Intentional Endowments Network
An initiative of CraneSustainability.org

September 30, 2020

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

Re: Proposed Rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

To whom it may concern:

On behalf of The Sustainable Retirements Initiative, a project of the Intentional Endowments Network (IEN), I write to provide comments in response to the Department of Labor's (DOL) proposed rule, "Fiduciary Duties Regarding Voting and Shareholder Rights" (RIN 1210-AB91) (the "Proposal").

The IEN launched the Sustainable Retirements Initiative in October 2019. The Initiative was created due to strong interest on the part of the 150+ Higher Education institutions, foundations, investment firms, and not for profits that are members of IEN in exploring the integration of ESG options into their retirement plans. The initiative is intended to support fiduciaries in their consideration of all financially material factors, including ESG factors, into their investment processes.

Unfortunately, the DOL Proposal's obligation on fiduciaries to document the economic impact calculation behind each vote is onerous, unnecessary, and unworkable. The Proposal's requirement will be costly and create an imprudent use of plan assets – which is what the DOL should be protecting against not requiring. In effect, the DOL is failing to consider risk exposures in the analysis and cost-benefit calculation, which is by definition imprudent under ERISA;

In this proposal the DOL attempts to address a problem that does not need to be addressed. DOL falsely states the rule is needed because of "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…" Yet, the DOL cites no data in support of this claim. In fact, only 13 percent of the Russell 3000 companies received a shareholder Proposal in any given year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a completely non-onerous single proposal once every 7.7 years.

The DOL is also misapplying the duty of loyalty through encouraging pension investor fiduciaries to defer to voting recommendations of corporate officers and directors who have lesser fiduciary duty standards, shorter term horizons and inherent conflicts of interest with ERISA participants and beneficiaries. Confusing the interests of participants and beneficiaries with short-term returns to an inanimate "plan" - without any basis in the plain language of ERISA (under which the duty of loyalty runs only to human participants and beneficiaries rather than the “plan”) Human participants have an interest in maintaining a sustainable standard of retirement living and not bearing foreseeable externalized or systemic risks/costs in the future, as human retirees, taxpayers and members of society.

In addition, the Proposal is missing the greater materiality of systemic risks (beta exposure) to investor returns by solely focusing on the alpha generation to which management of voting rights would be limited, completely undermining accuracy of the long-term holistic cost-benefit analysis. This in effect imposing a rule that guarantees a “tragedy of the commons“ outcome by considering only individual vote decisions with no recognition of the aggregate voting impact over the long term on the collective interests of ERISA participants and beneficiaries who are likely to be broadly diversified ultimate holders of financial risks addressed in proxy votes.

Consideration of ESG is a well-developed risk management strategy aimed at integrating factors such as climate change and human capital management that evidence shows have a material economic impact on asset prices, especially when taking into account the risks that long-term, universal investors like pension plans face. An inherent advantage of adding an ESG lens to traditional investing is that ESG provides an additional risk control for investors above and beyond traditional risk diversification by seeking to avoid non-diversifiable systemic factors common to environmental and social issues. It is this risk mitigation concept that makes an ESG lens so valuable and conversely the failure to consider ESG so dangerous to ERISA plan investments.

The DOL fails to articulate a rational connection between the relevant facts and the proposed rule. The Proposal reveals a fundamental misunderstanding of how professional investment managers use engagement with companies on environmental, social and governance criteria as an additional level of due diligence and analysis in the portfolio construction process. Investment managers increasingly analyze ESG factors precisely because they view these factors as material to financial performance. In addition, the recently enacted SEC rules governing proxy advisors and SEC rules restricting the ability of shareholders to offer shareholder resolutions address most of the concerns cited by the DOL. As the SEC new rules represent a major change, the proposal should at the very least be deferred until there some experience with the SEC regulations. As a result, the proposal could end up unnecessarily imposing costs on ERISA plans and their participants.

For the above stated reasons, we respectfully request that the Proposal be withdrawn. Thank you for your consideration of these comments.

Yours sincerely,

Chris Walker

Chris Walker

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