

MEMO# 32808

October 6, 2020

ICI Submits Comment Letter in Response to DOL Proposal on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

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October 6, 2020 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee

Proxy Working Group

SEC Rules Committee SUBJECTS: Pension RE: ICI Submits Comment Letter in Response to DOL Proposal on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

The Institute sent the attached comment letter to the Department of Labor (DOL) in response to its proposed regulation on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (Proposed Rule).^[1] DOL issued the Proposed Rule on August 31 for the stated purpose of ensuring that plan fiduciaries execute their ERISA duties in an appropriate and cost-efficient manner when exercising shareholder rights.^[2] Significant concerns have been raised that the Proposed Rule may actually increase the costs and burdens associated with plans' exercise of shareholder rights.

Proposal

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." 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. As such, the Proposed Rule explicitly rejects the more principles-based considerations previously articulated by DOL in Interpretative Bulletin 2016-01^[3] for a set of prescriptive conditions.

ICI Comments

Our letter applauds DOL for excluding from the Proposed Rule's coverage a retirement plan's exercise of shareholder rights with respect to its holdings of SEC-registered funds.^[4] Nevertheless, we explain that DOL must make clear its position that it is not DOL's 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.^[5] DOL 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.

- The letter expresses concern that, in the absence of further clarification, plan fiduciaries will not be comfortable voting mutual fund proxies in a manner that is *inconsistent* with the prescriptive requirements set forth in the Proposed Rule (i.e., voting absent a clear demonstration of an economic impact to the plan).
- The costs and difficulties associated with fund proxy campaigns are considerable, and the Proposed Rule—which DOL acknowledges is intended to provide disincentives for plan fiduciaries to vote proxies—will only exacerbate these challenges.
- If DOL moves forward to finalize the Proposed Rule, our letter strongly urges 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.
- When considering mutual fund 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.

DOL'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 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 DOL'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 DOL's claims, we are concerned that the Proposed Rule's "permitted practices" would not, as DOL intends, ease compliance burdens for plan fiduciaries.^[6]
- Imposition of the Proposed Rule's new prescriptive requirements would impose new costly monitoring obligations and encourage the forfeiture of important shareholder rights.

For the reasons discussed above, our letter urges DOL to withdraw the Proposed Rule. If DOL 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.

Attachment

endnotes

[1] The Proposed Rule was published at 85 Fed. Reg. 55219 (September 4, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19472.pdf>.

[2] See ICI Memorandum No. 32727, dated September 1, 2020, *available at* https://www.ici.org/my_ici/memorandum/memo32727. Note that the Proposed Rule is thematically consistent with DOL's recent proposed rule on environmental, social, and governance (ESG) investing, which, in July, we urged be withdrawn.

[3] For a description of Interpretive Bulletin 2016-01, see ICI Memorandum No. 30522, dated January 13, 2017, *available at* https://www.ici.org/my_ici/memorandum/memo30522.

[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] In the preamble, DOL asks "whether or how this proposal might influence plans' exercise of shareholder rights for SEC-registered funds, or their selection of such funds as plan investments, as well as comments on the costs and benefits associated with any such influence, such as impacts on the ability to achieve a quorum at shareholder meetings of such funds." 85 Fed. Reg. 55234.

[6] Attempting to minimize the likely increased costs of the new standards, the Proposed Rule would allow a fiduciary to use a "permitted practice." The three permitted practices described in the Proposed Rule include (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.