



Investing for a Sustainable Future

September 28, 2020

Jean Klinefelter-Wilson, Assistant Secretary
Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1210-AB91: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

Dear Assistant Secretary Klinefelter-Wilson,

I write today on behalf of First Affirmative Financial Network, LLC in response to the Department of Labor's above-referenced proposed rule (the "Proposal"). First Affirmative is an SEC registered investment advisor with oversight of approximately \$900 million in assets under management and advisement, including ERISA governed retirement plans. We consider the integration of environmental, social, and governance (ESG) issues, including proxy voting on behalf of our clients, to be a fundamental fiduciary duty to our clients and have been guided by this consideration since our inception in 1988.

We are dismayed that Department of Labor (DOL) has chosen to issue a second proposed rule, again with a scant 30 day comment period, that threatens to adversely impact our ability to properly assess and act upon long-term portfolio risks presented by corporate response to material ESG issues. Therefore, **our first request is that RIN 1210-AB91 be withdrawn. In the absence of such action we ask that the comment period be extended to 90 days.** We also offer the following comments, based on the minimal time with which the DOL has given us to evaluate the implications of this rule and to respond:

The DOL states that "It is likely that many of these Proposals have little bearing on share value or other relation to plan interests..." No data is provided to support this statement, and it directly contradicts a growing body of evidence that ESG issues do have bearing on value of both individual companies in the portfolio and on portfolio performance¹ — particularly when considering the long-term time perspective required when managing retirement assets. The DOL also states that the rule is needed because of "the recent increase in the number of environmental and social shareholder proposals introduced. Again, no data is provided to support this assertion. Regardless, an increase in the number of environmental and social proposals in and of itself is not sufficient cause to recommend not voting on them. And, although we cannot find the data that there is a recent increase in environmental and social proposals, we can certainly

¹ "ESG and financial performance: aggregated evidence from more than 2000 empirical studies" available at <https://www.tandfonline.com/doi/full/10.1080/20430795.2015.1118917>

document the increased shareholder **support** for these proposals² .

This increased support is reflective of increasing investor awareness and concern regarding emerging and growing systemic social and environmental risk factors with the potential to adversely impact plan assets. Such systemic risks call for a more nuanced approach to proxy voting than simply evaluating and attempting to specifically quantify impacts company by company. Prudent fiduciaries should evaluate proposals within the context of systemic risk and the potential for the issue to present significant long-term risk to the portfolio, and vote accordingly.

The Proposal's obligation on fiduciaries to determine if they should vote on a particular issue and document the calculations behind each and every vote is likely to be far more, rather than less, time-consuming and onerous than the efficient and effective policies and procedures currently have in place to vote proxies. It is not even clear precisely how such an analysis could be effectively conducted and what constitutes acceptable documentation to the DOL. What's more, this case-by-case analysis is not likely to lead to a better outcome for plan assets; again, such a narrow analysis would fail to capture the impacts of systemic risk to the portfolio.

We find the permitted practices suggested contrary to prudent fiduciary practice and/or in direct contradiction to the Proposal:

1. Vote proposals in favor of management — Encouraging a vote with management policy without appropriate due diligence is at odds with prudent fiduciary practice, regardless of the weight of the investment in the plan portfolio. In the absence of an evaluation, a fiduciary is not able to determine if such a vote is in the best interests of the plan and its beneficiaries.

2. A policy to vote only on particular types of proposals (corporate mergers and acquisitions, share buybacks, stock issuances, and proxy contests) — why are **ALL** types of proposals not subject to the requirements contained in this Proposal? For example, the Proposal states that **“A plan fiduciary must consider the likely impact that voting has on the investment performance of the plan based on such factors as the relative size of the plan's holdings and the costs involved.”** This constraint is equally relevant to a proposal of **any** type, and so such a policy would directly contradict what is seemingly a core premise of the Proposal — that fiduciaries **must not** vote on matters not economically relevant to the plan.

3. A policy of refraining from voting unless the plan holds a concentrated position in a company relative to the size of the plan's overall portfolio or relative to the plan's percentage of ownership in the company. The suggested cap on both measures is 5 percent. The DOL has not presented any data that would justify such a policy or quantify the impacts of a 5% cap should it be implemented broadly as policy. The suggested cap of 5% would likely eliminate virtually all proxy voting by ERISA plans, as only the very largest fiduciaries would meet or exceed such a cap for any holding. The DOL states that “Fiduciaries must act prudently and must diversify the plan's investments in order to minimize the risk of large losses.”³ Many fiduciaries find such concentrated positions of 5% or more of plan assets to not meet prudent diversification standards — making this permitted practice a de facto do not vote proxy voting policy.

As with the Department's ESG Proposal announced June 23rd, the Proposal relies on scant evidence and exhibits a fundamental misunderstanding of the importance fiduciaries and other investors place on voting proxies in order to communicate their preferences to company management. Without it, the investor voice

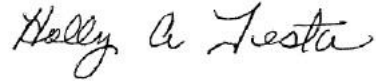
² FACT SHEET: Shareholder Proposal Trends, Sustainable Investments Institute (SI2), (January 2020). https://siinstitute.org/special_report.cgi?id=80

³ <https://www.dol.gov/general/topic/retirement/fiduciaryresp>

is greatly diminished, thus disenfranchising plan beneficiaries represented by this voice.

We once again urge you to withdraw this proposal. Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Holly A. Testa".

Holly A. Testa
Director, Shareowner Engagement

Cc:

Doug Lamborn, US Representative, Colorado District 5

Michael Bennett, US Senator, Colorado