Mackinac Center for Public Policy comment in support:

Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

RIN 1210-AB91

ERISA Fiduciaries Must Use their Proxy Voting and Other Management and Shareholder Voting Rights Solely for the Economic Benefit of Plan Participants and Beneficiaries

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Mackinac writes in support of the Department of Labor's proposed rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," issued on September 4, 2020.

Founded in 1987, the Mackinac Center for Public Policy is a 501(c)(3) public policy research organization with a well-established history of advocating changes to state and federal labor and pension policies that promote freedom in the workplace and mutually beneficial interactions between workers and job creators.

As with its recent notice of proposed rulemaking in "Financial Factors in Selecting Plan Investments" RIN 1210-AB95, the Department is correct in seeking to protect the retirement security of millions of Americans.

ERISA managers and fiduciaries should use the money they control but do not own solely for the economic benefit of plan participants and beneficiaries.

This includes plan management exercising proxy voting rights and other shareholder voting rights appurtenant to shares of stock.

Many shareholder resolutions are motivated by political, social, or environmental factors that may not be directly related to the stock's value and the pecuniary interest of an investment fund.

For example, in 2019 People for the Ethical Treatment of Animals bought stock in Levi Strauss to pressure the company to stop using animal leather in its products, claiming cow skin "has at least three times the negative environmental impact as most vegan leather." [1]

[1] https://www.spglobal.com/marketintelligence/en/news-insights/trending/DQWNTWBYJJeEbLXtI1Beeg2

Each year, the AFL-CIO releases its “Key Votes Survey,” detailing how “how investment managers, mutual funds and proxy voting consultants voted the shares they manage on behalf of pension plans on key issues at these meetings during the proxy season.”[2]

The survey notes that the proposals “are submitted by Taft-Hartley, union, and public employee pension funds as well as employee shareholders and other investors.”[3]

Topics include “CEO Pay Target Amounts” urging boards of directors “to take into consideration the pay grades and salary ranges of all company employees when setting target amounts for CEO compensation”; “Lobbying Disclosure” to disclose “the company’s policies and procedures for expenditures used for direct lobbying and grassroots lobbying communications”; and nominating employees to the board of directors; among others.[4]

The AFL-CIO, SEIU, the International Brotherhood of Teamsters, as well as many other foundations and financial planning firms such a Blackrock Inc. are members of Ceres. Ceres describes itself as an investor network which “includes over 175 institutional investors, managing more than $29 trillion in assets, advancing leading investment practices, corporate engagement strategies, and key policy and regulatory solutions.”[5]

It should be noted that Ceres includes a number of public sector pension plans and others plans free from the fiduciary protections of ERISA.

The Ceres 2020 Proxy Voting Guidebook suggests ways to conduct environmental shareholder activism at energy, manufacturing, and transportation companies. Proposals include publicizing a business transition strategy to meet the Paris-aligned GHG emissions reduction targets; “Disclosure of Direct and Indirect Climate and Energy Lobbying”; requiring company lobbying to be “aligned with the goals of the Paris Agreement” and using “Environmental, Social and Governance (ESG) Metrics in Executive Compensation.”[6]

While these shareholder activism and proxy voting efforts may be permissible by individuals and institutions with non-ERISA plans, ERISA fiduciaries should tread carefully in supporting or even spending time researching types of proposals which may only be tenuously connected to shareholder value.

Specifically, ERISA funds should not expend resources investigating, pursuing, or engaging in types of shareholder proxy voting that do not directly have an economic impact on the plan.

The NPRM, if promulgated, will help fiduciaries save expenses by giving clear guidance on avoiding such proposals and instead focusing on the “permitted practices” which will economically benefit participants and beneficiaries.

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[2] https://aflcio.org/sites/default/files/2019-12/2019%20AFL-CIO%20Key%20Votes%20Survey%20Report_0.pdf
[3] Ibid.
[4] Ibid.
[5] https://www.ceres.org/networks/ceres-investor-network
[6] https://www.ceres.org/sites/default/files/reports/2020-04/Proxy%20Voting%20Guidebook%202020.pdf

As we noted in our ESG comment:

> ERISA governs most private sector retirement and other benefit plans, such as health plans.[7] Section 404[8] of the Act specifies the fiduciary duty of plan administrators and their obligation to the participants and beneficiaries who benefits they safeguard. Courts have consistently held that ERISA requires these fiduciaries act with "complete and undivided loyalty to the beneficiaries"[9], and their actions must "be made with an eye single to the interests of the participants and beneficiaries."[10] The Supreme Court in 2014 unanimously held these benefits are financial. These benefits, it said, do not include "nonpecuniary benefits," and ERISA plan managers have a fiduciary duty to only minimize risk and maximize return with the money they control but do not own.[11]

This proposed rule would likewise protect the retirement security of millions of Americans. Again, ERISA fiduciaries should only use the money they control but do not own for financial benefits of a plan and its pecuniary objectives.

They should not subordinate the interests of the participants and beneficiaries in their retirement income or expend funds for research, introduction, or advancement of proxy voting that are not related to the economic interest of plan participants and beneficiaries.

Additionally, fiduciaries should keep a record of and document their reasoning for proxy voting decisions and refrain from engaging in proxy action that is de minimis or unlikely to have a material impact on investments and the performance of the portfolios they manage.

For these reasons we support the Department and its proposed rule "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights."

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[7] https://www.dol.gov/general/topic/retirement/erisa#:~:text=The%20Employee%20Retirement%20Income%20Security,for%20individuals%20in%20these%20plans.

[8] https://www.law.cornell.edu/uscode/text/29/1104

[9] https://law.justia.com/cases/federal/district-courts/FSupp/609/1221/1886536/

[10] https://law.justia.com/cases/federal/district-courts/FSupp/538/463/2296992/

[11] https://www.supremecourt.gov/opinions/13pdf/12-751_d18e.pdf