COUNCIL FOR INVESTOR RIGHTS AND CORPORATE ACCOUNTABILITY

October 5, 2020

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: Request of the Department of Labor (DOL) for Comment on
RIN 1210-AB91, The Proxy Voting and Shareholder Rights NPRM

Dear Director Canary:

This letter is submitted on behalf of the Council for Investor Rights and Corporate Accountability ("CIRCA"). We are a consortium of investors who believe that a well-functioning system of checks and balances between boards of directors and shareholders is fundamental to long-term economic growth and U.S. prosperity. We are responding to the DOL's request for comments on the above-referenced matter.

The proposed rules by the DOL are certain to do harm to the system of corporate accountability that is already limited in its efficacy and will be value destructive to the savings and assets of retirees, retirement plans on other beneficiaries that fall under the Department's oversight. Insofar as the proposed rules have the purpose and effect of conditioning and limiting the exercise of fiduciaries' judgement and the corporate franchise across the entire marketplace, individually and collectively, they are very bad ideas that should be reconsidered.

DOL is proposing to amend the "Investment duties" regulation issued in 1979 to address the application of the prudence and exclusive purpose duties under the Employee Retirement Income Security Act of 1974 (ERISA) to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

We believe that, as proposed, DOL's rules regarding proxy voting would stifle speech, impair the independence and integrity of proxy voting advice and unnecessarily and unduly interfere with the private contractual relationship of investors and proxy voting advice businesses to the ultimate detriment of shareholders and the legitimacy of proxy voting in general.

This is, indeed, a surprising proposal coming from an Administration that prides itself on deregulation. The essence of this initiative is to condition, limit, and sometimes prohibit certain owners of a company (ERISA plan shareholders) from voting on company matters. As such, it diminishes the value of a meaningful element of ownership of stock – voting on all corporate matters including the election of directors. This constitutes a sharp diminution of economic freedom and expansion of government coercion by an Administration that purports to favor the opposite approach. We believe this proposed rule, and the government overreach it entails, should be abandoned in its entirety.

Some specific concerns are outlined below.

Implications of the Proposed Rule

The most significant outcome of the proposed rule, and its clear intent, will be to decrease the number of proxies voted by retirement plan fiduciaries. The proposed rule's constraints on fiduciary duty could expose plan fiduciaries to greater liability and make them less effective in their ERISA plan oversight capacity. Other implications include the incremental burden and expense of analyzing and documenting each of the many votes that come up annually at every company to ensure compliance with the rule's mandates.

Key Concerns of the Proposed Rule

DOL's concerns are already addressed by current law. Under existing law, every ERISA plan fiduciary decision must be made solely in the interest of participants, for the exclusive purpose of providing benefits and defraying reasonable expenses, according to a prudent decision-making process. If these duties are satisfied, the law gives the fiduciary broad discretion with respect to its substantive decisions and expressly protects plan participants from actions that would harm their interests.

The premise of the proposed rule is speculative and not substantiated by evidence**.** DOL expresses concern that proxy voting activity could be leading to unnecessary plan expenses, but concedes it has no reliable data indicating that these costs are substantial. No information is provided to demonstrate that participants consider this a serious concern. DOL has taken no steps that could validate its concerns, and it has provided no data or analysis to support its view that the proposed rule would reduce plan expenses or otherwise benefit participants. This failure to substantiate the proposed rule's premise with evidence is inconsistent on its face with the requirements of the Administrative Procedures Act.

DOL has ample existing authority to protect ERISA plans and prevent conflicts of interest. Existing statute empowers DOL to enforce the law against fiduciaries that run afoul of their fiduciary duties or third parties who have conflicts of interest. Mandating needless constraints on fiduciary duty constitutes a clear regulatory overreach.

The proposed rule would magnify the problem it attempts to remove. The new rule would require plans to review every proxy proposal and document the justification for the decision to vote or not vote, which will increase plan expenses. This is a known and substantial cost effectively borne by retirees with no showing of any benefit, and therefore plainly a bad idea.

The proposed rule would leave fiduciaries vulnerable to increased liability. DOL's proposal would create considerable uncertainty and leaves open significant questions about how fiduciaries should be expected to comply with its requirements. This lack of clarity generates increased liability for fiduciaries and raises the specter of litigation.

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As a policy matter, incentivizing fiduciaries to give up the right to vote a proxy is inconsistent with the obligations of ERISA fiduciaries, and irrational as an economic premise of stock ownership. It is well established that ERISA fiduciaries have an obligation to act in the best interests of their beneficiaries. In many cases, the decision of how to vote shares is one of the most important decisions a fiduciary can make. By in effect pushing plan fiduciaries to give up their responsibility to vote their shares in a way that maximizes the value of their holdings, the rule would undercut the purpose of ERISA to create appropriate incentives to protect the interests of benefit plan beneficiaries.

We thank you for the opportunity to comment on this important Commission initiative. We would be happy to discuss any aspect of this letter with the Commission staff.

Respectfully submitted,

Rob Collins
Executive Director
Council for Investor Rights and Corporate Accountability