's timing of the Proposed Rule's effective date to coincide with the Department's proposed rulemaking on "Financial Factors in Selecting Plan Investments." Both of these proposals will amend regulation 2550.404a-1 on investment duties and should have been proposed as a single rulemaking. Proposing these two rulemakings separately ignores the potential for unintended interactions between these two related rulemakings. For example, how should ERISA plan fiduciaries consider the proxy voting practices of mutual funds? Because ERISA Section 401(b)(1) excludes assets held by registered investment companies, the Proposed Rule will not apply to the proxy voting of corporate shares held by mutual funds. But does a mutual fund's proxy voting of corporate shares on shareholder proposals related to environmental, social and governance issues make it imprudent under the Department's proposed rulemaking on Financial Factors in Selecting Plan Investments? Could such a mutual fund be included as the qualified default investment alternative for a participant directed plan?

VII. The Proposed Rule's "Permitted Practices" Intrude Into State Corporate Law

The Department's notice of proposed rulemaking does not adequately consider the federalism implications of the Proposed Rule. States' general corporation laws provide for proxy voting by shareholders to address the principal-agent problem that arises from the separation of ownership and control.[37] Proxy voting by shareholders on director elections and other corporate actions is an inherent part of the checks and balances that effectuates good corporate governance.[38] Contrary to this state corporate law assumption that shareholders will vote in their self-interest, the Proposed Rule's "permitted practices" encourage ERISA plan fiduciaries to always vote with corporate management or to refrain from proxy voting. Pursuant to Executive Order 13132, the Department should first consult with state officials regarding these federalism implications for proxy voting by shareholders before adopting the Proposed Rule.

Conclusion

For these reasons, UFCW respectfully requests that the Department withdraw the Proposed Rule in its entirety and allow its existing sub-regulatory guidance to remain in place. As discussed above, at a minimum the Department should revise the Proposed Rule to remove the unlawful "permitted practices" for proxy voting and the burdensome cost-benefit analysis and documentation requirements. The Department should invite additional comments on its revisions to the Proposed Rule if the Department decides to move forward with a rulemaking.

The UFCW also requests that the Department schedule a public hearing on the Proposed Rule, to be conducted virtually in accordance with COVID-19 public health guidelines. As is customary for Department rulemakings, the hearing should be accompanied by the opportunity for

[37] See e.g., Delaware General Corporation Law § 212.

[38] Robert Monks and Nell Minow, Corporate Governance (5th Edition), John Wiley & Sons, August 2011.

the submission of post-hearing comments by participants and observers. Accordingly, the comment period on the Proposed Rule should be held open after the public hearing.

Sincerely,

s/ Peter Ford

Peter Ford
General Counsel