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Submitted via the Federal eRulemaking Portal

Mr. Joe Canary, Director
Office of Regulations and Interpretation
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

Dear Director Canary:

We write in response to the Notice of Proposed Rulemaking Regarding Proxy Voting and Shareholder Rights published by the Department of Labor on September 4, 2020 (the "Proposed Rule"). The Proposed Rule would not benefit retirement plan participants and would create serious consequences for retirement plan fiduciaries.

Above all, it is clear that the Department has not gathered sufficient evidence—indeed, the Proposed Rule acknowledges there is no such evidence—about the actual scope and cost of plans' participation in proxy voting to justify imposing such sweeping regulation. And the Department's constricted, minimal 30-day comment period only exacerbates the impression that this is an unwarranted, rushed proposal timed for purposes other than the best interests of retirement plan participants.

By dictating fiduciaries' conclusions about what is and is not prudent, the Proposed Rule represents a dramatic departure from ERISA's bedrock principles—despite a dearth of evidence of any material risk to participants' interests. This directive would frustrate the responsible exercise of fiduciary discretion and impede participant interests. If it enacts the Proposed Rule, the Department will not only break new ground in terms of ERISA's statutory framework, but will embrace a standard of fiduciary conduct that is neither necessary nor advisable and has no clear precedent in any analogous areas of the law. The Department's erratic swings over the last several years on what constitutes, or is consistent with, fiduciary duty have muddied the waters for fiduciaries and undercut the need for commercial predictability. The Proposed Rule will only make this problem worse.

The Proposed Rule is Premature, Lacks any Evidentiary Record and Cannot Withstand Scrutiny under the Administrative Procedure Act. The Department acknowledges that there is no empirical data to substantiate either (1) that ERISA plans and their fiduciaries are burdened with unnecessary costs and responsibilities in connection with the voting of proxies; or (2) that significant changes in the way plans invest and in the capital markets more broadly will somehow lessen the (unsubstantiated) risk that a proxy vote will not benefit plan participants. In fact, the Department has advanced an expansive Proposed Rule with no supporting record whatsoever.

There is also no indication that retirement plan participants, fiduciaries or other industry stakeholders have highlighted this issue as a current priority; if this were truly such a problem, one would expect them to have expressed that view. The Department seems to have taken the silence of plan participants as a plaintive cry for help that only it can hear.

The Department's asserted concerns about proxy voting costs are entirely theoretical, and rely on mere conjecture that "actual total proxy voting costs *could be* substantially higher" and that "costs *may not be* justified."[1] Hypotheticals are not an adequate basis on which to impose extensive and burdensome requirements on retirement plan fiduciaries, and the lack of evidence warrants abandoning the Proposed Rule unless and until an appropriate record is established.

The Department's asserted concerns about the efficacy of proxy voting are equally ill-founded. Participating in the U.S. capital markets is essential for retirement plan fiduciaries to provide secure retirement income for participants. The success of these markets is premised on active shareholder engagement and supervision. While the Department questions the degree to which shareholder engagement directly affects investment values, it concedes that academic studies of this issue are inconclusive. When experts can reasonably come to differing conclusions on an issue, ERISA empowers fiduciaries to weigh the relevant facts and circumstances and determine the best interests of plan participants. The Department has not offered a defensible reason to depart from this longstanding principle.

The Department's asserted concerns are further undermined by the Proposed Rule itself. Notably, the Department aims to preclude shareholder engagement when there is purportedly no demonstration that the voting would further the investment performance of the plan, yet the Department proposes to explicitly permit such engagement when it is in accordance with management's recommendation. The Department's concerns about efficacy (unfounded as they are) are not even objective since they disappear so long as the vote aligns with management.

[1] Preamble to the Proposed Rule, 85 Fed. Reg. 55229 (Sept. 4, 2020).

The Administrative Procedure Act requires agencies to engage in reasoned decision-making, including collecting and examining relevant data, considering reasonable alternatives, and arriving at proposed regulations that are reasonable in light of the record.[2] Without reliable empirical evidence that the purported problems actually exist, the Proposed Rule is baseless and at best premature, and is not an appropriate exercise of the agency's authority under the APA. And the acknowledged lack of any evidentiary support for the Proposed Rule leaves it vulnerable to future challenges, and thus further clouds fiduciaries' expectations as to their proper role and the execution of their duties.

The Proposed Rule violates the fundamental precepts of the Administrative Procedure Act. It purports to be an "economically significant rule" that will have an estimated annual impact on the economy in excess of $100 million.[3] Yet it lacks any supporting record; the Department has not assessed, and the public cannot assess, whether the benefits of the intended regulation justify its costs.[4] That alone dooms the Proposed Rule under the APA.[5] Indeed, as the D.C. Circuit recently observed in a related context, "[i]f agencies were allowed to regulate in this way . . . the ramifications would be extraordinary."[6]

Moreover, allowing only 30 days to comment—instead of the 90 days that a proposed rule of this magnitude typically would be afforded—highlights the Department's lack of interest in proper consideration of the proposed rule. Ironically, the Proposed Rule is also replete with requests for data and information to fill in the missing support, which could not be satisfied in the minimal comment period afforded by the Department. And in any event, it is well-established that an agency may not adopt a rule in the hope that support will materialize after it takes effect.[7] That is a separate reason why the Proposed Rule will not be upheld.

The Proposed Rule Would Create Liability for Fiduciaries and Divert Limited Plan Resources. The Proposed Rule includes confusing and potentially contradictory substantive and procedural requirements, *obligating* fiduciaries to vote when doing so would have an economic impact on the plan while obligating them *not* to vote when doing so does not have an economic

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[2] *See, e.g.*, *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions.").

[3] *See* Preamble to the Proposed Rule, 85 Fed. Reg. 55227 (Sept. 4, 2020).

[4] *See, e.g.*, *New York Stock Exchange LLC v. SEC*, 962 F.3d 541, 545 (D.C. Cir. 2020) (invalidating rule that "impose[d] significant, costly, and disparate regulatory requirements on affected parties merely to allow the Commission to collect data to determine whether there might be a problem worthy of regulation"); *id.* at 555 (agency exceeded authority where it could not "reasonably assess the effects of [its] new Rule" and "ha[d] no real idea whether the data collected w[ould] be useful or to what end").

[5] *See State Farm*, 463 U.S. at 52 (agency may not "merely recite the terms 'substantial uncertainty' as a justification for its actions"); *New York Stock Exchange*, 962 F.3d at 556-57 (agencies may not "adop[t]" regulations "in search of regulatory problems to solve").

[6] *New York Stock Exchange*, 962 F.3d at 555.

[7] *See id.* at 545-46, 555-57.

impact on the plan. This vague mandate will create substantial uncertainty, distracting focus from core plan functions and exposing fiduciaries to costly and disruptive litigation.

To take one example, a plan fiduciary may be faced with a decision whether or not to vote on a shareholder proposal to approve an executive compensation package. Fiduciaries considering this proposal could reasonably reach different conclusions as to whether voting on this particular proposal would have an "economic impact" on the plan; indeed, they might reasonably reach different conclusions whether voting in *favor of* or *against* the proposal would have an economic impact on the plan. The notion that fiduciaries would have to justify each individual proxy voting decision based not on a prudent exercise of their fiduciary discretion in light of actual circumstances, but instead on an unworkable "economic impact" standard defies common sense.

As another more pernicious example, fiduciaries would face a Hobson's choice on ESG-related shareholder proposals. Under the Proposed Rule, must a fiduciary refrain from voting on an ESG issue because it might be difficult to measure the *short-term* economic impact on the plan? Or must a fiduciary *not* refrain from voting on that same issue because it might turn out to have a *longer-term* impact on the plan? And how does—or could—the fiduciary take into account the interests of the plan participants in reaching such a decision? As is evident, this rule would strip the fiduciary of its freedom to vote on critical issues, or if it did vote, leave it open to having to defend its actions in costly and complex subsequent litigation or investigations—the fear of which might chill it completely on these issues.

The Proposed Rule's puzzling mandate with respect to expert advice on proxy voting matters would exacerbate these concerns. ERISA requires a fiduciary to obtain expert advice on matters for which the fiduciary lacks the knowledge or skill necessary to satisfy the fiduciary standards of prudence and care. Many plan fiduciaries rely on the expertise of outside service providers to navigate the complex substantive and procedural issues that arise in matters of proxy voting. The Proposed Rule would impose an untenable burden on fiduciaries to micro-manage and second-guess their own experts; that would further undermine the fiduciaries' ability to meet their obligations. It is not reasonable, nor will it benefit Plan participants, to impair the relationship—and even create concerns over legal liability to each other—between fiduciaries and their expert advisers.

The Ambiguity of the Proposed Rule Will Chill Proxy Voting by ERISA Fiduciaries and Hinder Supervision of Plan Assets and the Functioning of the U.S. Capital Markets. Proxy voting plays a fundamental and crucial role in the supervision of public companies and the regulation of the capital markets, which in turn leads to greater retirement benefits for ERISA plan participants. In practical effect, the ambiguity introduced by the Proposed Rule would cause many ERISA fiduciaries to refrain from voting their shares, leaving a significant gap in corporate supervision and in the operation of the U.S. capital markets. In addition to hindering effective supervision of plan assets, this suppression of shareholder engagement would undermine the orderly functioning of the capital markets and the long-term security of participants' retirement incomes.

The Department's Stated Objectives Are Amply Addressed by Existing Law. The Proposed Rule is also a solution looking for a problem. ERISA's core fiduciary standards fully address the Department's stated objectives to protect participant interests, minimize plan expenses, monitor service providers, and avoid conflicts of interest. ERISA fiduciary duties are "the highest known to the law,"[8] and they have long served to safeguard participants in the fiduciary decisions of the greatest consequence to their interests.

Existing law is already well-designed to address the Department's concerns about potential conflicts of interest among third parties tasked with advising fiduciaries about proxy voting decisions. ERISA's existing regulations—the prohibited transaction rules—do not permit parties in interest (including service providers) to use plan assets for their own purposes. Moreover, the Department has broad statutory authority to investigate and take enforcement action against such conflicted parties and against fiduciaries who fail to satisfy their duties of loyalty and prudence.

The Proposed Rule Would Exacerbate the Problems It Seeks to Solve. The practical effect of the Proposed Rule is that it will force plans to spend plan assets to research and/or vote on proxy proposals, more than is already done. This will undoubtedly *increase* plan costs rather than reduce them.

To comply with the Proposed Rule, a plan fiduciary or its delegee would incur the costs of reviewing and, in some cases researching, each proxy proposal to determine whether it must vote or must not vote.[9] Those costs are exacerbated by the obvious difficulties of demonstrating which proposals "would have an economic impact on the plan"; reasonable minds will regularly disagree on that amorphous question. The fiduciary would also incur the administrative cost of documenting the rationale for each proxy voting decision, a new and unusual burden that the Department does not even attempt to justify. And the option to adopt proxy voting "policies" does not resolve the issue.[10] As the Proposed Rule makes clear, these policies would need to *limit* proxy voting, while requiring a truly prudent fiduciary to undertake continued efforts to consider whether each particular vote was in the economic interest of plan participants.

Moreover, the Department's proposed "policies" highlight the improvident, biased effects of the Proposed Rule. Consider the Department's stated objective of preventing conflicts of interest by persons who are tasked with proxy voting authority. The Proposed Rule impedes fiduciaries from engaging professional proxy advisory firms, who are not beholden to any special interests, while inviting plans to establish a policy of following the proxy voting

[8] *Id.* at 55221 (quoting *Tibble* v. *Edison Int'l,* 843 F.3d 1187, 1197 (9th Cir. 2016).

[9] *Compare* Proposed Rule Paragraph (e)(3)(i) ("A plan fiduciary must vote any proxy where the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan . . . .") *with* Proposed Rule Section (e)(3)(ii) (A plan fiduciary must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan . . . .").

[10] *See* Proposed Rule Paragraph (e)(3)(iii) ("plans may adopt proxy voting policies that voting authority shall be exercised pursuant to specific parameters reasonably designed to serve the plan's economic interest"); *id.* Paragraph (e)(3)(iii)(A) (approving policy to follow management recommendations).

recommendations of the corporate sponsor—who is undoubtedly an interested party with respect to the proxy vote. There are many instances in which the interests of corporate management may not align with the plan's interests, and the Proposed Rule cannot be reconciled with its putative goals. [11]

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In short, the Proposed Rule lacks any evidentiary basis and fails on its face to achieve its objectives. The implementation of the Proposed Rule would harm the interests of plan participants and undermine the healthy functioning of capital markets. Nor was there any pressing need to rush the process on such an important rule, an urgency which undercuts the rule's legitimacy and gives the appearance of the Department running a no-huddle offense for corporations before the election in November. We urge the Department to reconsider the Proposed Rule.

We appreciate the opportunity to submit this letter, and thank you in advance for your consideration of our comments. We would welcome the opportunity to discuss these issues with the Department, or to provide additional information.

Sincerely,

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[11] In suppressing proxy voting, and doing so in a way that is applauded in the executive suites of companies but was never asked for by plan participants, one cannot help but notice that this extraordinary step by the Department has come in near lockstep with the SEC's unsupported and rushed Proxy Advisor Rule, which was pushed through at the end of July 2020, and greeted with acclaim by the same audience. That step was followed by the SEC's adopted restrictions on the ability of shareholders to make proposals voted in on September 23, 2020. Both agencies have recently moved, together it appears, to cut off avenues of shareholder dissent and democracy and insulate corporate management.