Submitted via regulations.gov
10/05/2020
Office of Regulations and Interpretations
US 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)

Dear Secretary Scalia:

I write to provide comments in response to the Department of Labor's proposed rule, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" (RIN 1210-AB91) (the "Proposal"). The Proposal does not describe a problem that needs to be "fixed." Moreover, the Proposal lacks appropriate evidentiary support for its conclusions and assumptions, putting beneficiaries at greater, rather than reduced risk. A growing body of evidence demonstrates the increasing linkage between environmental, social, and governance (ESG) practices by companies and company value. Truly, this proposal flies in the face of common sense, requiring an unacceptably high level of work and cost, with no clear value to beneficiaries.

For over 25 years, *As You Sow* has had great success moving companies to adopt beneficial policies and practices on a range of environmental, social, and governance issues. As shareholder advocates, we regularly engage senior management in direct dialogue and negotiation.

The Proposal's obligation that fiduciaries conduct a cost-benefit analysis for each vote cast, is onerous and unworkable and will create a dramatic cost burden that is unjustified, contravenes shareholder rights to communicate issues of concern to their companies, abridges shareholders' first amendment rights, and inappropriately puts the agency's thumb on the scale in favor of all management decisions, no matter how poorly considered.

The Proposal will require fiduciaries to calculate the economic impact of every vote on the proxy ballot, including directors, independent auditors, say on pay, and shareholder Proposals. This is a costly and imprudent use of plan assets – the exact thing DOL should be protecting against. As with the Department's ESG Proposal announced June 23rd, the proxy voting Proposal relies on scant evidence and a fundamental misunderstanding of the importance fiduciaries and other investors place on voting proxies in order to communicate their concerns to company management. Without shareholder voting, the investor voice is greatly diminished.

The DOL 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…" No data is provided in support of these assumptions. In reality, on average, only 13 percent of Russell 3000 companies received a shareholder Proposal in any one year between 2004 and 2017. In other words, the average Russell 3000 company can expect to receive a Proposal once every 7.7 years.[1] Moreover, the rate of shareholder proposals has not increased dramatically. Rather, the subject matter has moved to increasingly important issues such as climate change, diversity, and other matters of significant public interest.

The conclusion that ESG proposals have little bearing on share value is equally bereft of data and flies in the face of studies showing the opposite[2]. The assumption that ESG proposals are a problem to be stopped does not align with the direction of the financial markets where the practice of sustainable investment -- including engaging in the shareholder process -- is increasing rapidly.

Despite the Proposed Rule's stated goal of providing clarity for ERISA fiduciaries, it instead creates confusion by creating unreasonable hurdles to use of a tool that helps protect beneficiary interests. The rule fails to distinguish ESG integration and Economically Targeted Investing (ETI).[3] ESG integration is the consideration of risk factors as part of prudent fiduciary management and a strategy that takes these factors into account in investment actions. ETIs are investments that aim to provide financial returns as well as collateral, non-financial benefits. For example, ETIs might advertise job creation as goals of the investment.[4] Shareholder proposals provide a straightforward and effective way for shareholders to communicate concerns about risk to the companies within their portfolios, including novel and evolving ESG-related risk, and for fiduciaries to take such risk into account.

Conclusion
If the Proposal is finalized in its current form, we are concerned that fiduciaries will not vote in support of proposals that raise important, financially material risk factors with companies.

As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. Studies indicate that ESG factors are increasingly financially material, and integrating ESG factors is therefore core to good investment decision-making.[5] If the Proposed Rule goes into effect, it will undermine ERISA fiduciaries' ability to act in the long-term best interest of their beneficiaries. As such,

[1] CII Letter to Senators Michael Crapo and Sherrod Brown (Dec. 4, 2018), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2018/December%205%202018%20Letter%20to%20Senate%20Banking.pdf

[2] See e.g., Friede, G. (n.d.). ESG and financial performance: Aggregated evidence from more than 2000 empirical studies, (Dec. 15 2020), https://www.tandfonline.com/doi/full/10.1080/20430795.2015.1118917

[3] For further discussion of ESG integration as an investment strategy, see Gary, S. *Best Interests in the Long-Term: Fiduciary Duties and ESG Integration*, 90 U. Colo. L. Rev. 733, 745 (2019).

[4] See note 3 above

[5] Morgan Stanley Sustainable Reality Report Reveals Sustainable Funds Outperformed Traditional Funds and Reduced Investment Risk Despite Global Pandemic. (Sep. 17, 2020), https://www.businesswire.com/news/home/20200917005519/en/Morgan-Stanley-Sustainable-Reality-Report-Reveals-Sustainable-Funds-Outperformed-Traditional-Funds-and-Reduced-Investment-Risk-Despite-Global-Pandemic

we urge you to you to allow the existing guidance to remain in effect and not move forward with this proposed rule.

We respectfully request that the Proposal be withdrawn in full. Thank you for your consideration of these comments.

Sincerely,

Andrew Behar
CEO