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WELLINGTON  
MANAGEMENT®

5 October 2020

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
US Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

*Via Federal eRulemaking Portal*

**Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (the "Proposed Regulation")  
RIN1210-AB91**

Dear Sir or Madam:

Wellington Management Company LLP ("**Wellington Management**") appreciates the opportunity to comment on the Department of Labor's (the "**Department**") proposed amendments to the "Investment Duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**") addressing fiduciary duties regarding proxy voting and shareholder rights. Wellington Management is a registered investment adviser organized as a private partnership, privileged to manage over \$1.12 trillion in client assets globally across a wide variety of equity, fixed income and asset allocation strategies. As of 30 June 2020, Wellington Management managed approximately \$86 billion in United States retirement plan assets subject to the requirements of ERISA and sub-advised \$618 billion of United States mutual funds.

We appreciate the efforts of the Department of Labor (the "**Department**") to ensure ERISA plans are not bearing unnecessary costs associated with voting proxies. We are concerned, however, that the regulatory framework that would be required under the Proposed Regulation is unnecessary and would increase, rather than decrease, costs to ERISA plans. Further, we are also concerned that the Proposed Regulation, if adopted, would have the effect of limiting the ability of ERISA plans to exercise their rights as shareholders and consequentially increase proxy voting costs paid by issuers who solicit proxies.

Therefore, we request that the Department either withdraw the Proposed Regulation or amend it to utilize a principles-based approach that directs plan fiduciaries to vote proxies solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan. Alternatively, we request that the Department revise the Proposed Regulation to provide an exemption or exception from the Proposed Regulation for ERISA plan fiduciaries who engage investment managers who adopt a proxy voting policy to vote proxies consistent with the requirements of ERISA and do not charge additional fees to ERISA plans for proxy voting services.

## BACKGROUND

Shareholder voting rights are fundamental with respect to shareholders' investments in issuers,<sup>1</sup> and shareholder engagement, through proxy voting, benefits shareholders and issuers alike.<sup>2</sup> Each year, issuers solicit shareholder votes at tens of thousands of shareholder meetings. These votes address an array of different matters, such as: routine matters or matters required to be submitted to shareholders by law (e.g., appointment of auditors, elections of directors); significant corporate matters such as matters relating to corporate reorganizations, mergers or acquisitions; or other idiosyncratic matters, such as advisory resolutions proposed by shareholders.

We believe that each of these proxy votes is a valuable opportunity to engage with issuers and provide feedback that will ultimately preserve or create shareholder value, i.e., economic benefits, for our clients. We believe that exercising shareholder rights allows us to support decisions that we believe will maximize the long-term value of securities we hold in client portfolios, and, conversely, oppose decisions that could harm that value. In other words, we feel that the ability to vote proxies itself provides an economic benefit to our clients. Our clients, whether or not governed by ERISA, also recognize the benefits of exercising their rights as shareholders and expect that we are able to do so on their behalf.

To ensure our clients are able to capture the benefits provided by the prudent exercise of shareholder rights and to meet the needs of our clients, we have developed proxy voting policies and procedures to vote proxies in the best interests of each of our clients and at scale. Specifically, we have adopted global proxy voting policies that set forth broad guidelines and positions on common proxy issues that can be broadly applied to proxy solicitations. We have also engaged a third-party voting agent for research, voting recommendations, and to manage the administrative aspects of proxy voting. With these systems, we are able to vote approximately 64,000 proposals at 6,250 shareholder meetings on behalf of our clients each year.

## THE PROPOSED REGULATION

The Proposed Regulation would introduce a new framework applicable to ERISA plan fiduciaries with respect to voting proxies on behalf of ERISA plans. Under the Proposed Regulation, when presented with a proxy proposal, an ERISA plan fiduciary would first be required to perform a cost-benefit analysis as to whether to vote that proxy on behalf of the ERISA plan.<sup>3</sup> This analysis would be based on a determination on whether the proxy proposal would have an economic impact on the ERISA plan.<sup>4</sup> For investment managers who serve as fiduciaries to multiple ERISA plans, this requirement would apparently apply not only on a vote-by-vote basis, but also on a client-by-client basis. Based on the outcome of that analysis, the ERISA plan fiduciary would either: (i) be required to vote the proxy (if the analysis suggested the proxy vote would have an "economic impact" on the plan's investments); or (ii) be prohibited from voting the proxy (if the analysis suggested the proxy vote would not have a "economic impact" on the plan's investments).<sup>5</sup> ERISA plan fiduciaries would be additionally required to maintain records of their analysis for each proxy vote, demonstrating the economic benefit to the plan.<sup>6</sup>

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<sup>1</sup> See, e.g., Julian Velasco, *The Fundamental Rights of the Shareholder* 19-59 (Feb. 6, 2006) (Notre Dame Law School Legal Studies Research Paper No. 05-16, 2006), available at <http://ssrn.com/abstract=761904>.

<sup>2</sup> See, e.g., Clayton, Jay. (Sept. 23, 2020). "Modernizing the Shareholder Proposal Framework for the Benefit of All Shareholders" [Public Statement] ("Our predecessors long recognized, in concert with prevailing state law, that proposals made by individual shareholders to all other shareholders, using the company's proxy statement, can have benefits for all shareholders, including through improved transparency and corporate governance.").

<sup>3</sup> Paragraph (e)(2)(i) of the Proposed Regulation.

<sup>4</sup> Id.

<sup>5</sup> Paragraph (e)(3) of the Proposed Regulation.

<sup>6</sup> Paragraph (e)(2)(iii)(E) of the Proposed Regulation.

As an alternative to this new framework, the Proposed Regulation includes an approach for ERISA plan fiduciaries to vote proxies pursuant to broadly applicable policies that align with three “permitted practices”:

- vote in accordance with the recommendation of management on proposals or types of proposals that are unlikely to have a significant impact on the value of the plan’s investment;<sup>7</sup>
- vote only a sub-set of proposals that are likely to have an economic impact on a plan’s investment;<sup>8</sup> or
- determine not to vote proxies where their holdings as a percentage of the plan’s total investments or the total outstanding votes is below certain levels (the “**Permitted Practices**”).<sup>9</sup>

As discussed in more detail below, we are concerned that the Proposed Regulation is unnecessary, will introduce new, costly and needless regulatory overhead for plan fiduciaries and may result in ERISA plan investors losing the ability to exercise important and fundamental shareholder rights.

## THE PROPOSED REGULATION IS UNNECESSARY

In issuing this Proposed Regulation, the Department is intending to address its perception that ERISA plans are unnecessarily expending resources to vote proxies that have no connection to increasing the value of the plan’s investments.<sup>10</sup> Underlying this perception are the assumptions that: (i) ERISA plans who vote proxies are expending meaningful resources to do so; and (ii) ERISA plans only receive economic benefits from voting certain types of proxies. We do not believe that either of these assumptions are correct, at least with respect to ERISA plans who engage professional investment managers. In fact, we believe that ERISA plans who vote proxies through professional investment managers receive the economic benefits of active shareholder engagement with minimal, if any, expenditure of resources.

### The Costs of Voting Proxies to ERISA plans are Minimal if Any

As noted above, professional investment managers are expected to be able to exercise shareholder rights on behalf of their clients by voting proxies. In response to that expectation, investment managers have created and implemented systems to research, assess and vote proxies for all of their clients. The costs of such capabilities are fundamental to the provision of advisory services, similar to the costs associated with maintaining a trading desk or a capability to respond to corporate actions. Investment managers do not assess new or separate fees relating to proxy voting. In fact, Wellington Management clients who opt to vote their own proxies (or to refrain from voting proxies altogether) do not receive associated fee discounts. Thus, ERISA plan fiduciaries who engage investment managers benefit from proxy voting operations at scale without the expenditure of any marginal resources.

Even assuming that ERISA plans bear costs associated with voting proxies, recent changes to the federal proxy rules by the United State Securities and Exchange Commission (“**SEC**”) are expected to reduce the number of shareholder proposals presented to investors, including ERISA plans.<sup>11</sup> These amendments would allow an issuer to exclude shareholder proposals that fail to meet certain qualifications from the issuer’s proxy statement.<sup>12</sup> These amendments will have the effect of reducing the number of proposals requiring assessment and their attendant costs, diminishing the utility of the Proposed Regulation.

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<sup>7</sup> Paragraph (e)(3)(iii)(A) of the Proposed Regulation.

<sup>8</sup> Paragraph (e)(3)(iii)(B) of the Proposed Regulation.

<sup>9</sup> Paragraph (e)(3)(iii)(C) of the Proposed Regulation.

<sup>10</sup> See, e.g., Proposed Regulation at 55222 and 55231.

<sup>11</sup> Procedural Requirements and Resubmission Thresholds under Exchange Act Rule 14a-8 (adopting release). SEC Rel. No. 34-89964 (Sept. 23 2020).

<sup>12</sup> The amendments to Rule 14a-8 would permit issuers to exclude shareholder proposals from shareholders who do meet specific ownership requirements and provide that shareholders may not submit more than one proposal. The amendments also increase the thresholds of support a shareholder proposal must obtain to be resubmitted. *Id.*

### Proxy Voting Itself Provides Economic Value

We also believe that proxy voting, as a general matter, provides economic benefits to our clients. Through voting proxies, we are able, on behalf of our clients and for the benefit of our clients, to impact the management of companies in which our clients invest, to express our views on matters critical to the organization and to have a say on matters relevant to shareholders. For example, even non-binding proposals can have an economic impact on an issuer's business as they send clear messages to the issuer's management about how shareholders view key issues. Indeed, this benefit goes beyond the particular matters being voted. The knowledge that an issuer's shareholder base can and will vote proxies in their own interests is itself a de facto economic benefit to shareholders. The active voting of proxies (subject to applicable fiduciary obligations) signals to management that the issuer's shareholders will exercise their rights to ensure the issuer is managed in their best interests. This signal provides a critical check on the issuer's management to ensure they operate the enterprise in the best interests of shareholders, which itself provides for increased potential economic returns.

Based on the above, we believe that, contrary to the assumptions of the Department underlying the Proposed Regulation, the costs to ERISA plans of voting proxies (at least for those who engage professional investment managers) are marginal, if any, and that the unencumbered right to influence management through the exercise of proxy voting (subject to applicable fiduciary obligations) provides a long-term economic benefit. Therefore, we submit that the Proposed Regulation is unnecessary to ensure ERISA plan assets are not being expended to vote proxies without providing such plans economic benefits.

## IMPACTS OF THE PROPOSED REGULATION

### The Proposed Regulation Would Increase Costs to ERISA Plan Fiduciaries and ERISA Plans

We are concerned that the Proposed Regulation will impose new and potentially prohibitive costs on ERISA plan fiduciaries. Specifically, the new requirement to perform and document a prescriptive cost-benefit analysis for each proxy proposal (and potentially each ERISA plan) is incompatible with the application of proxy voting policies that enable investment managers to vote proxies in the best interests of their clients at scale. Applying the same assumptions used by the Department, we estimate that compliance with the Proposed Regulation, without adopting the Permitted Practices, would require Wellington Management to devote an additional aggregate annual commitment of over 17 years of analyst time.<sup>13</sup>

We appreciate that the Department recognizes this outsized burden in the proposal. Recognizing the complexities and costs associated with the new economic analysis framework, the Department provides that ERISA plan fiduciaries may avoid the requirement to conduct the cost-benefit analysis by adopting the Permitted Practices. While we agree that the Permitted Practices could serve to mitigate the increased costs resulting from the Proposed Regulations, the Permitted Practices would still result in increased costs.<sup>14</sup> Based on the same assumptions used by the Department,

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<sup>13</sup> In the Proposed Regulation, the Department assumes that the cost benefit analysis required for each vote under the Proposed Regulation, not subject to the Permitted Practices, would require 2 hours and 20 minutes of time to research and document. Proposed Regulation at 55240. Assuming we apply consistent policies across our client base (i.e., that we apply this analysis to 64,000 votes annually) without adopting the Permitted Practices, the annual resource burden in time for Wellington Management would be 17.04 years (64,000 proxies \* 140 minutes each).

<sup>14</sup> We note that Paragraph (e)(3)(iii) does not clearly indicate that ERISA plan fiduciaries are relieved from the requirement to individually assess proxy votes, as required under Paragraph (e)(2). For example, Paragraph (e)(2)(iii) would require plan fiduciaries to require their investment managers to document the rationale for proxy voting decisions. Should the Department intend for the Permitted Practices to realize cost savings, we recommend the Department make revisions to the Proposed Regulation to clarify that adopting and compliance with the Permitted Practices would satisfy the analysis and documentation analysis that would be required in Paragraph (e)(2).

were we to adopt Permitted Practices applicable to 94.4% of proxy votes, as suggested by the Department,<sup>15</sup> the additional annual burden to Wellington Management would still represent approximately 5.5 years of analyst time.<sup>16</sup>

The Proposed Regulation would also introduce new secondary costs to ERISA plan fiduciaries, especially investment managers who manage assets for ERISA plans and clients not subject to ERISA. Given that clients who are not subject to ERISA would not be subject to the Proposed Regulations, we could attempt to mitigate increased costs by isolating ERISA plans and subject them to ERISA-specific proxy voting policies and procedures. While this may reduce the number of proxy votes subject to the Proposed Regulation (and therefore limit the cost impact), this segregation, itself, would require its own significant investment, both as an initial and ongoing matter. Further, this segregation would become increasingly challenging to implement as non-ERISA clients continue to demand (and in some jurisdictions may be required to demand) more by way of exercising their rights as shareholders. Alternatively, we could determine not to vote proxies for ERISA plans, which would shift the burden of compliance with the Proposed Regulation back to the plan fiduciary where the additional costs would ultimately be borne by the plan itself.

Further, these increased costs could result in fewer products and strategies available to ERISA plan investors. The increased compliance costs associated with the Proposed Regulation could serve as a disincentive for investment managers to accept ERISA plans as clients, at least for equity strategies. Investment managers, concerned about the incremental costs, could determine not to offer equity strategies to ERISA plans. As equity strategies are critical components of a long-term portfolio (especially for younger participants), limiting the universe of products available to ERISA plans would adversely impact their ability to maximize their beneficiaries' financial returns.

Finally, we note that the Proposed Regulation could also reduce returns for ERISA plans and investors as a whole. As noted by the Department, if ERISA plans cease voting proxies in response to the Proposed Regulation, either in compliance with a Permitted Practice or based on concerns that a given vote (e.g., re-election of directors) would not yield sufficient economic impact, issuers may find it more difficult to achieve a quorum on matters submitted to shareholders to vote.<sup>17</sup> This could increase costs to issuers and reduce returns for investors generally.

### The Proposed Regulation Could Result in Disenfranchisement of ERISA Plans

In addition to increased costs, we are concerned that the Proposed Regulation would serve to disenfranchise ERISA plans from voting proxies. First, we do not believe the cost-benefit analysis framework adopted in the Proposed Regulation would provide sufficiently clear results for ERISA plans to determine whether they are required to vote (or prohibited from voting) a given proxy. For example, we typically vote in favor of companies splitting the roles of chairman and CEO because we believe that a split structure provides for better corporate governance and, by extension, increased potential for future returns. That said, given the myriad of factors that can affect the value of an investment over time, there may or may not be a demonstrable correlation between a specific vote to support a split Chairman/CEO and the issuer's investment returns over the short- or even medium-terms. Conditioning proxy voting on such a nebulous analysis will create a chilling effect on ERISA plan fiduciaries who would otherwise benefit from exercising their rights as shareholders.

Each of the Permitted Practices in the proposed rule would, in some way, limit the ability for ERISA plans to benefit from this engagement. As discussed above, we believe proxy voting as a practice adds economic value and serves as a critical check on management that ensures that issuers are operated in the best interests of their shareholders. For

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<sup>15</sup> Proposed Regulation at 55233.

<sup>16</sup> The Department assumes the research and documentation of votes subject to the Permitted Practices would require 40 minutes per vote. Proposed Regulation at 58. Were we to apply the Permitted Practices to 94.4% of our proxy voting, the annual resource burden in time for Wellington Management would be 5.5 years (60,416 proxies under the Permitted Practices \* 40 minutes each + 3,456 proxies outside the Permitted Practice \* 140 minutes each).

<sup>17</sup> Proposed Regulation at note 63.

example, in the twelve-month period ending on June 30, 2020, we voted against the recommendations of management in almost 10% of all proxy proposals. We believe that each of these votes provided important feedback to issuer management that will provide the potential for more informed and directed decision-making. We are concerned that the requirements under the Permitted Practices to withhold voting on specific categories of proposals would undermine this check and effectively cede shareholder power to management, which is not in the interests of investors generally, or ERISA plans in particular.

## RECOMMENDATION

Our concerns notwithstanding, we appreciate the Department's efforts to ensure that ERISA plan fiduciaries are not imposing unnecessary costs on ERISA plans relating to proxy voting. As discussed above, we are concerned that the Proposed Regulation is unnecessary to achieve the Department's goal of preserving ERISA plan resources, and in fact, would impose significant new costs on ERISA plan fiduciaries while simultaneously limiting their ability to exercise their rights as shareholders.

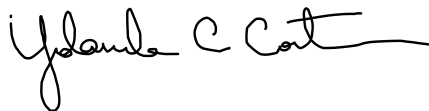
As an alternative to the Proposed Regulation, we suggest that the Department adopt guidance or a principles-based regulation directing plan fiduciaries to vote proxies solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.<sup>18</sup> A principles-based regulation based on the core precepts of the ERISA fiduciary duty would allow plan fiduciaries to determine the best way to conserve ERISA plan resources while simultaneously preserving the value of proxy voting.

Should the Department determine that the Proposed Regulation is necessary, we request that the Department provide an exemption or exception for ERISA plan fiduciaries who engage professional investment managers who: (i) adopt a proxy voting policy to vote all proxies solely in the interests of their ERISA plan clients and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan; and (ii) do not charge fees associated with proxy voting. We believe that such an exemption ensures that plan assets are not, as the Department fears, being expended unnecessarily in connection with proxy voting while preserving the real economic benefits plans can obtain from prudently voting proxies.

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We appreciate the opportunity to comment on the Proposed Regulation. If you have any questions, please contact me or Lance C. Dial, Managing Director and Counsel at the above number.

Sincerely,



Yolanda C. Courtines, CFA  
Equity Portfolio Manager  
Chair of Wellington Management Investment Stewardship  
Committee

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<sup>18</sup> See Paragraph (e)(2)(i) of the Proposed Regulation.