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October 5, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N–5655
Attention: Proxy Voting and Shareholder Rights NPRM
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

RE: RIN 1210–AB91—Fiduciary Duties Regarding Proxy Voting and Shareholder Rights Proposed Regulation

Dear Sir or Madam:

The Investment Company Institute[1] appreciates the opportunity to comment on the proposed regulation related to proxy voting and the exercise of certain shareholder rights ("Proposed Rule")[2] by fiduciaries for plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA) published by the Department of Labor (the "Department").

Proxy voting is important to mutual funds and other investment companies (including ETFs and closed-end funds) registered under the Investment Company Act of 1940 ("SEC-registered funds" or generally "funds") in their dual roles as institutional investors and issuers. As institutional investors, SEC-registered funds and their investment advisers have specific proxy voting responsibilities with respect to their portfolio securities. As issuers, funds prepare proxy solicitation materials in connection

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$26.9 trillion in the United States, serving more than 100 million US shareholders, and US$7.8 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

[2] 85 Fed. Reg. 55219 (September 4, 2020).

with meetings of their shareholders and experience the many challenges that accompany that process. In addition, more than half of 401(k) plan assets are invested in mutual funds.[3] Accordingly, the mutual fund industry has a strong interest in a well-functioning, cost-efficient proxy system.

Given this strong interest, we applaud the Department's decision to exclude from the Proposed Rule's coverage a retirement plan's exercise of shareholder rights with respect to their holdings of SEC-registered funds, including mutual funds.[4] This decision appears to be in recognition of the SEC's specific regulatory framework applicable to such funds under the Investment Company Act of 1940 and to investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act").[5] These two statutes and the rules and guidance adopted thereunder have meaningfully shaped how mutual funds and their investment advisers vote proxies.

The Department acknowledges, however, that exercising shareholder rights with respect to securities for which the plan fiduciary is responsible is subject to ERISA and as such there is a question as to whether the standards in the Proposed Rule would influence plan fiduciaries with respect to their exercise of shareholder rights associated with funds registered with the SEC, such as mutual funds. The Department invites comments on the effects of the Proposed Rule on the exercise of shareholder rights for SEC-registered funds and selection of such funds as plan investments, as well as comments on the costs and benefits associated with any such influence, for example, the ability to achieve a quorum at shareholder meetings of such funds.[6]

More generally,[7] with respect to plans' exercise of shareholder rights appurtenant to their stock holdings of individual companies, the Proposed Rule would *prohibit* a plan fiduciary from voting any proxy unless the fiduciary "prudently determines that the matter being voted upon would have an economic impact on the plan."[8] And, the Proposed Rule would *require* a plan fiduciary to vote on any matter that

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[3] At mid-year 2020, Americans had $6.3 trillion in 401(k) plans, with $3.8 trillion invested in mutual funds. See "The US Retirement Market, Second Quarter 2020" (September 2020), available at https://www.ici.org/research/stats/retirement.

[4] By its terms, the Proposed Rule would not govern plans' exercise of shareholder rights with respect to their holdings of mutual funds and shares of other funds registered with the SEC for which the plan fiduciary is responsible. The preamble to the Proposed Rule provides: "This proposal generally would govern plans' exercise of shareholder rights appurtenant to their stock holdings of individual companies, but not to their holdings of other securities." 85 Fed. Reg. 55234.

[5] The Department notes that it "is monitoring SEC rules and guidance to avoid creating duplicate or overlapping requirements with respect to proxy voting." 85 Fed. Reg. 55239.

[6] Id. at 55234.

[7] While, by its terms, the Proposed Rule applies only to plans' exercise of shareholder rights appurtenant to stock holdings of individual companies, but not other securities (such as mutual funds), it would broadly affect ERISA-covered plans, entities holding stock as plan assets (*e.g.*, collective investment trusts, master trusts, and pooled separate accounts), investment managers, investment advisors, proxy advisory services, proxy research services, proxy voting services, banks, and insurance companies.

[8] Proposed Rule section 404a-1(e)(3)(ii).

it prudently determines would have an economic impact on the plan.[9] As such, the Proposed Rule explicitly rejects the more principles-based considerations previously articulated by the Department in Interpretative Bulletin 2016-01 ("IB 2016-01") for a set of prescriptive conditions.[10] In that regard, the Proposed Rule is thematically consistent with the Department's recent proposed rule on environmental, social, and governance (ESG) investing, which we previously urged be withdrawn.[11] If published in its current form, the Proposed Rule would, as a practical matter, significantly and adversely change the fiduciary analysis and recordkeeping requirements and attendant costs associated with those responsibilities for plan fiduciaries voting proxies held by virtue of the plans' investments without providing any commensurate benefit to plans.

Our comments below respond to the Department's questions regarding the effects of the Proposed Rule on the exercise of shareholder rights for SEC-registered funds, and highlight many serious concerns with the Proposed Rule that collectively will result in its failure to meet the Department's stated goal of ensuring that plans' proxy voting costs incurred do not exceed the resulting benefits to such plans. Our key comments are summarized as follows:

The Department is correct to exclude from the Proposed Rule's coverage a retirement plan's exercise of shareholder rights with respect to its holdings of SEC-registered funds. Nevertheless, the Department must make clear its position that it is not its intent that plan fiduciaries apply the standards of the Proposed Rule in reviewing, analyzing or making a judgment on the proxy voting practices of such funds in which the plan invests. The Department must also recognize the adverse impact that the Proposed Rule could have on the ability of funds to achieve a necessary quorum in connection with their shareholder meetings.

- As discussed in detail below, the proxy voting responsibilities and activities of mutual funds are heavily regulated, efficient and informed. The average mutual fund votes on over a thousand separate proxy proposals each year. Due to the large number of portfolio securities that funds may hold in the United States and abroad, efficient and informed proxy voting is a large undertaking and requires substantial resources. Unlike retirement plans, SEC-registered funds have the scale, internal expertise and experience to analyze and vote proxies in a cost-efficient manner. Individual plans, in contrast, are not similarly situated and moreover would not be able to influence the fund's voting, which must be made in a manner consistent with the best interest of the fund as a whole—and not the interests of any particular shareholder in the fund. Moreover, retirement plans will often include multiple funds as investment options within the plan and therefore the number of proxy votes theoretically subject to review would rise exponentially to the tens of thousands if plan fiduciaries were considered to have an obligation

[9] Proposed Rule section 404a-1(e)(3)(i).

[10] The Department states that IB 2016-01 no longer reflects the agency's views. 85 Fed. Reg. 55221.

[11] See letter from Paul Stevens to Office of Regulations and Interpretations, Employee Benefits Security Administration, dated July 30, 2020, available at https://www.ici.org/pdf/20_ltr_dolesg2.pdf.

to analyze or make a judgment on the proxy voting practices of the mutual funds in which the plan invests. We appreciate then that the Department appears to recognize the possibility that the standards in the Proposed Rule could influence plan fiduciaries with respect to their exercise of shareholder rights associated with SEC-registered funds and the "selection of such funds as plan investments."[12] We are concerned that, in the absence of further clarification, plan fiduciaries will not be comfortable exercising shareholder rights with respect to their holdings of mutual fund shares in a manner that is inconsistent with the prescriptive requirements set forth in the Proposed Rule.

- We also appreciate that the Department appears to recognize the unique challenges faced by such funds in connection with their proxy campaigns and the impact the Proposed Rule would have in imposing unnecessary costs, particularly in connection with funds' ability to achieve a timely quorum at their shareholder meetings. The costs and difficulties associated with fund proxy campaigns are considerable, and the Proposed Rule—which the Department acknowledges is intended to provide disincentives for plan fiduciaries to vote proxies—will only exacerbate these challenges.

- If the Department moves forward to finalize the Proposed Rule, we strongly urge it to make clear its position that it is not its intent that plan fiduciaries apply the standards of the Proposed Rule in reviewing, analyzing or making a judgment on the proxy voting practices of the mutual funds in which the plan invests. The Department should acknowledge that such an obligation would impose untenable administrative burdens, costs and litigation risk on plans with little, if any, benefit, and therefore runs counter to the fiduciaries' obligations to carry out their duties solely for the economic benefit of plan participants and beneficiaries.

- We also urge the Department to acknowledge the detrimental impact the Proposed Rule would have on the ability of funds to achieve a necessary and timely quorum in connection with their shareholder meetings in a cost-effective manner. When considering proxy solicitations, plan fiduciaries should be able to incorporate into their fiduciary analysis the potential additional costs incurred by funds—and therefore fund shareholders such as plans— resulting from the failure to respond in a timely fashion to such solicitations.

The Department's failure to take a principles-based approach in codifying its position on proxy voting will significantly and detrimentally change the fiduciary analysis and recordkeeping requirements and attendant costs associated with those responsibilities for plan fiduciaries voting proxies held by virtue of the plans' investments.

- The Proposed Rule would fundamentally change how fiduciaries are required to analyze proxy voting decisions. The Proposed Rule takes a prescriptive approach in determining whether any

[12] 85 Fed. Reg. 55234.

particular proxy vote would be consistent with the ERISA responsibilities of plan fiduciaries—*prohibiting* the voting of any proxy unless the fiduciary "prudently determines that the matter being voted upon would have an economic impact on the plan"[13] and *requiring* the vote on any matter that it prudently determines would have an economic impact on the plan.[14] As discussed more fully below, the idea that a fiduciary would be able to determine conclusively whether each proxy vote, by itself, would have an economic impact is not realistic. It also does not address the Department's concerns about the costs of proxy voting. On the contrary, the costs associated with attempting to comply with the requirements of the Proposed Rule could far exceed the current costs associated with proxy voting.

- Contrary to the Department's claims, we are concerned that the Proposed Rule's "permitted practices" would not, as the Department intends, ease compliance burdens for plan fiduciaries. Rather, as proposed, we are concerned that compliance with the permitted practices could subject plan fiduciaries to similar burdens and potential litigation exposure as the prescriptive requirements of the Proposed Rule more generally. In this respect, use of the permitted practices would not appear to relieve the plan fiduciary from the obligation to *determine whether a matter will have an economic impact*, either concurrently or in advance of a vote, and therefore the same burdensome fiduciary analysis, documentation and general voting considerations and processes will have to be pursued by plans in making proxy voting determinations.

- Imposition of the Proposed Rule's new prescriptive requirements would not only serve to increase the costs and burdens associated with an ERISA fiduciary's consideration of proxy voting, it would impose new costly monitoring obligations and encourage the forfeiture of important shareholder rights.

For the reasons discussed above and further below, we urge the Department to withdraw the Proposed Rule.

- If the Department believes that it needs to act in this area, it should implement a principles-based rule confirming that plan fiduciaries are not required to vote all proxies presented to them, and that fiduciaries should have a written proxy voting policy that is reasonably designed to ensure that the fiduciary votes proxies in the best interest of the plan, without including any of the overly prescriptive provisions that will add cost, burden and liability to plan fiduciaries.

- If the Department does adopt any final rule, it should provide substantial time to allow plans and advisers to adjust their processes (at least 12 months).

[13] Proposed Rule section 404a-1(e)(3)(ii).

[14] Proposed Rule section 404a-1(e)(3)(i).

I. The Department Must Make Clear Its Position That It Is Not Its Intent That Plan Fiduciaries Apply the Standards of the Proposed Rule to Review, Analyze or Make a Judgment on the Proxy Voting Practices of the Mutual Funds in Which the Plan Invests. It Must Also Recognize the Adverse Impact That the Proposed Rule Could Have on Funds' Ability to Achieve a Necessary Quorum in Connection with Their Shareholder Meetings.

As noted above, proxy voting is important to mutual funds in their dual roles as institutional investors and issuers. We appreciate in this regard that the Department appears to recognize the significant requirements and complexity inherent in the proxy voting process engaged in by mutual funds in its decision to exclude from the Proposed Rule's coverage a retirement plan's exercise of shareholder rights with respect to their holdings of such funds. Still, as the Department acknowledges, exercising shareholder rights with respect to securities for which the plan fiduciary is responsible is subject to ERISA,[15] and as such there is a question as to whether the standards in the Proposed Rule would influence plan fiduciaries with respect to their exercise of shareholder rights associated with funds registered with the SEC. We are concerned that, in the absence of further clarification, plan fiduciaries will not be comfortable exercising shareholder rights with respect to their holdings of mutual fund shares in a manner that is inconsistent with the prescriptive requirements set forth in the Proposed Rule. We strongly urge the Department to build upon its decision to exclude SEC-registered funds from coverage of the Proposed Rule by clarifying that it is not its intention that plan fiduciaries use the standards in the Proposed Rule to review or oversee how mutual funds vote the proxies associated with the operating companies in which the fund invests. It is also critical that the Department recognize the impact that the Proposed Rule could have on the ability of funds to achieve a necessary quorum in connection with shareholder meetings.

A. Given the heavily regulated and efficient proxy voting practices of mutual funds and advisers, imposing any obligation on plan fiduciaries to review, analyze and make a judgment on the proxy voting practices of the mutual funds in which the plan invests would be inconsistent with the goals of the Proposed Rule.

The Investment Company Act of 1940 and the Investment Advisers Act, and the rules adopted thereunder in 2003, have meaningfully shaped how mutual funds and their investment advisers vote their portfolio company proxies.[16] SEC-registered funds (but *not* any other institutional investors) publicly report their proxy votes to the SEC, providing a full and transparent record of how they vote

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[15] 85 Fed. Reg. 55234.

[16] *Proxy Voting by Investment Advisers*, SEC Release No. IA-2106 (Jan. 31, 2003), available at www.sec.gov/rules/final/ia-2106.htm; and *Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies*, SEC Release No. IC-25922 (January 31, 2003), available at www.sec.gov/rules/final/33-8188.htm.

proxies.[17] SEC-registered funds also must describe in their registration statements the policies and procedures that they use to determine how to vote proxies for their portfolio securities.[18]

The SEC's engagement on these issues is also evidenced by the staff resources it has devoted to providing guidance and overseeing proxy voting. In 2014, the staff issued proxy-related guidance to investment advisers and proxy advisory firms.[19] And the staff has examined investment advisers' compliance with their fiduciary duty in voting proxies, as well as certain proxy advisory firms and how they make recommendations and disclose and mitigate conflicts.[20]

Mutual funds are notable in the role that their boards of directors play in proxy voting. A fund's board is responsible for voting the proxies relating to the fund's portfolio securities. The board typically delegates this day-to-day responsibility to the fund's adviser, which the adviser carries out in accordance with the fund's board-approved proxy voting policies and procedures. This delegation is subject to the board's continuing oversight of the fund adviser, and proxy voting policies and procedures are part of the compliance programs that the board reviews under Investment Company Act Rule 38a-1.

The mutual fund industry devotes substantial resources to meeting its proxy voting responsibilities. During the 2017 proxy voting season, funds cast more than 7.6 million votes for proxy proposals, and the average mutual fund voted on 1,504 separate proxy proposals.[21] These numbers represent only

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[17] Investment Company Act Rule 30b1-4 and Form N-PX.

[18] Item 17(f) of Form N-1A (registration statement for open-end funds), Item 18 of Form N-2 (registration statement for closed-end funds), and Item 23 of Form N-3 (registration statement for separate accounts organized as management investment companies). Closed-end funds also must include similar disclosures under Item 7 of their annual Form N-CSR filings.

[19] *Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms*, SEC Staff Legal Bulletin No. 20 (June 30, 2014) (the "Bulletin"), available at www.sec.gov/interps/legal/cfslb20.htm.

[20] *See, e.g.,* SEC Office of Compliance Inspections and Examinations ("OCIE"), *Examination Priorities for 2015*, available at www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf (proxy services as an examination priority); OCIE, *Compliance Alert*, July 2008, available at www.sec.gov/about/offices/ocie/complialert0708.htm (describing reviews of practices with respect to use of third party proxy voting services); and OCIE, *Highlights*, February 3, 2010, available at www.sec.gov/about/offices/ocie/ocie_highlights.shtml (during routine inspections, staff has focused on proxy voting policies, including to ensure disclosures were consistent with votes cast).

[21] *Funds and Proxy Voting: Funds Vote Thoughtfully and Independently*, ICI Viewpoints (Nov. 7, 2018), available at www.ici.org/viewpoints/view_18_proxy_voting_results. This 7.6 million figure is the total number of proxy votes cast by funds during proxy season 2017. If, for example, there were two affiliated funds casting proxy votes for a company that had 10 proposals on its ballot, the total number of votes would be 20 (equal to two funds casting proxy votes times 10 proxy proposals).

funds' proxy voting activity for their US-listed portfolio companies.[22] Many funds also invest in portfolio companies domiciled outside the United States—for them, proxy voting responsibilities are even more expansive and complex. In 2017, one ICI member cast nearly 160,000 proxy votes in connection with over 17,000 shareholder meetings across 82 countries. Due to the large number of portfolio securities that funds may hold in the United States and abroad, efficient and informed proxy voting is a large undertaking and requires substantial resources. Given that retirement plans will often include multiple funds as investment options,[23] the number of proxy votes theoretically subject to review would rise exponentially to the tens of thousands if plan fiduciaries were considered to have an obligation to analyze or make a judgment on the proxy voting practices of the mutual funds in which the plan invests.

As fund advisers' investment management styles differ, so too do their approaches for gathering and processing relevant information related to their large and diverse proxy voting responsibilities. Fund advisers do not use a single technique for deciding how to vote proxies. Some fund advisers utilize individuals, teams, or committees specifically dedicated to analyzing proposals and voting proxies. Others may look to the individual fund portfolio managers to make voting decisions. The analytical approach that fund advisers typically take to proxy votes also may differ depending on the proposal's subject matter and nature.[24]

What is relevant here is that mutual funds have the scale, internal expertise and experience to analyze and vote proxies. Individual plans, in contrast, are not similarly situated and moreover would not be able to influence the fund's voting, which must be made in a manner consistent with the best interest of the fund as a whole—and not the interests of any particular shareholder in the fund.[25]

Simply put, it would be inconsistent with the goals of the Proposed Rule to impose any obligation on plan fiduciaries to review, analyze and make a judgment on the proxy voting practices of the SEC-registered funds in which the plan invests. Such an obligation would impose untenable administrative

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[22] ICI's data set included fund proxy voting information only for those companies included in the Russell 3000 Index. The Russell 3000 Index tracks the performance of the 3,000 largest stocks traded in the US and represents approximately 98 percent of US stock market capitalization.

[23] The typical large 401(k) plan includes 28 investment options in its investment lineup. See Exhibit 2.1 in BrightScope and Investment Company Institute, *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2017*, San Diego, CA: BrightScope and Washington, DC: Investment Company Institute, available at https://www.ici.org/pdf/20_ppr_dcplan_profile_401k.pdf. Many 401(k) plans include mutual funds in their investment lineups, and mid-year 2020, mutual fund assets represented more than half of 401(k) plan assets (note 3, *supra*).

[24] *See* the Bulletin, note 19, *supra*, which states the SEC staff's view that "as part of an investment adviser's ongoing compliance program, it should review, no less frequently than annually, the adequacy of its proxy voting policies and procedures to make sure they have been implemented effectively, including whether these policies and procedures continue to be reasonably designed to ensure that proxies are voted in the best interests of its clients." (citing Advisers Act Rule 206(4)-7 and Investment Company Act Rule 38a-1).

[25] Rule 206(4)-6 under the Advisers Act. A fund would be the adviser's "client" for purposes of the rule.

burdens, costs and litigation risk on plans with little, if any, benefit. For this reason, we strongly urge the Department to build upon its decision to exclude SEC-registered funds from coverage of the Proposed Rule by clarifying that it is not its intent that plan fiduciaries apply the standards of the Proposed Rule in reviewing, analyzing or making a judgment on the proxy voting practices of the SEC-registered funds in which the plan invests. If the Department moves to finalize the Proposed Rule without making such clarification, the rulemaking will result in substantially increasing the administrative burdens and costs for plans that hold their assets in mutual funds in contravention of the Department's own impact analysis. [26]

B. The Department must recognize the unique challenges of fund proxy campaigns and the impact the Proposed Rule could have in exacerbating those challenges.

We appreciate that the Department has excluded mutual funds from the Proposed Rule's coverage. If the Proposed Rule were to apply, it would create great difficulty for mutual funds in carrying out *their* proxy campaigns and would result in imposing unnecessary costs on funds, particularly in connection with funds' ability to achieve a timely quorum at their own shareholder meetings. It is important to emphasize, however, that these problems will also arise if plan fiduciaries are left with uncertainty as to whether they *should* apply the standards of the Proposed Rule to the voting of plans' mutual fund proxies. We urge the Department to provide needed clarification to plan fiduciaries on this important issue if it moves forward with its rulemaking.

The Department appears to be aware that funds face more daunting challenges than operating companies to achieve a quorum and obtain approval of their proxy matters.[27] This is due to major differences in shareholder bases (funds have more diffuse and retail-oriented shareholder bases), proxy voting behavior of those bases (institutional investors comprise a larger percentage of operating companies' shareholder bases and are far more likely to vote), legal obligations, and organizational differences. Funds also can have difficulty even identifying and reaching their shareholders when they invest through intermediaries, which severely limits a fund's ability to communicate with its shareholders to encourage voting.[28]

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[26] In assessing the impact of the Proposed Rule, the Department states that "[p]lans that only hold their assets in registered investment companies, such as mutual funds, will be unaffected by the proposed rule." 85 Fed. Reg. 55237.

[27] The Department seems to acknowledge that reaching quorum may be a problem and notes that a pension plan's policy can account for this. "For example, a fiduciary declining to submit any proxy votes for holdings below a prudently determined quantitative materiality threshold may modify the policy in advance to allow proxy voting if needed for the portfolio holding to achieve a quorum for its shareholders' meeting." 85 Fed. Reg. 55226. However, the Proposed Rule makes this suggestion unworkable.

[28] For a detailed discussion of the factors contributing to funds' difficulty in obtaining quorum and the resultant costs, see letter from Paul Schott Stevens, President and CEO, ICI, to Vanesa Countryman, Acting Secretary, SEC (June 11, 2019), available at https://www.ici.org/pdf/19_ltr_fundproxy.pdf. Also see *Analysis of Fund Proxy Campaigns: 2012–2019*, Investment Company Institute (December 2019) (presenting the findings from ICI's Fall 2019 member survey on funds' proxy campaigns over the past seven years), available at https://www.ici.org/pdf/19_ltr_proxyanalysis.pdf.

These factors contribute significantly to the costs and effort required to seek and obtain necessary shareholder approvals for mutual fund matters. It is not unusual for mutual funds to painstakingly canvass retail shareholders to convince them to vote. The result is these funds often struggle to obtain a quorum for some proxy proposals, and adjournments are commonplace. In fact, ICI surveys show that 38 percent of reported proposals required at least one meeting adjournment to reach quorum, meaning that the affected fund(s) had to reconvene the meeting at a later date (in some cases, multiple times) to resolve the proxy matter.[29] Of course, funds—and therefore fund shareholders—often bear the proxy costs associated with proxy campaigns, which in some cases can run into the millions of dollars.[30] The costs associated with follow-up solicitations (*i.e.*, the costs incurred following preparation of the materials and the first distribution) largely drive these overall numbers.[31]

In recent years, the SEC has recognized these issues. Last year, the Division of Investment Management initiated an outreach targeted at small- and mid-sized fund sponsors, with its goal "to hear from these groups about regulatory barriers and to begin thinking about ways we could address them."[32] And the SEC's rulemaking agenda now indicates that the staff is considering recommending that the SEC propose rule and form amendments to address challenges unique to funds' proxy campaigns.[33] As part of this initiative, we have provided the SEC with detailed suggestions for reducing the costs and challenges of the fund proxy system.[34]

In short, the costs and difficulties associated with fund proxy campaigns can be considerable and will only be exacerbated by adoption of the Proposed Rule, which—as shown in our comments below and as the Department acknowledges—would provide disincentives for plan fiduciaries to vote proxies. As the Department evaluates comments received in connection with the Proposed Rule, these challenges merit special attention. If the Department moves forward to finalize the Proposed Rule, we strongly urge it to make clear its position that, when considering fund proxy solicitations, plan fiduciaries should be able

[29] See *Analysis of Fund Proxy Campaigns: 2012–2019,* note 28, *supra.*

[30] We understand that advisers sometimes agree to assume costs in connection with certain proxy proposals (*e.g.*, fund reorganizations). And some funds are subject to expense limitation arrangements that could result in an adviser bearing some or all of these proxy costs, although some of these arrangements may exclude proxy costs from the limitation.

[31] Several fund-specific factors influence a fund's follow-up solicitation costs, including the type of proposal (and its quorum and passage requirements), its number of shareholders, and the relative make-up of its shareholder base (*e.g.*, institutional vs. retail, and omnibus account vs. non-omnibus account).

[32] *Keynote Address: ICI Mutual Funds and Investment Management Conference*, SEC, Division of Investment Management Director Dalia Blass (March 18, 2019), available at www.sec.gov/news/speech/speech-blass-031819.

[33] See Notice of *Amendments to Improve Fund Proxy System* (Spring 2020), available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202004&RIN=3235-AM73.

[34] Letter from Paul Schott Stevens, President and CEO, ICI, to Vanesa Countryman, Acting Secretary, SEC (June 11, 2019), available at https://www.ici.org/pdf/19_ltr_fundproxy.pdf.

to incorporate into their fiduciary analysis the potential additional costs incurred by funds and therefore fund shareholders resulting from the failure to respond in a timely fashion to such solicitations.

II. The Department's Failure to Apply a Principles-Based Approach on Proxy Voting Will Adversely Change the Fiduciary Analysis and Recordkeeping Requirements and Attendant Costs Associated with Plan Fiduciaries' Proxy Voting Responsibilities.

The Department's justification for the Proposed Rule is its belief that prior proxy voting guidance has resulted in fiduciaries incurring proxy voting costs exceeding the resulting benefits to plans.[35] Moreover, the Department is concerned that plan fiduciaries may be over-relying on third parties' advice, such as proxy advisory firms, without sufficient prudent consideration of that advice and the party offering it.[36] Finally, the Department believes it should issue guidance to harmonize its guidance with the SEC's recently published rules.[37] As we explain in more detail below, the Proposed Rule has not been designed in a way that would achieve these stated goals. Instead, the fundamental changes in how fiduciaries must analyze proxies contemplated by the Proposed Rule would impose additional administrative burdens on plan fiduciaries and result in increasing the costs associated with their review of proxies.

A. The Proposed Rule would fundamentally change how fiduciaries are required to analyze proxy voting decisions.

The Proposed Rule would abandon current Departmental guidance, fundamentally changing how fiduciaries are required to analyze proxy voting decisions. The Proposed Rule would *prohibit* a plan fiduciary from voting any proxy unless the fiduciary "prudently determines that the matter being voted upon would have an economic impact on the plan."[38] The Proposed Rule would *require* a plan fiduciary to vote on any matter that it prudently determines would have an economic impact on the plan.[39] The Department stresses in this regard that "fiduciaries must be prepared to articulate the anticipated economic benefit of proxy-vote decisions in the event they decide to vote."[40]

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[35] "First, the Department is concerned that responsible plan fiduciaries, in their efforts to decide whether or how to vote plan shares—and where applicable, to vote them—and exercise other shareholder rights, may impose costs on plans that exceed the consequent economic benefits to them." 85 Fed. Reg. 55228.

[36] "Second, the Department has reason to believe that responsible fiduciaries may sometimes rely on third-party advice without taking sufficient steps to ensure that the advice is impartial and rigorous." Id.

[37] "[T]he SEC's actions would not apply to ERISA fiduciaries that are outside of the SEC's jurisdiction. The Department believes that it would be appropriate to consider updating its regulations to ensure more consistent conduct by all plan fiduciaries." Id. at page 55223.

[38] Proposed Rule section 404a-1(e)(3)(ii).

[39] Proposed Rule section 404a-1(e)(3)(i).

[40] 85 Fed. Reg. 55224.

A determination whether a particular proxy vote would have *an economic impact on the plan* must also be "based on such factors as the size of the plan's holdings in the issuer relative to the total investment assets of the plan, the plan's percentage ownership of the issuer, and the costs involved."[41] As such, the Department is effectively rejecting its prior common sense position that a plan fiduciary can consider whether they expect the plan's vote, either alone or together with votes of other shareholders, to have an effect on the value of the plan's investment, versus the additional cost of voting shares.[42]

By proposing these new prescriptive requirements for analyzing proxy votes, the Department seemingly ignores the complexity involved in a determination of economic versus non-economic impact. In this regard, it is important that the Department not mistake factors that on their face seem to be "non-financial" in nature as having no economic impact. Corporations routinely, and to an extent inextricably, include seemingly non-financial or qualitative considerations in their decision making and related proxy solicitation proposals to improve their economic performance by enhancing their public profiles, managing business risks, and identifying emerging business risks and opportunities. In determining whether qualitative factors are material, a corporation will often analyze its potential long-term impact on the immediate or longer-term financial health of the corporation. Qualitative factors, while less concrete in nature, are no less pecuniary than quantitative factors.[43]

Two well-understood examples of matters that are not easily or definitively categorized as financial or non-financial, but that can have a significant economic impact in enhancing shareholder value, include corporate governance and disclosure issues. As the Department has noted, dysfunctional corporate governance can present a pecuniary risk.[44] Audit standards, board composition, and executive compensation are other aspects of corporate governance that can be financially material and whose consideration can have a positive economic impact in enhancing shareholder value. [45] Accordingly, by

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[41] Proposed Rule section 404a-1(e)(2)(ii)(B).

[42] IB 2016-01 does not require plan fiduciaries to consider whether the plan's individual exercise of its voting rights would affect the value of the plan's investment but rather whether the votes of all shareholders would affect the value of the plan's investment.

[43] The above arguments echo the comments ICI made in response to the Department's proposal on ESG investments. *See* note 11, *supra.*

[44] 85 Fed. Reg. 39113, 39116 (June 30, 2020).

[45]Academic research shows that corporate governance can have an impact on price through cash flow and discount rates (in other words has an economic impact). Wafaa Salah Mohamed and May M. Elewa, *The Impact of Corporate Governance on Stock Price and Trade Volume*, International Journal of Accounting and Financial Reporting, Vol. 6, No. 2 (2016), available at http://www.macrothink.org/journal/index.php/ijafr/article/view/9757/7991. It is also relevant that corporate law requires items beyond what the Department identifies as likely to have impact (M&A, contested elections) to be submitted to shareholders and would seem to indicate recognition by lawmakers that these types of matters have an impact on the company. Claire H. Holland, Holly J. Gregory and Rebecca Grapsas, *Shareholder rights and powers in USA*, Sidley Austin LLP (July 10 2018), available at https://www.lexology.com/library/detail.aspx?g=1b53f42b-40df-420e-a54f-8cf522990345.

ensuring that companies are well run, protecting shareholder interests and avoiding conflicts of interest, shareholders may see positive economic impact. And, conversely, if companies are not well run and not focused on protecting shareholder interests, proxy voting is a way for shareholders to hold management accountable. Similarly, although downplayed by the Department,[46] proposals that encourage greater disclosure can also result in enhancing shareholder value or serve in a prophylactic manner to prevent actions that might serve to diminish shareholder value. In this respect, proxy proposals often focus on risk mitigation, and risk, by its very nature, is very difficult, and sometimes impossible, to quantify unless it materializes.

A well-known example that illustrates the relevance of governance and disclosure in impacting shareholder value is the Volkswagen emissions scandal. There were significant signals at Volkswagen that governance was problematic at the firm before news of the emissions scandal broke. Volkswagen had internal power struggles between its Board Chair and CEO and significant allegations of corruption. From a financial, or economic perspective, however, the firm had "flattering financial ratings."[47] An analysis focused solely on quantifiable economic considerations, as the Proposed Rule would seem to require, may have led to the decision not to vote ahead of the scandal as these factors are not easily incorporated into a financial model. An analysis through a risk mitigation or governance lens, however, may have resulted in a decision to vote against certain board members or support shareholder resolutions intended to address the governance risk. Ultimately, if action had been taken early enough, then the firm could have avoided, or mitigated the impact of, the emissions scandal. As this example demonstrates, forcing fiduciaries to make decisions based solely on what can be measured in concrete economic or financial terms can cause portfolios to become more risky and more volatile over time, causing harm to shareholder value and to the very beneficiaries that ERISA is intended to protect.

The Proposed Rule's prescriptive approach of whether a particular proxy vote does or does not have an economic impact is not an appropriate framework to evaluate proxy voting. As explained above, many votes are not clearly economic or non-economic, and the consequence of getting this determination wrong (voting when a matter *will not have* an economic impact, or not voting when a matter *will have* an economic impact) will constitute a breach of fiduciary duty. This is a serious consequence for something that is often impossible to demonstrate with certainty, and will likely result in giving plan fiduciaries no choice but to expend significant resources analyzing every proxy proposal for its potential

[46] In fact, the Department seems to suggest that such matters are not worth the cost of voting for plans. In its discussion in the preamble of environmental and social proxy matters submitted over the past decade, the Department notes, "[t]hese proposals increasingly call for disclosure, risk assessment, and oversight, rather than for specific policies or actions, such as phasing out products or activities." 85 Fed. Reg. 55229.

[47] See *Volkswagen's "Uniquely Awful" Governance at Fault in Emissions Scandal*, CNBC, October 4, 2015, available at https://www.cnbc.com/2015/10/04/volkswagens-uniquely-awful-governance-at-fault-in-emissions-scandal.html, for a discussion of the Volkswagen emissions scandal.

economic impact. Contrary to the Department's stated goals then, the Proposed Rule will require more—not less—analysis, even when the fiduciary ultimately decides not to vote a proxy.[48]

A more workable framework that is more consistent with the Department's stated goal of reducing plan costs would be a principles-based approach that focuses on whether a fiduciary has a prudent process for proxy voting, including written proxy voting policies and procedures that are reasonably designed to ensure that the fiduciary votes securities in the best interest of the plan. This approach is consistent with that taken by the SEC in the Advisers Act proxy voting rule (Rule 206(4)-6). Requiring investment advisers that are plan fiduciaries to develop a completely different process for voting proxies for their ERISA clients is not necessary and would be very costly for plans and fiduciaries.

B. The Proposed Rule's *permitted practices* would not ease compliance burdens for plan fiduciaries.

The Department acknowledges that the proposed determination of economic value "may often burden fiduciaries out of proportion to any potential benefit to the plan"[49] and it proposes "permitted practices" that are designed to "help fiduciaries more cost-effectively comply"[50] with the obligation to vote or not vote proxies. As specified in the Proposed Rule, we are concerned that the permitted practices would not, as the Department intends, ease compliance burdens for plan fiduciaries. Rather, as proposed, we are concerned that compliance with the permitted practices could subject plan fiduciaries to similar burdens and potential exposure as the prescriptive requirements of the Proposed Rule more generally.

The introductory language to the permitted practices provision provides that "[i]n deciding whether to vote a proxy pursuant to paragraphs (e)(3)(i) and (ii) of this section, plans may adopt proxy voting policies that voting authority shall be exercised pursuant to specific parameters *reasonably designed to serve the plan's economic interest.*"[51] This language does not provide relief from complying with the requirements of paragraphs (e)(3)(i) and (ii), so it is not clear what advantage would be provided to a fiduciary using a permitted practice.

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[48] Regardless of what the fiduciary decides, this new requirement could subject plans to increased risk of litigation claiming that they breached their fiduciary duty because they voted when they should not have or did not vote when they should have. Even if the fiduciary has a prudent process and has documented its reasons for the decision, others will be able to second guess the determination on economic impact and conclude that the plan came to the wrong conclusion. As described below, the permitted practices do not adequately relieve this increase in burden.

[49] 85 Fed. Reg. 55225.

[50] *Id.* The Proposed Rule describes three such permitted practices, which it believes will reduce costs for plans through reduced voting: (1) voting proxies with management, (2) voting only on certain types of corporate events (e.g., mergers and acquisitions), or (3) voting only if the corporate stock makes up a minimum threshold of the plan's investment holdings.

[51] Proposed Rule section 404a-1(e)(3)(iii) (emphasis supplied).

The third permitted practice—refraining from voting unless the plan's holding is significant, such as ten percent or more of the plan's assets—if adopted by a plan, could lead to the plan almost never voting, because ERISA's diversification requirements limit significant ownership by a plan. The fact that a vote may have only a modest impact on a given plan should not mean that the investment manager should not vote on behalf of individual plans. If the Department moves to finalize the Proposed Rule, it should clarify that, in considering a quantitative threshold, a fiduciary is not limited to considering the interest of single plan, but may consider the aggregate interests of all the accounts on whose behalf the fiduciary may be voting proxies relating to a single issuer.

Even if the Department made clear that fiduciaries using the permitted practices would not be subject to certain provisions of the rule, fiduciaries would still have significant compliance burdens relating to certain permitted practices. For example, the first two permitted practices—(1) voting with management *except where matters are likely to have a significant impact on the value of the plan's investment*, and (2) voting *only on matters that the fiduciary has previously determined will have a significant economic impact*—do little to simplify the fiduciary screening process.

These practices define what actions a plan fiduciary may take *only after* first determining that a proxy matter is not economically material. The plan fiduciary would not be relieved from the obligation to *determine whether a matter will have an economic impact*, either concurrently or in advance of a vote.

The permitted practices provide no fiduciary or litigation relief when a fiduciary adopts and prudently follows such a policy (as a specific "safe harbor" might do)[52] and therefore the same burdensome fiduciary analysis, documentation and general voting considerations and processes will have to be pursued by plans in making proxy voting determinations.

The Department acknowledges that it anticipates that most, if not all, plans will adopt such permitted policies, and that without the use of such a policy, the costs of the Proposed Rule, including determining whether each proxy vote will have an economic impact, would be significant.[53] Yet the Department also suggests that a plan's expenditure of plan resources to decide "whether and how to vote on other proposals that are unlikely to have an impact on a plan's economic value may be unwarranted and, given the particular facts and circumstances, could constitute a fiduciary breach."[54] Given that a plan is required to vote if the matter will have an economic impact, it is not clear how a

[52] In fact, the Proposed Rule explicitly states that adopting such a permitted practice will not preclude or impose liability for voting or not voting in accordance with the policy. See Proposed Rule section 404a-1(e)(3)(v). ("No policies adopted under paragraph (e)(3)(iii) of this section shall preclude, or impose liability for, submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after taking into account the costs involved, or for refraining from voting when the fiduciary prudently determines that the matter being voted upon would not have an economic impact on the plan after taking into account the costs involved.")

[53] 85 Fed. Reg. 55232.

[54] Id.

fiduciary could determine, without spending assets for analysis, whether the matter would have or not have an economic impact. The significant flaw in the reasoning is due to the Department's failure to realize that this determination will, in many cases, not be readily demonstrable.

C. Contrary to the Department's claims, the represented benefits from the Proposed Rule do not outweigh the costs of complying with its prescriptive requirements and the resultant forfeiture of important shareholder rights.

The Department's primary goal of its proposed rulemaking appears to be ensuring that plan fiduciaries do not "expend plan assets unnecessarily"[55] when voting proxies. As discussed above, however, imposition of the Proposed Rule's new prescriptive requirements would only serve to increase the costs and burdens[56] associated with an ERISA fiduciary's consideration of proxy voting, and its permitted practices would not serve to lesson these costs and burdens. The Department not only offers no evidence that those costs are outweighed by any benefits, it acknowledges that there is no evidence of plans currently spending excessive amounts for this purpose.[57]

The new burdens and costs imposed by the Proposed Rule will be compounded by its imposition of new monitoring requirements. The Department acknowledges that many ERISA plan fiduciaries delegate their proxy voting authority to investment managers.[58] Under the Proposed Rule, plan fiduciaries who delegate their proxy voting authority to investment managers will have a duty to monitor the investment manager's proxy voting decisions. To properly fulfil the duty to monitor, the Department specifies that:

> "fiduciaries should require documentation of the rationale for proxy-voting decisions so that fiduciaries can periodically monitor proxy-voting decisions made by third parties. A plan fiduciary must also assess and monitor an investment manager's use of any proxy advisory firm, including any review by the manager of the advisory firm's policies and procedures for identifying and addressing conflicts of interest."[59]

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[55] 85 Fed. Reg. 55231.

[56] In addition to the increased cost of the threshold decision of economic impact (which is a focus of our letter), we note that the Proposed Rule also adds unnecessary burdens by articulating a prescriptive list of obligations that fiduciaries must comply with to meet their ERISA duties when making decisions on exercising shareholder rights, including voting proxies. See Proposed Rule section 404a-1(e)(2)(ii)(A) through (F).

[57] "[W]hile the Department believes that the common practices of most plans related to proxy voting are generally consistent with the standards in the proposal, we lack data for the share of plans that do not currently meet such standards." 85 Fed. Reg. 55233-4. The existing guidance (and the prior iterations of the guidance) has already put fiduciaries on notice about when they should vote and, importantly, when they should not vote proxies. Therefore, ERISA fiduciaries already should be aware that they do not need to vote if they believe the cost outweighs the benefits.

[58] 85 Fed. Reg. 55225.

[59] 85 Fed. Reg. 55224. Also see Proposed Rule section 404a-1(e)(2)(iii): "a responsible plan fiduciary shall require such investment manager or proxy advisory firm to document the rationale for proxy voting decisions… sufficient to demonstrate

While we agree that plan fiduciaries retain a duty to monitor service providers, including investment advisers, this level of oversight runs counter to the practical reality that plan fiduciaries often outsource such duties and responsibilities because they lack the requisite expertise, as ERISA directs. This heightened monitoring requirement seems even more unnecessary in the case of a delegation to an ERISA 3(38) investment manager.

Finally, the Proposed Rule will result in plans forfeiting important shareholder rights. First, the Department describes an expected benefit of the Proposed Rule being "societal resources freed for other uses due to voting fewer proxies."[60] We do not agree that plans simply voting fewer proxies should be promoted as a goal nor seen as a benefit. Voting rights are understood to have a value. The right to vote represents an important shareholder right with respect to a plan's investment and should not be subject to the Department's across-the-board minimalization of its value. In fact, we would argue that the Proposed Rule's creation of costs and risk barriers to voting, which will result in plans' diminished ability to exercise voting rights, could be characterized as a move to expend and waste plan assets, particularly where there would otherwise generally be no incremental cost to the plan for ensuring they are exercised responsibly in the plans' and participants' interest.

Additionally, the prescriptive nature of the rule would impede the ability of investment managers and other plan fiduciaries to efficiently and effectively exercise their voting authority. Currently, investment managers with voting discretion may vote consistently across client accounts as appropriate (i.e., on those proposals for which objectives of the accounts are consistent and divergent economic interests or client-specific preferences are not present). While the SEC states that investment advisers must vote in the best interests of each client and should consider whether it should have distinct voting policies, the SEC ultimately allows the adviser to determine whether it may vote multiple clients' shares in the same manner.[61] The Department appears to misconstrue this SEC rule and related guidance, implying that the SEC's rule would require the investment adviser to perform a discrete analysis of the proxy vote for each client in order to make voting determinations that are in its best interest.[62] In this respect, the

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that the decision… was based on the expected economic benefit to the plan, and that the decision… was based solely on the interests of participants and beneficiaries in obtaining financial benefits under the plan."

[60] 85 Fed. Reg. 55231.

[61] The SEC explains that "an investment adviser should consider whether voting all of its clients' shares in accordance with a uniform voting policy would be in the best interest of each of its clients. In particular, where an investment adviser undertakes proxy voting responsibilities on behalf of multiple funds, pooled investment vehicles, or other clients, it should consider whether it should have different voting policies for some or all of these different funds, vehicles, or other clients, depending on the investment strategy and objectives of each." See page 13 of *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers* , SEC Release Nos. IA-5325; IC-33605 (August 21, 2019), available at https://www.sec.gov/rules/interp/2019/ia-5325.pdf.

[62] 85 Fed. Reg. 55234-5.

Proposed Rule could also end up conflicting with other obligations that fiduciaries have which do not discourage the voting of proxies and use a different test than the one proposed by the Department.[63]

The Proposed Rule would make such services more expensive[64] and ultimately would provide less value for plan participants. The Proposed Rule would inhibit an investment manager's ability to use its expertise to decide which voting decisions, as a whole, are likely to maximize long-term value to investors and therefore are in the best interest of investors. Instead, the Proposed Rule will require investment managers to allocate resources to analysis and record keeping in order to determine whether each individual voting matter will have an economic impact to the individual plan and then document that decision. Managers may even have to run a parallel voting process for ERISA and non-ERISA assets, and the ERISA plan clients may ultimately have to pay for that additional administrative burden. Due to the increased risk, some managers may move in the direction of not undertaking voting responsibility, which will require plans to make these assessments on their own and invariably result in increased costs. We believe that requiring investment advisers to perform these separate analyses for their ERISA plan clients would be very costly for plans and fiduciaries and would provide no additional value compared to the services they currently provide.

III. The Department Must Withdraw the Proposed Rule.

For the reasons discussed above, we have very serious concerns about the Proposed Rule and urge the Department to withdraw it. The Proposed Rule will increase, not decrease, costs, and will result in plans forfeiting important shareholder rights. Fiduciaries will continue to have a need for third parties' advice, but they will pay more for it, and be required to do an excessive amount of oversight. In fact, the need for third party advice will be heightened because the risk of making the wrong determination regarding economic impact, and thus voting or not voting accordingly, could subject the fiduciary to significant liability. Finally, we do not agree that the Proposed Rule and the SEC's rules are aligned.[65]

If the Department believes that it needs to act in this area, however, it should implement a principles-based rule consistent with that taken by the SEC in the Advisers Act proxy voting rule (Rule 206(4)-

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[63] Where the Department is taking a very strict and narrow view on whether fiduciaries can vote (and requiring the analysis to focus on economic impact), the SEC, by contrast, provides advisers and clients considerable latitude in shaping the scope of an adviser's voting activity, and takes a more principles-based view of what follows from fiduciary duties in the context of proxy voting.

[64] As the Department notes, currently investment advisers often do not charge a separate fee for providing proxy services, because the investment adviser is providing the analysis for all its clients, and many of the significant costs associated with proxy voting are generally fixed, rather than variable. 85 Fed. Reg. 55228-9. ("The reported information sheds little light on the costs attendant to voting proxies or exercising other shareholder rights. The information omits very small direct payments, direct payments by small plans, and essentially all indirect payments.") A separate analysis for each client is certain to increase costs substantially.

[65] See note 63, *supra.*

6).[66] The Department can achieve its goal of codifying the rule under a notice and comment process, and confirming that plan fiduciaries are not required to vote all proxies presented to them, and that fiduciaries should have a written proxy voting policy that is reasonably designed to ensure that the fiduciary votes proxies in the best interest of the plan without including any of the overly prescriptive provisions that will add cost, burden and liability to plan fiduciaries. We do not believe that additional action by the Department regarding proxy voting is necessary or justified by the evidence. Finally, if the Department does adopt any final rule, it should provide substantial time to allow plans and advisers to adjust their processes (at least 12 months).

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We appreciate the Department's consideration of the above comments. Please feel free to contact Susan Olson (202-326-5813 or solson@ici.org), David Abbey (202-326-5920 or david.abbey@ici.org), or Shannon Salinas (202-326-5809 or shannon.salinas@ici.org) with any questions.

Sincerely,

/s/ Susan Olson

Susan Olson
General Counsel
Investment Company Institute

/s/ David Abbey

David Abbey
Deputy General Counsel – Retirement Policy
Investment Company Institute

[66] For example, the Department could consider adopting a safe harbor under which ERISA fiduciary duties will be deemed satisfied where a plan has adopted a policy reasonably designed to allow its investment manager to vote (or not) in the plan's best interests.