SIERRA CLUB FOUNDATION

THE FOUNDATION FOR A HEALTHY PLANET.

October 1, 2020

VIA ELECTRONIC FILING

Jason A. DeWitt
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, Proxy Voting and Shareholder Rights NPRM

Dear Mr. DeWitt,

This comment is being submitted by the Sierra Club Foundation. The Sierra Club Foundation provides a 403(b) benefit to 9 employees. We are opposed to the proposed rule and request that it be withdrawn because the adoption of the rule may result in diminished risk-adjusted returns for our beneficiaries, thus defeating the purpose for which the rule was crafted in the first place.

The Foundation plan will from time to time hold shares of company stock, with attendant voting rights. We believe that we can prudently enhance returns for our beneficiaries by exercising our proxy privilege. The Proposed Rule places onerous conditions of documentation on our process, however, calling into question whether it will ever be feasible to vote without running afoul of the Proposed Rule. In this way the Proposed Rule has the effect of disenfranchising our plan, as well as thousands of other plans across America.

This issue has been well explained by other experts, as has the convoluted logic of the Rule itself.[1] We would instead like to comment specifically on the Department's biased and inaccurate view of environmental and social shareholder proposals, which has been asserted with zero evidence. The Department states that its concern that plans' voting costs sometimes exceed attendant benefits "has been amplified by the recent increase in the number of environmental and social shareholder proposals introduced. It is likely that many of these proposals have little bearing on share value or other relation to plan interests." Two references are cited to support the assertion that environmental and social shareholder proposals have little bearing on share value: a paper by Matsusaka et al, and one by Kalt et al. The former reference does not support the Department's assertion, and the latter is a biased, industry-produced public relations pamphlet.

The Matsusaka et al paper examined the stock reaction after a shareholder proposal was rejected by the SEC. It found that there was a slight improvement in stock price associated with the rejection, but the study lumped together proposals that concerned corporate governance issues as well as environmental and social proposals. When the study separated out environmental and social proposals, the authors were unable to draw any conclusions: "Overall, the

[1] Ann Lipton, "I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired (from typing)," September 4, 2020, available at https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+typepad%2FrMru+%28Business+Law+Prof+Blog%29.

results of these explorations do not lend themselves to strong conclusions….Although abnormal returns were positive on average when the SEC granted a no-action letter, we do not find the opposite pattern when the SEC allowed a proposal to go to a vote. In fact, the mean return associated with a decision to decline a no-action letter request is usually positive and often statistically different from zero.”[2] The Kalt et al paper was published by the National Association of Manufacturers, the lobbying group behind the notorious Main Street Investors Coalition, which folded after its involvement in the SEC fake letters scandal came to light.[3] It can hardly be termed a piece of serious scholarship.

On the other hand, the Department has ignored studies which indicate that the filing of environmental and social shareholder proposals, and engagement around environmental and social risks, may enhance plan returns. For example, Grewal et al found that “42 percent of the shareholder proposals in our sample are filed on material issues…a significant number of ESG proposals are financially material and associated with subsequent increases in market valuation.”[4] Dimson et al studied environmental and social engagements between investor coalitions and corporate targets, and observed “a significant increase in abnormal stock returns at target firms within three years after the engagement initiation, relative to the pre-engagement level for the subsample of engagements with lead investors.”[5] These studies are especially salient given the Department’s contention that “plans may incur substantially larger costs to exercise shareholder rights more vigorously, such as by sponsoring or campaigning for shareholder proposals. Such activities may deliver little or no benefit to plans because they concern issues that have little bearing on share value or other plan interests.” In fact, it would seem to be the case that filing environmental and social shareholder proposals, engaging about them, and supporting them in the proxy process actually **enhances** plan returns.

The Administrative Procedure Act prohibits regulations that are “unsupported by substantial evidence” or “unwarranted by the facts.”[6] In this regard the DOL, unless it withdraws this Proposed Rule, will continue the Trump administration’s dismal record of promulgating regulations that do not survive judicial review.[7]

Respectfully submitted,

Dan Chu
Executive Director, Sierra Club Foundation

[2] John G. Matsusaka, Oguzhan Ozbas, & Irene Yi, Can Shareholder Proposals Hurt Shareholders? Evidence from SEC No-Action Letter Decisions,U.S.C. CLASS Research Paper No. CLASS17-4 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881408, at 4.
3 “Senator chastises SEC Chair over ‘fake’ proxy letters,” 19 December 2019, available at https://www.manifest.co.uk/senator-chastises-sec-chair-over-fake-proxy-letters/.
[4] Grewal, Jyothika and Serafeim, George and Yoon, Aaron, Shareholder Activism on Sustainability Issues (July 6, 2016). Available at SSRN: https://ssrn.com/abstract=2805512, at 4.
[5] Dimson, Elroy and Karakaş, Oğuzhan and Li, Xi, Coordinated Engagements (July 1, 2020). Available at SSRN: https://ssrn.com/abstract=3209072, at 7.
[6] Todd Garvey, “A Brief Overview of Rulemaking and Judicial Review,” Congressional Research Service, March 27, 2017, at 13. Available at https://fas.org/sgp/crs/misc/R41546.pdf.
[7] The Institute for Policy Integrity, “Roundup: Trump-Era Agency Policy in the Courts,” available at https://policyintegrity.org/?ACT=69&path=trump-court- roundup%2Fpdf&size=letter&orientation=portrait&key=deregulation-roundup&attachment=1&compress=1&filename=.