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

Ladies and Gentlemen:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments to the Department of Labor (Department) on a proposed rule (Proposal) that would amend the Department's regulations to add requirements concerning a fiduciary's proxy voting activity and exercise of other shareholder rights under the Employee Retirement Income Security Act of 1974 (ERISA). The Proposal would incorporate revisions to the "investment duties" regulation that would address (i) the application of the prudence and exclusive purpose duties under ERISA to the exercise of shareholder rights (including proxy voting), (ii) the use of written proxy voting policies and guidelines, and (iii) the selection and monitoring of proxy advisory firms.[2] The Proposal is intended to underscore that the economic interests of retirement plan participants and beneficiaries (collectively, retirement investors) must be the basis of fiduciary decision-making. In this regard, the Proposal specifically requires that fiduciaries carry out their duties relating to proxy voting and other exercise of shareholder rights prudently and solely for the economic benefit of retirement investors.

The Proposal parallels the Department's recently proposed rule, *Financial Factors in Selecting Plan Investments* (ESG Proposal), which requires plan fiduciaries to select investments and investment courses of action based solely on financial considerations that are relevant to the risk-adjusted economic value of a particular investment or investment course of action.[3] On July 30, 2020, we filed a comment letter recommending that the Department withdraw the ESG Proposal

[1] The American Bankers Association is the voice of the nation's $21.1 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $17 trillion in deposits, and extend nearly $11 trillion in loans. Learn more at www.aba.com.
[2] *See* 85 *Fed. Reg.* 55,219 (2020) (Proposal). *See also* 29 C.F.R. § 2550.404a-1 (investment duties regulation).
[3] *See* U.S. Department of Labor, Financial Factors in Selecting Plan Investments, 85 *Fed. Reg.* 39,113 (2020). We refer to the proposal as the "ESG Proposal" since it purports to circumscribe investments that take into account environmental, social, and corporate governance (ESG) considerations and related forms of economically targeted investing. *See id.* at 39,115-16.

on the basis that it was not only unnecessary, but also potentially inconsistent with ERISA and unduly burdensome to affected parties.[4]

Similarly, we believe that the instant Proposal – particularly key provisions that purport to address economic interests and benefits – is over-prescriptive, needlessly creates compliance complexity and uncertainty, and increases regulatory burdens and costs, thereby creating undue and unmanageable fiduciary liability and litigation risks without any tangible benefit to plans. Affected fiduciaries will include, among others, our bank members that act as service providers for defined contribution plans or manage collective investment funds (CIFs) on behalf of retirement investors. We are also concerned about the Department's inadvertent creation of regulatory conflicts arising from possible inconsistencies with requirements and/or expectations of the Office of the Comptroller of the Currency (OCC) concerning CIF administration, as well as federal and state fiduciary law requirements applicable to bank CIFs.[5] We further believe that the Department's regulatory impact analysis is fatally and legally insufficient and, therefore, fails to justify the Proposal.

We recommend, therefore, that the Department withdraw the Proposal and re-propose an amended version that is significantly less rigid and complex and that does not unnecessarily diminish a fiduciary's discretionary authority to prudently vote (or not vote) proxies after considering all relevant facts and circumstances. If the Department does not withdraw the Proposal, then we request that the Department adopt the recommended modifications to the Proposal as described below which, if adopted in their entirety, would (i) achieve the Department's goal to formalize regulatory guidance on proxy voting, (ii) provide compliance certainty, (iii) minimize additional regulatory burdens and costs, and (iv) avoid unintended adverse consequences for fiduciaries, plans, and retirement investors. For your reference, we have included as an attachment to the letter (Attachment A) our recommended revisions to the Proposal (ABA Mark-Up).[6]

I. <u>The Proposal</u>.

In the preamble to the Proposal (preamble), the Department states that it has issued the Proposal in response to: (i) significant changes in plan investing and global investing generally since the Department first addressed proxy voting and the exercise of shareholder rights, (ii) a "persistent misunderstanding" among some stakeholders that fiduciaries must vote all proxies, and (iii) recent actions by the Securities and Exchange Commission (SEC) in connection with the proxy voting process.[7] The Department then describes the chronology of its evolving views on proxy voting activity and, in particular, socially directed proxy voting initiatives. In Interpretive Bulletin 94-2 (IB 94-2), Department staff took the position that fiduciaries may engage in shareholder activities intended to influence corporate management where "the fiduciary

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[4] *See* ABA Letter to Department on ESG Proposal (July 30, 2020).

[5] For example, it is not clear that the OCC would agree with the Department's position in the Proposal that a national bank trustee of a CIF should, in managing the CIF's portfolio, attempt "to reconcile, insofar as possible, the conflicting [investment] policies [of plans]" – which inevitably may favor some plans over others – as this position may be inconsistent with OCC expectations regarding that bank's treatment of CIF participants. *See* 29 C.F.R. § 2550.404a-1(e)(4)(ii) (proposed).

[6] Attachment A includes a redlined version showing the revisions and additions that we would make to the Proposal.

[7] *See* 85 *Fed. Reg.* at 55,220.

concludes that, after taking into account the costs involved, there is a reasonable expectation that such shareholder activities (by the plan alone or together with other shareholders) will enhance the value of the plan's investment in the corporation."[8]

In October 2008, the Department superseded IB 94-2 with Interpretive Bulletin 2008-02 (IB 2008-02), which stated that votes shall be cast only in accordance with a retirement plan's economic interests. As stated in the preamble:

> *The Department also reiterated in IB 2008-02 that any use of plan assets by a plan fiduciary to further political or social causes "that have no connection to enhancing the economic value of the plan's investment" through proxy voting or shareholder activism is a violation of ERISA's exclusive purpose and prudence requirements.*[9]

In 2016, the Department again shifted its position by withdrawing IB 2008-02 and replacing it with Interpretive Bulletin 2016-01 (IB 2016-01), which generally reinstated IB 94-2. Among other things, IB 2016-01 clarified that a fiduciary's shareholder engagement could include the monitoring and communication with management on such issues as "plans on climate change preparedness and sustainability . . . and policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance."[10] In doing so, the Department stated that the "existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on ESG issues."[11] Therefore, IB 2008-02 is "out of step" with domestic and international investment trends that may potentially dissuade fiduciaries from voting proxies "that are increasingly being recognized as important to long-term shareholder value."[12]

The Proposal represents the Department's new and prevailing thinking on proxy voting in light of ERISA's mandate that fiduciaries "discharge their duties 'solely in the interest' and 'for the exclusive purpose' of providing benefits to participants and their beneficiaries."[13] The Department's latest position seeks to reject any use of plan assets "that would permit plan fiduciaries to expend trust assets to promote myriad public policy preferences, including through shareholder engagement activities, voting proxies, or other investment policies."[14] Therefore, since IB 2016-01 "no longer represents the view of the Department," the agency intends to replace IB 2016-01 with the Proposal, which would install a highly prescriptive regulatory scheme for plan fiduciaries' proxy voting and other exercise of shareholder rights.[15]

We do not object to the Department's goal of codifying principles-based language, such as stating that part of a fiduciary's duty to prudently manage plan investments in shares of stock

[8] *See id.*
[9] *Id.* at 55,221.
[10] IB 2016-02.
[11] *Id.*
[12] *Id.*
[13] 85 *Fed. Reg.* at 55,221.
[14] *Id.*
[15] *Id.*

includes the duty to determine whether and how to vote proxies in the interests of retirement investors, and for the exclusive purpose of providing benefits to them and to defray reasonable expenses. The Department, moreover, could neatly clarify that such duty does not necessitate the voting of any or every proxy, which would address a primary agency concern. We further are not opposed to language clarifying that voting authority may be delegated to an investment manager, or to the Proposal's inclusion of "permissible policies" that act as optional safe harbors for a fiduciary's prudent exercise of proxy voting discretion. We believe such principles-based provisions would provide a useful roadmap for ascertaining regulatory expectations and fiduciary compliance.

If enacted in its current form, however, the Proposal would institutionalize an unworkable regulatory structure for fiduciary proxy voting governance that would inhibit, rather than advance, the economic interests of and benefits to plans and their retirement investors. As drafted, for example, the Proposal would formalize an intense, laborious, and costly deliberative process on proxy voting responsibilities that, for the reasons described herein, would likely be impractical, if not impossible, for fiduciaries to achieve. Consequently, as the Department itself acknowledges, a fiduciary would essentially be compelled to adopt one or more of the Proposal's "permissible practices," which would limit the fiduciary's ability to exercise its discretionary authority to select a prudent course of action that is tailored to all relevant facts and circumstances, as required by ERISA. Not only does this needlessly restrict proxy voting activity, but it may also lead to the establishment and implementation of investment policies that are inconsistent with fiduciary duties on prudent investing under ERISA. Further, the resulting disincentive to vote proxies ultimately may work only to disenfranchise ERISA plan voters, diminishing a fiduciary's ability to pursue the financial interests of plans and their retirement investors while enhancing the voting power of non-plan voters to advance their own agendas, *including non-financial agendas*.

II. ABA Recommendations for Proposal.

A. Investment Managers of Pooled Investment Vehicles:

Delete proposed paragraph (e)(4)(ii) and revise proposed paragraph (e)(4)(i)(B) to explicitly cover investment managers for pooled investment vehicles that hold plan assets.

Our members include banks that act as investment managers of pooled investment vehicles, (*e.g.*, sponsors, trustees, and administrators of CIFs). CIFs are widely used as investments by ERISA-governed plans (participating plans) as a means to achieve their investment objectives and for diversification of invested assets. Under the terms of the trust that establishes the CIF, the bank trustee of the CIF generally has full responsibility and authority for proxy voting (and for the exercise of other shareholder rights) with respect to all of the trust's securities and other assets. In the case of CIFs and other pooled vehicles that hold ERISA plan assets, the bank or registered investment adviser that manages the CIF or other pooled vehicle acts as an investment manager pursuant to section 403(a)(2) of ERISA with respect to the ERISA plan assets invested in that CIF or other pooled vehicle.

The Proposal states that "[a]n investment manager of a pooled investment vehicle that holds assets of more than one plan may be subject to an investment policy statement that conflicts with the policy of another plan," and that in such cases, ERISA requires the manager to "reconcile, insofar as possible, the conflicting policies."[16] In the case of proxy voting, the Proposal further states that "the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle."[17] The Proposal would permit the investment manager to require participating plans to accept the investment manager's investment policy as a condition of investment, however. In such case, a fiduciary would be required to assess whether the investment manager's investment policy, including any proxy voting policy, is consistent with ERISA (including the provisions of the Proposal) before deciding to retain the investment manager.

This approach does not accurately reflect industry standard practice and could result in conflicting or misinterpreted regulatory expectations. We are generally not aware of any CIFs or other pooled investment vehicles that do not have their own investment objectives, guidelines, and/or policies that must be accepted as a condition for investment, since it would be completely impractical (if not impossible) for the manager of a pooled investment vehicle to comply with multiple (and potentially conflicting) investment policies. Moreover, as noted above, typically the governing documents for CIFs (and other pooled vehicles that hold ERISA assets) provide that the trustee or investment manager with authority to manage the assets pursuant to section 403(a)(2) has full authority to vote proxies on securities in the CIF's or other pooled vehicle's portfolio because proportionate voting of proxies may be impractical. We recommend, therefore, that the Department delete proposed paragraph (e)(4)(ii) and revise proposed paragraph (e)(4)(i)(B) to reflect the industry standard practice followed by investment managers for CIFs and other pooled investment vehicles that hold ERISA plan assets. This change, if adopted, would be entirely consistent with ERISA and avoid the confusion arising from the Department's proposed approach.

B. Requirement to Consider Economic Interests of, and Benefits to, the Plan:

Delete the requirements throughout the Proposal (including, without limitation, in paragraph (e)(2)(ii)) that a fiduciary act solely in accordance with the economic interest of, and benefits to, the plan and its participants and beneficiaries because this is overly rigid (imposing a standard that is impossible to meet in practice), vague (and therefore subject to compliance uncertainty), increases regulatory burden and costs, and exposes the fiduciary to undue and unmanageable liability and litigation risks.

In addition to certain principles-based standards, the Proposal sets forth specific requirements that fiduciaries are required to meet when deciding whether and when to exercise shareholder rights, including proxy voting. In particular, fiduciaries must "act solely in accordance with the economic interest of the plan considering only factors that they prudently determine will affect the economic value of the plan's investment based on a determination of risk and return over an appropriate investment horizon consistent with the plan's investment objectives and the funding

[16] 29 C.F.R. § 2550.404a-1(e)(4)(ii) (proposed), 85 *Fed. Reg.* at 55,243.
[17] *Id.*

policy of the plan."[18] Other provisions of the Proposal likewise require the fiduciary to consider the economic interests and benefits to the plan and the plan's retirement investors. Indeed, the Proposal states that the fiduciary *must vote any proxy* where the fiduciary determines that the matter being voted on would have an economic impact on the plan and *must not vote any proxy unless* the matter being voted on would have such economic impact.[19] The terms "economic interest," "economic benefit," and "economic impact" are not defined in the Proposal.

The Proposal's emphasis on "economic" interests, benefit, and impact are over-prescriptive and are likely to significantly raise the costs involved in research on proxy issues and in making proxy voting determinations. The absence of a definition of "economic" in the Proposal, when paired with such words as "interest," "benefits," and "impact," results in vague prescriptions that cloud regulatory expectations and challenge compliance certainty. This further raises undue and unmanageable liability and litigation risks for fiduciaries that attempt to engage in proxy voting by taking a "prudent" leap into the "economic" unknown. The Proposal's requirements, in fact, appear written to encourage a fiduciary to abstain from proxy voting altogether, since it is unclear how to identify or measure an "economic" interest or benefit to, or impact on, the plan in connection with any particular vote. Further, some votes, such as those supporting good corporate governance practices (*e.g.*, election of outside directors) may not have an immediately measurable economic effect, but still be in the interest of retirement investors. Given the foregoing and the lack of regulatory clarity, it is not surprising that the Department simply expects that "most, if not all plans, will adopt policies that utilize the [Proposal's] permitted practices."[20]

We further believe that the Department's economic-based restrictions are not necessary since all plan proxy voting is subject to ERISA's requirement to always put the interests of the retirement investors first. These restrictions will inhibit fiduciaries from voting proxies generally (at least outside the safe harbors), even when the interests of retirement investors would tend to encourage voting. In some cases, for example, such as where a plan has selected an index-based strategy and the responsible fiduciary thus may be constrained in its ability to sell an investment, voting proxies may take on additional importance for investment protection and preservation. In any event, it would be impossible for the Department to describe all situations (and provide related safe harbors) where proxy voting relates (or does not relate) to the economic interests of the plan.

In sum, we believe the Department's emphasis on "economic" interests, benefits, and impact as a means to regulate proxy voting is misplaced and imposes a rigid and unworkable standard that is impractical, if not impossible, to meet in practice. We recommend, therefore, that the Department delete from the Proposal all provisions that require the fiduciary to solely consider economic factors (*i.e.*, economic interests, benefits, impact, etc.) in determining whether or when to engage in proxy voting on behalf of a plan and its retirement investors.

[18] 29 C.F.R. § 2550.404a-1(e)(2)(ii) (proposed), 85 *Fed. Reg.* at 55,242.
[19] 29 C.F.R. § 2550.404a-1(e)(3)(i) & (ii) (proposed), 85 *Fed. Reg.* at 55,242. *See* Discussion in Section II.I., *infra*.
[20] 85 *Fed. Reg.* at 55,232.

C. Reference to "Other Shareholder Rights" in Addition to Proxy Voting:

Delete references throughout the Proposal of a fiduciary's "exercise of shareholder rights" in addition to proxy voting since such rights are distinct from proxy voting, are not substantively addressed in the Department's proposal, and are not necessarily tied to "economic" benefits or value.

Throughout the Proposal, reference is broadly made to the "exercise of shareholder rights" in addition to proxy voting, when in fact the Proposal's requirements focus *exclusively* on proxy voting. Other shareholder rights, however, do not necessarily share the same objectives as those of proxy voting in connection with stock ownership. Moreover, the exercise of such other rights, which can include such disparate things as inspecting the issuer's corporate record books and participating in corporate actions taken by the issuer, is substantively separate and distinct from proxy voting. Decisions on corporate actions like stock splits, tender offers, exchange offers on bond issues, and mergers and acquisitions are generally not governed by proxy voting policies or undertaken with advice from proxy voting advisers. For this reason, the treatment of other shareholder rights should not be coupled with proxy voting in the regulation.

Thus, we recommend that the Department delete from the Proposal all references to the "exercise of shareholder rights" and focus only on proxy voting, including the decision of whether to exercise voting rights.

D. Clarification of Fiduciary Duties on Proxy Voting:

Clarify in proposed paragraph (e)(2)(i) that a fiduciary may make a prudent determination not to vote every proxy, based on general fiduciary principles.

The Department states in the preamble that there is a "persistent misunderstanding" and a "misplaced belief" among some stakeholders that fiduciaries must vote all proxies to satisfy ERISA requirements.[21] We are not aware of any such concerns among plans and their investment managers and service providers, and the preamble does not appear to cite any supporting data. Nevertheless, in issuing the Proposal, "the Department wishes to be clear: there is no fiduciary mandate under ERISA to vote proxies appurtenant to shares of stock."[22] Although the Department states that "[it] has tried to convey in its sub-regulatory guidance that fiduciaries need not vote all proxies," the Department did not include in the Proposal a statement that proxy voting is not required in every circumstance.[23] Given the Department's objective to dispel any notion that all proxies must be voted, we recommend that language be added at the end of proposed paragraph (e)(2)(i) to clarify that, under appropriate facts and circumstances, a fiduciary may make a prudent determination to not vote a proxy based on the general fiduciary principles set forth in section 404(a) of ERISA.

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[21] *Id.* at 55,220.
[22] *Id.* at 55,223.
[23] *Id.* at 55,221 and 55,230.

E. **<u>Requirement to Consider Likely Impact on Investment Performance of Plan</u>:**

<u>Delete the requirement in proposed paragraph (e)(2)(ii)(B) that a fiduciary be required to consider the likely impact on the investment performance of the plan since this would often defy meaningful measurement, and would add unnecessarily to the regulatory burden and costs.</u>

In deciding whether and when to exercise rights to vote proxies, a fiduciary is required under the Proposal to consider the impact on the investment performance of the plan based on such factors as (i) the size of the plan's holdings in the issuer relative to the total investment assets of the plan, (ii) the plan's percentage ownership of the issuer, and (iii) the costs involved.[24] This requirement apparently is part of the "economic" impact analysis that fiduciaries must undertake under the Proposal. The Department, however, has provided no basis or explanation for this requirement to consider the impact on investment performance. It will often be impractical, if not impossible, to measure the impact of any given vote on investment performance in any meaningful way (*e.g.*, a "say on pay" vote could lead to cost savings, but the resulting effect on share price, if any, would not be measurable, given the numerous variables underlying share prices).

Moreover, as a matter of investment policy and practice, plans do not generally make or retain significant investments in any particular issuer, whether measured in terms of size of the plan holdings or in the percentage ownership in an issuer that would allow plans individually to control the likely outcome of a given vote.[25] The Department has confirmed this by citing federal government statistics showing that the share of individual stock holdings in private pension funds has declined to 5% (from 22% in 1985) and the percentage of ERISA plan assets invested in corporate debt and equity instruments has declined to 11% (down from 27% in 1993).[26] The requirement to consider the impact on investment performance thus would needlessly and unjustifiably increase regulatory burdens and costs. We recommend, therefore, that the Department delete this provision from the Proposal.

F. **<u>Requirement to Investigate Material Facts Forming Basis of Proxy Vote</u>:**

<u>Delete the requirement in proposed paragraph (e)(2)(ii)(D) that a fiduciary investigate material facts that form the basis for any particular proxy vote as this is over-prescriptive and unnecessarily increases the regulatory burden and costs</u>.

The Proposal further would require fiduciaries to investigate material facts that form the basis for any particular proxy votes (or other exercise of shareholder rights), with the "understanding that certain proposals may require a more detailed or particularized voting analysis."[27] This is purportedly consistent with the Department's view that "fiduciaries must be prepared to

[24] 29 C.F.R. § 2550.404a-1(e)(2)(ii)(B) (proposed), 85 *Fed. Reg.* at 55,242.
[25] The requirement under ERISA to diversify plan investments in section 404(a)(1)(C) generally ensures this result. *See* 29 U.S.C. § 1104(a)(1)(C).
[26] *See* 85 *Fed. Reg.* at 55,221-22.
[27] *See* 29 C.F.R. § 2550.404a-1(e)(2)(ii)(D) (proposed) and 85 *Fed. Reg.* at 55,224.

articulate the anticipated economic benefit of proxy-vote decisions in the event that they decide to vote."[28] The Department also appears to expect that fiduciaries generate and maintain records to show the course and results of any such investigation.[29]

Not every proxy vote, however, necessarily requires the resources and expense of an investigation. There may be instances where routine or recurring proxy votes, such as annual proxy votes on the same subject matter, may not require a separate and distinct investigation in order for a fiduciary to prudently determine whether and when to vote. The Department has declared that the Proposal "is intended to . . . ensure ERISA fiduciaries execute shareholder rights in an appropriate and *cost-efficient* manner."[30] Yet, this investigation requirement would impose unnecessary costs on plans. We recommend, therefore, that the Department delete this provision from the Proposal.

G. Recordkeeping Requirement:

Simplify the recordkeeping mandate in proposed paragraph (e)(2)(ii)(E) and (e)(2)(iii) by requiring only that fiduciaries undertake prudent efforts to maintain accurate records reflecting proxy voting activities and other exercises of shareholder rights or, in the case of paragraph (e)(2)(iii), require such other persons to do so.

A fiduciary would be required under the Proposal to maintain records on proxy voting activities, including records that demonstrate the basis for particular proxy votes.[31] Where the fiduciary has delegated the authority to vote proxies to an investment manager or proxy voting firm, the fiduciary must require the investment manager/proxy voting firm to document the rationale for proxy voting decisions or recommendations.[32] These are unnecessarily prescriptive and costly requirements, particularly given the volume, specificity, and variety of proxy issues which confront fiduciaries annually. We recommend that the Department simplify the recordkeeping requirement by requiring only that fiduciaries undertake prudent efforts to maintain accurate records that include proxy voting activities and other exercises of shareholder rights, and where voting authority is delegated, to require the same of investment managers and proxy voting firms.

H. Selection and Monitoring of Service Providers and Proxy Advisory Firms:

Simplify the provisions on the selection and monitoring of service providers and proxy advisory firms by deleting the illustrative list of services in proposed paragraph (e)(2)(ii)(F) and eliminating the documentation requirement in proposed paragraph (e)(2)(iii).

[28] 85 *Fed. Reg.* at 55,224.
[29] *See* Section II.G., *infra.*
[30] 85 *Fed. Reg.* at 55,231. [Emphasis added.]
[31] *See* 29 C.F.R. § 2550.404a-1(e)(2)(ii)(E) (proposed), 85 *Fed. Reg.* at 55,242.
[32] *See* 29 C.F.R. § 2550.404a-1(e)(2)(iii) (proposed), 85 *Fed. Reg.* at 55,242.

As part of its duties under the Proposal, a fiduciary must exercise prudence and diligence in the selection and monitoring of any persons appointed to advise or assist the fiduciary with the exercise of voting proxies, such as in providing (i) recommendations regarding proxy votes, (ii) research and analysis, (iii) administrative services in connection with proxy voting, and (iv) recordkeeping and reporting services.[33] Where authority to vote proxies has been delegated to an investment manager or proxy voting firm, the Proposal further directs the fiduciary to require such manager or firm to document the rationale for proxy voting recommendations or decisions sufficient to demonstrate that the decision or recommendation was based on the expected economic benefit to the plan and made solely in the interests of the retirement investors in obtaining financial benefits.[34] This requirement is "to ensure such entities are voting, or refraining from voting, in a manner that maximizes investment returns and does not sacrifice economic benefits for non-pecuniary objectives."[35]

Since fiduciaries are already required under ERISA to monitor proxy voting decisions that have been delegated to a third party, the Proposal's delegation requirements appear exceedingly pedantic. It is not necessary for the Department to codify an itemized list of duties that fiduciaries routinely delegate to investment managers and proxy voting firms. In doing so, the Proposal in any event fails to specify which types of services may be necessary or appropriate for a particular proxy voting activity. This omission may lead to confusion or uncertainty over regulatory expectations regarding any delegation of these fiduciary responsibilities to a third party.

Moreover, the documentation provision that requires a written rationale and justification for each and every proxy vote, recommendation, or decision of a third party delegatee (including on routine and recurring matters) is similarly over-prescriptive, unnecessarily contributes to regulatory burden and costs, and may simply result in an abandonment of voting rights, given the volume, specificity, and variety of proxy voting opportunities arising in the market. It further does not reflect general industry practice that proxy voting rights are to be exercised in accordance with approved proxy voting guidelines where, generally, only votes *contrary* to such policies warrant specific documentation.[36] We recommend, therefore, that the Department streamline the fiduciary delegation provisions by deleting both the illustrative list of services in proposed paragraph (e)(2)(ii)(F) and the documentation requirement in proposed paragraph (e)(2)(iii).

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[33] *See* 29 C.F.R. § 2550.404a-1(e)(2)(ii)(F) (proposed), 85 *Fed. Reg.* at 55,242.
[34] *See* 29 C.F.R. § 2550.404a-1(e)(2)(iii) (proposed), 85 *Fed. Reg.* at 55,242.
[35] 85 *Fed. Reg.* at 55,224.
[36] Specifically, a fiduciary generally engages a proxy advisory firm, under contract and for an all-inclusive fee, to provide voting recommendations and the supporting research. Although the fee may be based on the volume of proxies voted, there is generally no separate fee charged for individual proxies. From this perspective, there are no incremental costs associated with voting a shareholder proxy – the fee is already fixed and paid. On the other hand, requiring discrete documentation for each individual proxy vote as required under the Proposal would require unbundling the fee paid to, and services provided from, proxy advisory firms and would likely necessitate a significant restructuring of the fiduciary-proxy advisory firm relationship in the ERISA marketplace.

I. <u>Requirement to Vote/Not Vote Proxies</u>:

<u>Delete proposed paragraphs (e)(3)(i) and (ii) which describe the conditions under which a fiduciary must vote, or refrain from voting, any proxy. Instead, allow the fiduciary, under proposed paragraph (e)(2) to prudently make a facts-and-circumstances determination of whether or not to vote, consistent with the principles-based approach of ERISA.</u>

The Department asserts in the preamble that "there will be circumstances when fiduciaries are required to vote a proxy and there will be circumstances when a fiduciary is required not to vote a proxy."[37] The Department again links this determination with whether the subject matter of the proxy vote would have an economic impact on the plan. Consequently, the Proposal mandates when a fiduciary *must* vote a proxy and when a fiduciary *must* <u>*not*</u> vote a proxy, in both instances driven wholly by a consideration of measurable economic factors.

This is a heavy-handed approach to proxy voting regulation that unnecessarily exposes the fiduciary to a host of liability, compliance, and examination risks. There may be instances, for example, where a fiduciary may be asked to vote on routine or recurring matters that would not implicate the need for the fiduciary to undertake the cost of separately weighing the economic impact on the plan and its retirement investors. Under the Proposal, however, the fiduciary would be required to undertake an economic impact analysis – in advance and for an unknown cost – on the issue that is the subject of the proxy vote in order to even consider voting. This amounts to a "poll tax" on proxy voting. Ironically, the fiduciary may not discover until *after* the analysis is performed that the costs involved in determining whether to vote outweigh the economic benefits to the plan. This places fiduciaries in an untenable "Catch 22" situation, forcing them to take action while subjecting them to personal liability simply for doing so.

These provisions thus serve to actively discourage proxy voting activity altogether in favor of reliance on a "permitted practice," even where the fiduciary has concluded that voting on a certain matter may be consistent with its fiduciary duty to act in the best interests of the plan and its retirement investors, regardless of whether economic factors are considered. We recommend, therefore, that the Department delete paragraphs (e)(3)(i) and (ii) from the Proposal and instead allow the fiduciary, under proposed paragraph (e)(2), to prudently make a facts-and-circumstances determination of whether or not to vote, consistent with the principles-based approach of ERISA.

J. <u>Permitted Policies</u>:

(i) <u>Modify the language in each of the three permitted policies in proposed paragraph (e)(3)(iii) to allow the fiduciary the discretion to prudently determine an appropriate course of action with respect to voting on a particular issue</u>.

[37] 85 *Fed. Reg.* at 55,225.

(ii) **Add a permitted policy that would allow the fiduciary to vote proxies where such voting would not result in material additional costs to the plan.**

(iii) **Clarify that the permitted policies are non-exclusive, do not imply that different approaches are inconsistent with ERISA, and that compliance may be achieved by adopting one or more policies not identified and described in the Proposal.**

(iv) **Refer to and treat the permitted policies as safe harbors.**

As explained above, in using the Proposal to construct a novel "economic benefit" paradigm for proxy voting, the Department has correspondingly erected cost barriers for fiduciaries seeking to exercise proxy voting rights on behalf of plans.[38] The Department openly concedes that, under this new construct, "the costs for fiduciaries to prudently exercise proxy voting rights often will exceed any potential economic benefits to the plan,"[39] The Department, in other words, expressly acknowledges that prudently *fulfilling* the fiduciary duty to vote proxies paradoxically may result in a *breach* of fiduciary duty where the costs of voting, which may not be known in advance, outweigh the economic benefits.

In order to address this anomalous outcome, the Department has proposed so-called "permitted practices" (policies) by which fiduciaries may "cost-effectively comply" with the new obligations under the Proposal (*i.e.*, paragraphs (e)(3)(i) and (ii) – see discussion in Section II.I., above). Specifically, the Proposal provides for three policies that a fiduciary may adopt and apply to its proxy voting practices. The relevant provision allows for the adoption of (i) a policy of voting proxies generally in accordance with the voting recommendations of an issuer's management, (ii) a policy of voting only on particular types of proposals that are substantially related to the issuer's business activities, and (iii) a policy of refraining from voting on proposals when the plan's holding in the issuer relative to the plan's total investment assets is below a certain fiduciary-determined threshold.[40] A new paragraph (e)(3)(v) is added to ensure that such proxy voting policies would not preclude a fiduciary from voting, or refraining from voting, in any particular case in which the fiduciary "determines that the matter being voted upon would have an economic impact on the plan."[41]

These policies would assist fiduciaries that would find it problematic to comply with the Proposal's proxy voting requirements. The exception or "escape valve" available under paragraph (e)(3)(v), however, is not broad enough. It should expressly permit fiduciaries the flexibility to consider any prudent alternative courses of action for any particular proxy issue that may otherwise fall within the description of a permitted practice.

We recommend, therefore, that the Department expressly allow the fiduciary to choose any prudent alternative to the described safe harbor policies. This will avoid "one-size-fits-all"

[38] *See* Discussion in Section II.I., *supra.*
[39] 85 *Fed. Reg.* at 55,225.
[40] *See* 29 C.F.R. § 2550.404a-1(e)(3)(A)-(C) (proposed), 85 *Fed. Reg.* at 55,242.
[41] 29 C.F.R. § 2550.404a-1(e)(3)(v) (proposed), 85 *Fed. Reg.* at 55,242.

determinations. We recommend further that the Department adopt an additional "permitted practice" in the form of a policy that authorizes the fiduciary the flexibility to vote proxies where the fiduciary reasonably determines that voting would not result in material additional costs to the plan (*e.g.*, where a manager will determine whether and how to vote proxies for its other funds or clients, regardless of whether plans are included in the vote).[42] We also recommend that the Department reinforce the foregoing by expressly clarifying that the permitted policies described are non-exclusive, do not imply that different approaches are inconsistent with ERISA, and that compliance may be achieved by adopting one or more policies not identified and described in the Proposal. Finally, for regulatory clarity and consistency, we recommend that the Department refer to and treat these "permitted practices" as safe harbors.

K. Responsibility for Voting Proxies.

Add language to proposed paragraph (e)(4)(i) to reflect that, in participant directed plans, the trustee shall be responsible for voting proxies solely as directed by plan participants.

The Proposal includes a provision that identifies the parties responsible for voting proxies and exercising other shareholder rights. Specifically, paragraph (e)(4)(i) of the Proposal states that the responsibility lies exclusively with the plan trustee except to the extent that (i) the trustee is subject to the directions of a named fiduciary, or (ii) the power to manage, acquire, or dispose of the assets has been delegated by a named fiduciary to an investment manager.[43] This section, however, omits voting responsibility with respect to participant-directed plans (*e.g.*, through brokerage windows) that provide for participant voting of proxies. The Department, therefore, should add language to this paragraph stating that, for such participant-directed plans, a trustee's responsibility for exercising proxy voting shall be in accordance with the investment directions of the relevant participants of such plan as provided under Department regulations.[44]

L. Review of Proxy Voting Policies:

Delete requirement in proposed paragraph (e)(3)(i) that plan fiduciaries shall review proxy voting policies at least once every two years as this is unnecessary and over-prescriptive. Review, instead, can be part of a plan fiduciary's periodic review of its ERISA policies and procedures, the timing and frequency of which should be flexible, taking into account all relevant facts and circumstances.

The Proposal requires that fiduciaries review proxy voting policies every two years. The Department states that this provision is intended to allow fiduciaries to prudently determine a review cycle for their proxy voting policies, as long as the interval is capped at every two years.

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[42] We have included suggested language in the ABA Mark-Up. *See* Attachment A, *infra.*
[43] *See* 29 C.F.R. § 2550.404a-1(e)(4)(i) (proposed), 85 *Fed. Reg*. at 55,242-43.
[44] *See* 29 C.F.R. § 2550.404c-1(c)(1)(ii) (allowing for participant exercise of control with respect to voting in connection with an investment alternative). We have included suggested language in the ABA Mark-Up. *See* Attachment A, *infra.*

The Department believes this is consistent with industry practice and is an appropriate limit "given ongoing changes in financial markets and the investment world."[45]

There is no need, however, to codify a "one-size-fits-all" review requirement. Review of proxy voting policies are part of a plan fiduciary's periodic review of its ERISA policies and procedures, which is itself not subject to an inflexible minimum standard. Providing for special treatment or a separate regulatory standard for the former thus seems unwarranted. It also appears to create a risk of arbitrary liability unrelated to relevant facts and circumstances. We recommend, therefore, that the Department delete this requirement, with the understanding that fiduciaries' regular review of ERISA policies and procedures includes review of proxy voting policies, the timing and frequency of which should be flexible and take into account all relevant facts and circumstances.

M. Applicability Date of Proposal:

If the Department proceeds with the Proposal, it should set the applicable date of the final rule at least 12 months after the effective date in order to allow affected entities the time required to transition to the new rule's requirements.

If finalized, the Proposal is designated to be effective 30 days after the publication date of the final rule.[46] The Department has asked whether any transition or applicability date provisions should be added to any provisions of the proposal. We believe that plan sponsors, investment managers, proxy advisory firms, and other fiduciaries that may be impacted by the Proposal will require a significant transitional period to review and modify their policies, procedures, and practices to conform to the final rule's requirements. Fiduciaries will further need sufficient time to renegotiate contracts and arrangements with proxy advisory firms and other third parties, including reworked representations and covenants and proxy voting services. We recommend, therefore, that the Department establish the applicability date of the final rule on the date that is, at a minimum, one year after the date of final rule's publication in the *Federal Register*.[47]

III. Regulatory Impact Analysis.

A. ABA Assessment and Recommendation:

The Department's regulatory impact analysis is fatally insufficient. The Department, therefore, should conduct a new and more thorough regulatory impact analysis prior to issuing a re-proposal.

The Office of Management and Budget (OMB) has determined that the Proposal is an "economically significant" rule that requires the Department to perform a regulatory impact analysis (RIA).[48] Although the Department attempts in its RIA to provide broad justification for

[45] 85 *Fed. Reg.* at 55,226.
[46] *See* 29 C.F.R. § 2550.404a-1(g) (proposed), 85 *Fed. Reg.* at 55,243.
[47] We have included suggested language in the ABA Mark-Up. *See* Attachment A, *infra.*
[48] *See* 85 *Fed. Reg.* at 55,227.

the Proposal, the Department's analysis nevertheless is fatally insufficient for the following reasons:

(1) The RIA improperly focuses only on direct plan investments, thereby marginalizing the impact of plan investments that are made through plan asset vehicles, such as CIFs, despite noting in the Proposal that most ownership of stock by ERISA plans is now indirect.[49]

(2) The RIA illogically assumes that, because "the magnitude of unreported costs [on voting proxies] is unknown," those costs therefore must be substantial.[50]

(3) The RIA illogically assumes that, because cited research into the benefits of proxy voting "has yielded mixed results," the benefits therefore must be insubstantial.[51]

(4) In lieu of quantifying the costs and benefits of proxy voting in any meaningful way, the Department appears to rely instead on the unproven assumption that the costs inexorably will tend to outweigh the benefits.

(5) The Department does not provide or cite any evidence that "a misunderstanding that fiduciaries must research and vote all proxies continues to persist" in any material degree.[52]

We recommend therefore that, after the Department has withdrawn the Proposal, it conduct a meaningful RIA prior to releasing a re-proposal. This analysis should include, but not be limited to: (i) inclusion of plan asset vehicles, including CIFs, in the RIA; (ii) avoiding conclusory statements based on inconclusive findings or research; (iii) quantifying the costs and benefits to the extent possible; and (iv) providing evidence (*e.g.*, surveys, regulatory investigations and examinations, etc.) of the purported widespread belief among stakeholders that plan fiduciaries must vote all proxies, addressing specifically the proxy voting histories for public companies and the mutual funds owned by ERISA plans, which appear to point, instead, to a *lack* of ERISA plan proxy voting. The re-proposal, moreover, should accurately reflect, and be tailored to, the findings in the revised RIA. If the Department believes that it has insufficient relevant data to conduct a comprehensive RIA, it should, prior to releasing any re-proposal, issue a Request for Information (RFI) in order to obtain such available data from industry sources and the public. We would be glad to respond to the RFI in order to assist in providing such information to the Department.[53]

For the reasons described above, we recommend that the Department withdraw the Proposal and, with the benefit of an amended and expanded RIA, submit an amended version for public comment. If, however, the Department does not withdraw the Proposal, we recommend that the Department adopt each of our recommendations as described herein.

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[49] *See id.* at 55,222.
[50] *Id.* at 55,229.
[51] *Id.*
[52] *Id.* at 55,230.
[53] The Securities and Exchange Commission would also be an excellent source of detailed proxy voting data.

Thank you for your consideration of our views and recommendations. If you have any questions or require any additional information, please do not hesitate to contact the undersigned at 202-663-5479 (tkeehan@aba.com).

Sincerely,

Timothy E. Keehan

Timothy E. Keehan
Vice President & Senior Counsel

ATTACHMENT A

ABA-Amended Version of Department of Labor Proposal

§ 2550.404a-1 -- Investment duties.

* * * * *

(e) Proxy voting.

(1) The fiduciary duty to manage plan assets that are shares of stock includes the duty to vote proxies.

(2)

(i) When deciding whether and in what manner to exercise rights to vote proxies, plan fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan pursuant to ERISA sections 403 and 404. Where prudent under all relevant facts and circumstances, a fiduciary may choose to refrain from exercising proxy voting rights with respect to a particular matter or matters.

(ii) In order to fulfill the fiduciary obligations under paragraph (e)(2)(i) of this section, when deciding whether and in what manner to vote proxies, a plan fiduciary must:

(A) Not subordinate the interests of the participants and beneficiaries in their retirement income or other financial benefits under the plan;

(B) Maintain accurate records on proxy voting activities; and

(C) Exercise prudence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with proxy voting activities.

(3)

(i) To assist in deciding whether and in what manner to vote a proxy, plan fiduciaries may adopt proxy voting policies providing that voting authority shall be exercised pursuant to specified parameters reasonably designed to serve the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries, and otherwise consistent with the fiduciary's duties under ERISA sections 403 and 404. Each of the following policies shall act and be treated as a safe harbor for compliance with this paragraph (3)(i):

(A) A policy of voting proxies in accordance with the voting recommendations of management of the issuer on proposals or particular types of proposals, except where the fiduciary determines that it would be imprudent to do so;

(B) A policy that voting resources will focus only on particular types of proposals as prudently determined by the fiduciary, such as proposals relating to corporate events (mergers and acquisitions transactions, dissolutions, conversions, or consolidations),

corporate repurchases of shares (buy-backs), issuances of additional securities with dilutive effects on shareholders, or contested elections for directors;

(C) A policy of refraining from voting on proposals or particular types of proposals as prudently determined by the fiduciary; and.

(D) A policy of voting proxies on proposals or on particular types of proposals that the fiduciary has prudently determined are unlikely to involve additional material costs to the plan (e.g., where the fiduciary or manager engaged by the fiduciary will determine whether and how to vote the same proxies for other clients regardless of whether the plan's rights to vote are exercised), including considering the expected costs of determining whether refraining from exercising such voting rights is consistent with its fiduciary obligations under paragraph (e)(2)(i) of this section.

(E) For each of the policies listed in (A) through (D) above, the fiduciary may, where prudent, determine an alternative course of action with respect to any particular proposal or particular types of proposals described therein.

(F) Each of the policies listed in (A) though (D) above are non-exclusive safe harbors and do not imply that different approaches are necessarily inconsistent with ERISA or this regulation. Other policies not specifically identified and described in this section may also be appropriate, provided they are prudently selected and otherwise in accordance with ERISA and this regulation.

(4)

(i) The responsibility for voting proxies lies exclusively with the plan trustee except to the extent that: (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1); (2) the power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2); or (3) the trustee is the trustee of a participant directed plan and is required, under applicable plan documents, to vote in accordance with the investment directions of the relevant participants of such plan.

(ii) Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), including an investment manager with respect to a pooled investment vehicle that holds plan assets, the investment manager shall have exclusive authority to vote proxies in accordance with this section, except to the extent otherwise provided in the plan document, trust document, or investment management agreement, as applicable.

(g) Effective date. This section shall be effective on [30 days after date of publication of final rule].

(h) Applicability date. This section shall apply [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

(i) Severability. Should a court of competent jurisdiction hold any provision(s) of this subpart to be invalid, such action will not affect any other provision of this subpart.

ABA-Amended Version of Department of Labor Proposal
(Redlined to Show ABA Changes from Proposal)

§ 2550.404a-1 -- Investment duties.

* * * * *

(e) ***Proxy voting ~~and exercise of shareholder rights~~.***

(1) *The fiduciary duty to manage plan assets that are shares of stock includes ~~the management of shareholder rights appurtenant to those shares, such as~~ the dutyright to vote proxies.*

(2)

(i) *When deciding whether and in what manner to exercise rights to ~~shareholder rights and when exercising such rights, including the~~ vote~~ing of~~ proxies, plan fiduciaries must carry out their duties prudently and solely in the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan pursuant to ERISA sections 403 and 404. Where prudent, under all relevant facts and circumstances, a fiduciary may choose to refrain from exercising proxy voting rights with respect to a particular matter or matters.*

(ii) *In order to fulfill the fiduciary obligations under paragraph (e)(2)(i) of this section, when deciding whether and in what manner to vote proxies~~exercise shareholder rights and when exercising shareholder rights~~, a plan fiduciary must:*
~~Act solely in accordance with the economic interest of the plan and its participant and beneficiaries considering only factors that they prudently determine will affect the economic value of the plan's investment based on a determination of risk and return over an appropriate investment horizon consistent with the plan's investment objectives and the funding policy of the plan;~~

~~Consider the likely impact on the investment performance of the plan based on such factors as the size of the plan's holdings in the issuer relative to the total investment assets of the plan, the plan's percentage ownership of the issuer, and the costs involved;~~

(A) Not subordinate the interests of the participants and beneficiaries in their retirement income or other financial benefits under the plan ~~to any non-pecuniary objective, or sacrifice investment return or take on additional investment risk to promote goals unrelated to those financial interests of the plan's participants and beneficiaries or the purposes of the plan~~;

~~Investigate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights. The fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without appropriate supervision and a determination that the service provider's proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries as defined in paragraph (e)(2)(ii)(A) of this section;~~

(B) Maintain accurate records on proxy voting activities ~~and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights~~; and

(C) Exercise prudence ~~and diligence~~ in the selection and monitoring of persons, if any, selected to advise or otherwise assist with proxy voting activities. ~~exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services.~~

(iii) *~~Where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person performs advisory services as to the voting of proxies, a responsible plan fiduciary shall require such investment manager or proxy advisory firm to document the rationale for proxy voting decisions or recommendations sufficient to demonstrate that the decision or recommendation was based on the expected economic benefit to the plan, and that the decision or recommendation was based solely on the interests of the participants and beneficiaries in obtaining financial benefits under the plan.~~*

(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 after considering those factors described in paragraph (e)(2)(ii) of this section and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote).~~*

(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 after considering those factors described in paragraph (e)(2)(ii) of this section and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote).~~*

(i~~ii~~) *To assist i~~I~~n deciding whether and in what manner to vote a proxy ~~pursuant to paragraphs (e)(3)(i) and (ii) of this section~~, plan fiduciaries may adopt proxy voting policies providing that voting authority shall be exercised pursuant to specifiede~~e~~ parameters reasonably designed to serve the interests of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries, and otherwise consistent with the fiduciary's duties under ERISA sections 403 and 404 ~~the plan's economic interest~~. Each of the following policies shall act and be treated as a safe harbor for compliance with this sub-section (3)(i)~~Such policies may include, for example~~:*

(A) A policy of voting proxies in accordance with the voting recommendations of management of the issuer on proposals or particular types of proposals, except where the fiduciary determines that it would be imprudent to do so ~~that the fiduciary has prudently determined are unlikely to have a significant impact on the value of a plan's investment, subject to any conditions determined by the fiduciary as requiring additional analysis because the matter being voted upon may present heightened management conflicts of interest or is likely to have a significant economic impact on the value of the plan's investment~~;

(B) A policy that voting resources will focus only on particular types of proposals as prudently determined by the fiduciary ~~that the fiduciary has prudently determined are substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment~~, such as proposals relating to corporate events (mergers and acquisitions transactions, dissolutions, conversions,

or consolidations), corporate repurchases of shares (buy-backs), issuances of additional securities with dilutive effects on shareholders, or contested elections for directors;~~ and~~

(C) A policy of refraining from voting on proposals or particular types of proposals as prudently determined by the fiduciary; and~~when the plan's holding in a single issuer relative to the plan's total investment assets is below a quantitative threshold that the fiduciary prudently determines, considering its percentage ownership of the issuer and other relevant factors, is sufficiently small that the outcome of the vote is unlikely to have a material impact on the investment performance of the plan's portfolio (or investment performance of assets under management in the case of an investment manager)~~.

(D) A policy of voting proxies on proposals or on particular types of proposals that the fiduciary has prudently determined are unlikely to involve additional material costs (e.g., where the fiduciary or manager engaged by the fiduciary will determine whether and how to vote the same proxies for other clients regardless of whether the plan's rights to vote are exercised), including considering the expected costs of determining whether refraining from exercising such voting rights is consistent with its fiduciary obligations under paragraph (e)(2)(i) of this section.

(E) For each of the policies listed in (A) through (D) above, the fiduciary may, where prudent, determine an alternative course of action with respect to any particular proposal or particular types of proposals described therein.

~~(C)~~(F) Each of the policies listed in (A) though (D) above are non-exclusive safe harbors and do not imply that different approaches are necessarily inconsistent with ERISA or this regulation. Other policies not specifically identified and described in this section may also be appropriate, provided they are prudently selected and otherwise in accordance with ERISA and this regulation.

(ii~~v~~) ~~Plan fiduciaries shall review proxy voting policies adopted pursuant to paragraph (e)(3)(iii) of this section at least once every two years.~~

(iii~~v~~) ~~No policies adopted under paragraph (e)(3)(iii) of this section shall preclude, or impose liability for, submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after taking into account the costs involved, or for refraining from voting when the fiduciary prudently determines that the matter being voted upon would not have an economic impact on the plan after taking into account the costs involved.~~

(4)

(i)

~~(A)~~ The responsibility for voting proxies~~exercising shareholder rights~~ lies exclusively with the plan trustee except to the extent that~~ either~~: (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1); ~~or~~ (2) ~~Or~~ the power to manage, acquire, or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2); or (3) the trustee is the trustee of a participant directed

plan and is required, under applicable plan documents, to vote in accordance with the investment directions of the relevant participants of such plan.

(ii) ~~(B)~~ Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), including an investment manager with respect to a pooled investment vehicle that holds plan assets, the investment manager shall have~~has~~ exclusive authority to vote proxies ~~or exercise other shareholder rights appurtenant to such plan assets~~ in accordance with this section, except to the extent otherwise provided in the plan document, trust document, or investment management agreement, as applicable ~~expressly provides that the responsible named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the exercise or management of some or all of such shareholder rights~~.

(iii) ~~An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to an investment policy statement that conflicts with the policy of another plan. Compliance with ERISA section 404(a)(1)(D) requires the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)). In the case of proxy voting, to the extent permitted by applicable law, the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled investment vehicle. Such an investment manager may, however, develop an investment policy statement consistent with Title I of ERISA and this section, and require participating plans to accept the investment manager's investment policy, including any proxy voting policy, before they are allowed to invest. In such cases, a fiduciary must assess whether the investment manager's investment policy statement and proxy voting policy are consistent with Title I of ERISA and this section before deciding to retain the investment manager.~~

(g) Effective date. This section shall be effective on [30 days after date of publication of final rule].

(h) Applicability date. This section shall apply [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

(i~~h~~) Severability. Should a court of competent jurisdiction hold any provision(s) of this subpart to be invalid, such action will not affect any other provision of this subpart.