

MEMO# 30522

January 13, 2017

DOL Updates Guidance on Fiduciary Duties Related to Exercise of Shareholder Rights

[30522] January 13, 2017 TO: ICI Members SUBJECTS: Pension RE: DOL Updates Guidance on Fiduciary Duties Related to Exercise of Shareholder Rights

In late December, the Department of Labor issued Interpretive Bulletin (IB) 2016-1, which provides guidance regarding the application of ERISA's fiduciary standards to the voting of proxies on securities held in employee benefit plans, maintenance of and compliance with statements of investment policy (including proxy voting policy), and the appropriateness of shareholder engagement with corporate management by plan fiduciaries.[\[1\]](#) IB 2016-1 replaces IB 2008-2 and reinstates the prior guidance from IB 94-2 with certain modifications.[\[2\]](#)

Background

IB 94-2 laid out principles that plan fiduciaries must follow to satisfy fiduciary duties under ERISA with respect to the exercise of shareholder rights related to securities held in employee benefit plans. The key principle of IB 94-2 is that in undertaking any covered activities, a fiduciary must consider only factors that affect the value of a plan's investment, and that the fiduciary must not subordinate the interests of participants and beneficiaries in their retirement income to unrelated objectives.

In 2008, the Department issued IB 2008-2 to clarify and update IB 94-2 to reflect interpretive guidance issued after IB 94-2.[\[3\]](#) IB 2008-2 re-emphasized that, in making decisions on proxy voting, investment policy and shareholder activism with respect to plan investments, a fiduciary must only be concerned with the factors affecting the economic value of a plan's investments. In a new section entitled "Socially-Directed Proxy Voting, Investment Policies and Shareholder Activism," the Department described the requirement that fiduciaries "be prepared to articulate a clear basis for concluding that the proxy vote, the investment policy, or the activity intended to monitor or influence the management of the corporation is more likely than not to enhance the economic value of the plan's investment before expending plan assets."

In the preamble to IB 2016-1, the Department explains that the principles articulated in IB 94-2 are a better expression of a fiduciary's obligation under ERISA and that IB 2008-2 is out of step with domestic and international trends in investment management. Therefore, IB 2016-1 essentially reinstates the provisions of IB 94-2, with minor updates to reflect the

trends on shareholder engagement.

Reason for Change

The Department withdrew IB 2008-2 because it believes that the changes incorporated into IB 2008-2 have been misunderstood and may actually discourage ERISA plan fiduciaries from voting proxies and exercising other shareholder rights. According to the Department, some practitioners have interpreted IB 2008-2 to prohibit ERISA fiduciaries from exercising shareholder rights “unless the plan has performed a cost-benefit analysis and concluded in the case of each particular proxy vote or exercise of shareholder rights that the action is more likely than not to result in a quantifiable increase in the economic value of the plan’s investment.”^[4] The Department also notes its concern that IB 2008-2 may cause confusion about whether or how a plan fiduciary may consider environmental, social and governance (ESG) factors when voting proxies or undertaking other shareholder engagement activities.^[5]

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endnotes

^[1] IB 2016-1, published at 81 Fed. Reg. 95879 (December 29, 2016), is *available at*: <https://www.gpo.gov/fdsys/pkg/FR-2016-12-29/pdf/2016-31515.pdf>; DOL’s accompanying news release is *available at*: <https://www.dol.gov/newsroom/releases/ebsa/ebsa20161228>.

^[2] Modifications to IB 94-2 include updates to the examples of areas where monitoring or communication with management is likely to enhance the value of the plan’s investment in the corporate securities. 81 Fed. Reg. 95879 at 95882.

^[3] See ICI Memorandum No. 23001, dated October 20, 2008. *Available at*: http://www.ici.org/my_ici/memorandum/memo23001

^[4] 81 Fed. Reg. 95879 at 95880-1.

^[5] Id. at 95881. Note that in 2015, DOL issued IB 2015-01, providing guidance providing guidance regarding the application of ERISA fiduciary standards to the investment of plan assets in “economically targeted investments” (ETIs). See ICI Memorandum no. 29448, dated October 27, 2015. *Available at*: http://www.ici.org/my_ici/memorandum/memo29448