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October 5, 2020

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: Proxy Voting and Shareholder Rights NPRM, RIN 1210-AB91

I write as Trustee of the New York State Common Retirement Fund (the Fund) with an estimated $216.3 billion in assets under management as of June 30, 2020. The Fund holds and invests the assets of the New York State and Local Retirement System on behalf of more than 1.1 million members and beneficiaries and pays over $1 billion per month in benefits.

The Fund is not subject to Employee Retirement Income Security Act (ERISA) or the Department of Labor's rules. Accordingly, I submit this comment to the Department's Proposed Rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (Proposed Rule) not because it will directly impose obligations on the Fund, but because it has the potential to change market standards by impacting the common and prevailing market practices of ERISA fiduciaries, who are a meaningful segment of institutional investors. It also has the potential to affect the corporate governance of the companies in which the Fund invests and, therefore, the Fund's investments. In that context, I wish to express my opposition to this Proposed Rule. I hope that after the Department completes its review and analysis of these comments, and others that have been submitted, it finds that the Proposed Rule is unnecessary.

The Importance of Proxy Voting

Like ERISA plan investors, the Fund's purpose is to ensure the availability of funds to pay pensions. We accomplish this through a balanced investment strategy focused on long-term, sustainable returns. For the fiscal year ending March 31, 2019, the Fund's public equities portfolio was valued at $113.3 billion and included over three thousand public companies. Given the size of the Fund's equity portfolio, we have significant experience with proxy voting and therefore have relevant insight into the issues raised by the Proposed Rule.

The Fund uses broad passive indexes which means that we are invested in a large number of companies and sectors in the economy. To address potential risks and opportunities that could impact shareholder value and to safeguard the Fund's portfolio, consistent with my fiduciary duty, we vote the proxies for the public companies in which the Fund invests and encourage best corporate practices and sustainable business strategies to reduce risks and realize strong returns. This strategy is grounded in the widely accepted view that robust corporate governance practices can positively impact shareholder value.

The Fund votes by proxy on all ballot items presented at annual meetings and special meetings for each of the domestic companies in the Fund's economic portfolio, as well as those of selected international companies. In the 2019 proxy season, the Fund cast 28,322 votes on ballot items at 3,273 company meetings.

The Fund makes all proxy voting decisions independently based on the standards in its Environmental, Social & Governance Principles and Proxy Voting Guidelines, which describe in detail the Fund's governance expectations for public companies and establish principled recommendations for voting on a broad range of issues. Proxy voting decisions are based on reviews of available information relating to items on the ballot at each portfolio company's annual and special meetings. The Fund staff analyzes a variety of materials from publicly available sources, including but not limited to: Securities and Exchange Commission (SEC) filings, analyst reports, relevant studies and materials from proponents and opponents of shareholder proposals, third-party independent perspectives and studies, and analyses from corporate governance data and proxy research providers. In addition the Fund may engage with companies, asset managers, partners, and other investors to help inform its independent voting decisions.

The Fund believes that proxy voting is an effective mechanism to communicate with boards of directors and management on environmental, social and governance (ESG) issues as these issues impact the sustainability, value and performance of companies. This belief is based on the full body of research regarding the financial materiality of ESG issues.[1]

The Cost of Proxy Voting & Economic Analysis

The Proposed Rule discourages ERISA pension plans from voting proxies, on the erroneous supposition that proxy voting imposes significant costs to investors but provides no benefits. But the Proposed Rule fails to account for the fact that the cost of proxy voting is relatively low while its benefits to investors are considerable.

The cost of proxy voting is small partly due to the research and voting platforms provided by proxy advisors. A single subscription allows the Fund to research and vote proxies at over 3,000 companies efficiently in accordance with the Fund's independent guidelines. These proxy advisors allow investors to essentially pool research costs and collect most of the relevant research at low cost. In the case of the Fund, for example, our investment officers can then review this research independently to make informed decisions on routine and noncontroversial items quickly and efficiently.

Additionally, the Fund's proxy voting guidelines inform our general views regarding issues that regularly appear on proxy ballots. The Proposed Rule would not allow ERISA plan investors to take a similar approach; it would instead impose a bureaucratic approach that may add significant costs for ERISA plan investors, with collateral negative impact on investors generally.

Because of the significant benefits described within this comment that come from effective shareholder oversight to hold corporate management accountable, there is inherent value to investors in the regular casting of proxy votes. A board of directors that is held to account by shareholders is more likely to keep those shareholders' interests at the top of mind, and the ability of shareholders to opine on important issues facing our company is an invaluable resource to shareholders and management alike.

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[1] BlackRock, Comment letter on Financial Factors in Selecting Plan Investments (Appendix B), July 30, 2020. https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00701.pdf; Council of Institutional Investors, Empirical Research on ESG Factors and Engaged Ownership, August, 2020. https://www.cii.org/files/publications/misc/08-25-20%20Bibliography.pdf; Principles for Responsible Investment, Top Academic Resources on Responsible Investment, https://www.unpri.org/academic-research/topacademic- resources-on-responsible-investment/4417.article. See also Principles for Responsible Investment, Academic ESG Data Review, https://www.unpri.org/academic-esg-data-review/5469.article.

The Proposed Rule Does Not Demonstrate a Need for New Regulation

The proposed rulemaking is premised on the assumption of the ostensible need to reduce high costs associated with proxy voting, however, it mischaracterizes this burden. The Department expresses concern that voting on shareholder proposals has grown, however, research shows the total number of shareholder proposals has been declining since 2015.[2] In fact, less than two percent of all proxy votes are on shareholder proposals and the number of shareholder proposals going to a vote has not increased in recent years.[3] Moreover, there is already a process at the SEC that considers the materiality of shareholder proposals when challenged by issuers. And while this process has been in place for years, the SEC's new rule on shareholder proposals is expected to further restrict the number of proposals going to a vote in future years.

Secondly, the Department expresses concern that ERISA plans may rely on proxy advisors' supposed inaccuracies in research. Although many investors have disputed this claim, the SEC recently adopted new regulations to provide companies with an opportunity to review proxy advisor research for accuracy.[4] Additionally, proxy advisors keep costs low for investors; it is much more cost effective for a proxy advisor to research a company one time for all investors than for each private plan to conduct its own duplicative research.

Instead of seeking such data on proxy voting, the Department provides an "analytical model" to estimate the Proposed Rule's potential impact. But the model begs the question—it uses the Proposed Rule's burdensome new requirements as a baseline, with all of the additional research costs imposed by it. Then the Proposed Rule highlights the purported cost savings that will result from the "permitted practices."

The Proposed Rule's Flawed Approach

The Proposed Rule starts from the flawed premise that the only way to properly consider voting a proxy consistent with fiduciary duty is for an ERISA fiduciary to first make a company-specific determination that even spending the time to look at that ballot will bring an economic benefit to that ERISA plan. I believe the Department should consider other manners in which an ERISA fiduciary can efficiently cast ballots based on guidelines that determine in advance what voting positions will most benefit that Fiduciary's plan, for frequently recurring issues. These findings, based on academic research and market experience, mean that proxy voting positions can be determined in advance to reliably increase shareholder value without the overly-bureaucratic approach the Department assumes is necessary.[5] And the advisory nature of a fiduciary's guidelines could allow an ERISA fiduciary to depart from these standard positions when doing so is prudent. (Of course, as I describe below, the Department *does* recognize that such policies can effectively fulfill the fiduciary duty but only if its substance is automatically pro-management or anti-shareholder-resolution.)

The Proposed Rule's suggestion is that an investment officer should, as a general rule, carry out a fully documented economic analysis of whether to spend time researching and casting a proxy vote. The process would simply add costs for ERISA plan sponsors and investment staff, while adding no real benefit to the plan's beneficiaries. It would be less costly overall for the investment officer to simply research the questions and cast a vote.

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[2] Sullivan & Comwell LLP, 2020 Proxy Season Review: Part 1 Rule 14a-8 Shareholder Proposals, July 15, 2020. https://www.sullcrom.com/files/upload/SC-Publication-2020-Proxy-Season-Review-Part-1-Rule-14a-8.pdf

[3] Council of Institutional Investors, Comment letter to the SEC on proposed amendments to Rule 14a-8, January 30, 2020. https://www.sec.gov/comments/s7-23-19/s72319-6729684-207400.pdf

[4] Council of Institutional Investors, SEC comment letter proxy advisor accuracy, October 24, 2019. https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191024%20SEC%20comment%20letter%20proxy%20advisor%20accuracy.pdf

[5] Lingwei Li and Huai Zhang, The Devil is in the Detail? Investors' Mispricing of Proxy Voting Outcomes on M&A Deals, August 1, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232839

Additionally, the Proposed Rule provides little guidance on what votes may be deemed economically significant. Typically one does not know the significance of one's vote, as it relates to the final result, at the time of voting. Therefore, how can a fiduciary conclude before voting that their vote will not change the result for a give ballot item? We have seen numerous proxy items pass or fail by a small number of votes. The results, even with respect to items that fail, can have a profound impact on the future of a company, and therefore, all votes are potentially economically significant. For example, at the 2017 Duke Energy Corporation Annual Meeting, the Fund's shareholder proposal requesting the company assess the impact of the Paris Climate Agreement on its business received 46.4% support from shareholders. Following meeting, Duke Energy agreed to conduct a 2-degree scenario analysis and disclose their findings. We believe the Fund's shareholder proposal set in motion significant company action on climate change, including a 2019 announcement that Duke Energy aims to achieve net-zero carbon emissions by 2050.

The Proposed Rule is Decidedly Pro-Management, to the Detriment of Long-Term Shareholders

The Department suggests that the default position of an ERISA plan fiduciary should be deferring to management recommendations. Affording such deference would be an abdication of a plan fiduciary's responsible stewardship obligations by shifting control of corporate governance further toward corporate management. The Proposed Rule's exception that would allow ERISA plans to ignore all of the Proposed Rule's requirements by simply agreeing to vote in favor of management recommendations further facilities this disproportionate and imprudent shift toward management.

Always voting with corporate management or only voting on select issues still requires the burdens of a proxy voting infrastructure, so it is unclear what benefit such a policy would bring to an ERISA plan. Moreover, a decision to refrain from proxy voting would not relieve ERISA plans of their duty to monitor the corporate governance of portfolio companies.

ERISA fiduciaries should not blindly rely on corporate management's fiduciary duty to protect their interest, as the Proposed Rule suggests. There is a great deal of room between what is *unlawful* under corporate law and what is truly best for a pension plan's beneficiaries. There are a range of options acceptable under directors' and officers' fiduciary duties, but not all of them are in the best interest of any particular pension plan. The Proposed Rule should allow ERISA plans to use their votes in a way that brings the most benefit their members.

Since the corporate accounting scandals at Enron and WorldCom in the early 2000s, it has been widely recognized that good corporate governance can mitigate risks to investors. Proxy voting can enhance investment returns by holding corporate management accountable to investors, thereby reducing the risk of costly corporate wrongdoing. The proposed rulemaking's "permitted practice" that would allow ERISA plans to only vote on particular types of proposals (corporate mergers and acquisitions, share buybacks, stock issuances, and proxy contests) rests on the faulty assumption that only these issues can have a material economic impact. The ability to vote against directors (which make up seventy percent of all proxy votes) is an important accountability mechanism that helps to avert corporate scandals that ultimately drain resources from companies.

Conclusion

Even if one accepts the Department's curious conclusion that there is no fiduciary mandate under ERISA to vote proxies, it does *not* follow from this that ERISA plans are required to favor management by default when they do vote, or engage in a written company-by-company economic analysis to determine whether to vote at all. And the Department has not offered evidence to support its determination. The rule will only add costs to ERISA plans that wish to exercise their fundamental rights and protect the long-term interests of their beneficiaries by promoting sound corporate governance practices.

Finally, it cannot be emphasized enough that this Proposed Rule does not only impact ERISA plans. There will be significant aggregate effects on the overall market from the strictures in the Proposed Rule. If the Department achieves what appears to be its objective—namely, that many ERISA plans stop voting their proxies altogether—there will be a marked shift in power away from shareholders and toward management because ERISA plans constitute a sizeable portion of total market capitalization. It will also result in a shift in power away from those that provide a measure of stability to the market and toward short-term traders and speculators, certainly not a good outcome for the markets and the trillions of dollars of retirement savings of millions of Americans invested in them.

I appreciate the opportunity to submit a comment on this important matter. I trust the Department will conduct the necessary analysis and review of these comments and others that have been submitted, and that it finds that rulemaking relating to proxy voting is unnecessary. Thank you for your attention to these comments.

Sincerely,

Thomas P. DiNapoli
State Comptroller