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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
Proposed Regulation (RIN 1210-AB91)**

Ladies and Gentlemen:

BMO Global Asset Management ("BMO GAM") appreciates the opportunity to comment on the Department of Labor's proposed amendments to the "Investment Duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), entitled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (the "Proposal").

We appreciate the Department's effort to ensure ERISA fiduciaries clearly understand that all proxy votes must be managed in accordance with their duties of prudence and loyalty. Nonetheless, we are concerned that the Proposal significantly underestimates the value created through proxy voting and imposes fiduciary obligations that are too complicated and costly, or simply not possible, to implement in practice. We are concerned that the Proposal will not only be detrimental to ERISA plans, which will be disenfranchised due to the unique new burdens they will face under the Proposal, but also to the broader U.S. capital markets as the proportion of engaged advocates of best practice is reduced.

Overall, we agree with the various points and recommendations made in the comment letters submitted by the Council of Institutional Investors, Securities Industry Financial Markets Association, the Investment Company Institute, and the American Bankers Association. We appreciate the detailed thought each trade association has put into analyzing the Proposal and would emphasize the points raised below.

Background

BMO GAM is a multi-asset management business with US$266 billion[1] in AUM. Our business is characterized by specialized, regional investment teams providing a range of investment solutions, with the objective of delivering investment management expertise to clients across North America, Europe, Asia/Pacific and the Middle East. We manage ERISA Plans, through separately managed accounts and pooled vehicles, including collective investment trusts and private funds. With this investment management, plan sponsors generally delegate proxy voting authority to BMO GAM.

At the center of our investment solutions, which span alternatives, equity, fixed income and multi-asset strategies, lies our responsible investment strategy that outlines our approach to proxy voting and engagement with corporate issuers. Not only do we see these activities as part of our duty as an investor

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[1] As of 30 June 2020

acting in the best interest of our clients, we consider it our fiduciary duty to enhance the value of client portfolios, which in turn benefits the global financial system in which we are a participant.

It is our policy to vote at all shareholder meetings on behalf of our investment clients and third-party clients where voting is requested. In 2019, we voted at over 11,000 company meetings on over 110,000 resolutions. In each case, we apply a consistent philosophy and approach based on overarching principles of good corporate governance practice, as detailed in our Global Corporate Governance Guidelines[2]. We review these Guidelines annually to consider and incorporate as appropriate developments in international governance practices.

Discussion

Proxy voting is widely accepted as a key source of value creation

The Proposal underestimates the value derived from investment managers voting all proxies and advocating for the adoption of best practices across their portfolios, which in turn improves the quality of companies throughout the global market. Specifically, the Department notes that the "research regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment in the corporation has yielded mixed results." With over two decades of proxy voting experience and engagement, we have learned that advocating for the adoption of corporate governance best practices and encouraging improvements in ESG practice, for example, improves the quality of the client assets we manage. Our advocacy for our clients leads to better risk-adjusted performance of their portfolios.

Supporting this view is a key paper on the impact of successful engagement on company performance by Dimson et al. (2012)[3], which is based on BMO GAM data. Based on analysis of engagement with U.S. companies over the 1999-2009 period, the authors find that successful engagement is followed by positive investment returns averaging 4.4%, whereas unsuccessful engagement has no impact on returns. In addition, the authors concluded that our engagement led to improvements in operating performance, profitability, efficiency, shareholding and governance[4].

To achieve these successful engagements, shareholders must embrace the communication tool that proxy voting provides to stress a need for change through either voting against management proposals or supporting shareholder proposals. In our experience, participating in the shareholder proposal process has had a positive impact on improving corporate governance practices and the ESG performance of U.S. companies. Examples of such positive impact include climate scenario disclosure, classified board structures, and proxy access. Each was the subject of shareholder proposals in the early stages of their adoption, but today we see their voluntary adoption by many companies as they gain acceptance by the broader market. We are concerned that, by discouraging proxy voting through the introduction of burdensome regulations, the Department will prevent ERISA plans from unlocking the full potential value of their investments.

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[2] https://www.bmogam.com/gb-en/intermediary/wp-content/uploads/2019/05/corporate-governance-guidelines.pdf

[3] Elroy Dimson, Oğuzhan Karakaş, Xi Li, Active Ownership, *The Review of Financial Studies*, Volume 28, Issue 12, December 2015, Pages 3225–3268, https://doi.org/10.1093/rfs/hhv044

[4] Other support studies include: Appel I., Gormley, T., Keim, D. 2016. Passive Investors, Not Passive Owners. *Journal of Financial Economics*. https://ssrn.com/abstract=2475150, which details the benefits from active voting and how it improves long-term performance; Flammer, 2015. Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach. *Management Science* https://www.fir-pri-awards.org/wp-content/uploads/Article_Flammer1.pdf

Proposal will increase rather the decrease the current cost of proxy voting for ERISA plans

We note the Department's core concern that plan fiduciaries mistakenly believe they must vote all proxies presented to them, which in turn leads to their spending more on voting than necessary. However, we engage proxy advisory firms for a set fee with no incremental costs associated with voting a plan's shareholder proxy once the fund has been set up for voting. While our fee may vary based on volume of proxies available to vote, there are no separate fees for actually voting individual proxies. As a result, carving out a plan and not voting its proxy will result in no cost savings to the plan.

Conversely, it would be extremely difficult and cost prohibitive to make voting decisions on a plan-by-plan basis. In the case of pooled investment funds, it is often not possible to instruct a single client's holding within the fund differently than other clients, as split-voting[5] is not permitted practice in certain markets or custodian banks. As an investment manager with a wide range of clients, we vote at shareholder meetings on behalf of hundreds of accounts, often representing many different ERISA and non-ERISA clients. Use of proxy advisory firms is a critical component in facilitating and executing our management responsibilities to all of our clients in a manner that is scalable, cost-effective and accurate. By requiring individual assessment of each plan's particular circumstances, these benefits of scale will be sacrificed, leading to a significant increase in costs for ERISA plans.

Proposal fails to consider the limited perspective of investment managers

The threshold economic determination under the Proposal would require the manager to "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." Investment managers have line of sight only of the issuer holding that they directly manage and not the plan's entire portfolio. Without access to the plan's aggregate holding in the issuer, the plan's investment manager will not be able to determine if they have made the correct decision within the meaning of the Proposal – to vote or not vote – with respect to any given plan.

With a single focus on individual ERISA plans, the Proposal neglects to consider situations where ERISA plans, particularly those with aligned objectives and liabilities, may hold a significant stake in a company, which could potentially be unvoted if every slice of that aggregate hold concludes that its individual stake is too insignificant. This is a likely outcome given that investment managers would only be concerning themselves with their individual client, or slice, rather than the total picture.

In that regard, the Proposal addresses the economic detriment to a plan's holding where the issuer fails to achieve a quorum due to numerous ERISA plans choosing not to vote in accordance with the permitted practices. In that case, the plan may modify its proxy voting policy to vote when necessary to support a quorum. The Proposal fails to consider that neither the plan investor nor an investment manager will be able to assess whether a plan's vote alone will impact a quorum thereby necessitating further action.

Permitted practices must be safe harbors

Recognizing the challenges to comply with the Proposal's new proxy voting requirements, the Department includes three "permitted practices," which plans, or their appointed investment managers, may adopt to more "cost-effectively comply" with the Proposal. These permitted practices provide no fiduciary or litigation relief for their adoption, however; hence, fiduciaries need to conduct the same fiduciary analysis, documentation and voting process to ensure that a permitted practice is correctly applied, thereby negating

[5] Defined as different vote instructions being applied proportionally within a single proxy ballot

any meaningful cost savings from not instructing a vote.

If the Department proceeds with this Proposal, each permitted practice should be a clear safe harbor without a required analysis of the economic impact of each vote.

Conclusion

Investment professionals have been using their influence through proxy voting for decades to promote best practices at their holdings, leading to improvements in individual company performance and, by extension, improving the quality of global capital markets. The Proposal will impose significant costs and regulatory burdens on both ERISA plans and their investment managers that far exceed those currently in place, while risking significant disenfranchisement of ERISA plans and their influence from other participants in the market.

As such, we urge the Department to withdraw the Proposal and schedule a public hearing or roundtable with ERISA plan fiduciaries and other experts to gather the most current research on proxy voting. We appreciate the opportunity to submit this comment and are available to answer any questions.

Sincerely,

Kristi Mitchem

Kristi Mitchem | Chief Executive Officer
BMO Global Asset Management