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October 5, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Ave NW, Room N-5655
Washington DC 20210

Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights,
RIN 1210-AB91

To Whom It May Concern:

The Service Employees International Union (SEIU) submits these comments in response to the Employee Benefits Security Administration's Notice of Proposed Rulemaking on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.[1] SEIU is a union that represents over 2.2 million working men and women in the health care, education, child care, property services, and public sectors. SEIU's own family of funds have combined assets of $2.4 billion and cover roughly 120,000 participants, who stand to lose their voice and a tool for holding corporations accountable. In addition, SEIU represents 800,000 participants in public plans who follow ERISA guidelines and will be similarly disenfranchised.

The DOL's proposed rule jeopardizes the retirement security of plan participants by burdening and constraining proxy voting. Through the exercise of proxy voting rights, plan fiduciaries hold corporations accountable for creating long-term economic value. The increase in proxy voting cited by the DOL reflects appropriate monitoring and engagement efforts by institutional investors following high-profile corporate governance failures and the growing recognition that the environment, diversity, and other societal issues present economic risks and opportunities.[2] Plan fiduciaries would be remiss to ignore their economic implications. Burdening and constraining proxy voting limits plan fiduciaries' ability to serve the economic interests of plan participants through shareholder engagement.

The DOL justifies burdening and constraining proxy voting by suggesting that proxy voting may have veered off into economically irrational or non-pecuniary behavior. This speculative claim is not supported by the sources cited in the proposed rule.

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[1] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210-AB91, 85 Fed. Reg. 55,219 (Sept. 4, 2020), https://www.federalregister.gov/documents/2020/09/04/2020-19472/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights. ("NPRM")

[2] Climate-Related Market Risk Subcommittee, *Managing Climate Risk in the U.S. Financial System.* Market Risk Advisory Committee, U.S. Commodity Futures Trading Commission (September 2020); Rebecca Greenfield, "When Companies Improve Their Diversity, Stock Prices Jump," *Bloomberg*, (September 17, 2019).

- The DOL states that it is "concerned that some fiduciaries and proxy advisory firms…may be acting in ways that unwittingly allow plan assets to be used to support or pursue proxy proposals for environmental, social, or public policy agendas that have no connection to increasing the value of investments used for the payment of benefits or plan administrative expenses, and in fact may have unnecessarily increased plan expenses"[3] and cites the US Department of Labor Office of Inspector General Report *Proxy-Voting May Not be Solely for the Economic Benefit of Retirement Plans.* However, the Inspector General's report is a study of documentation and enforcement effort and does not empirically assess the connection between proxy voting and shareholder value or plan expenses.

- The DOL asserts that "research regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment in the corporation has yielded mixed results."[4] It cites a review of 73 studies that concludes, to the contrary, that "[shareholder] activism in more recent years is more frequently associated with increased share values and operating performance."[5] It cites a study that finds "private pension fund ownership—driven by the Teachers Insurance and Annuity Association-College Retirement Equities Fund, which engages in strategies designed to influence corporate behavior in its portfolio—is associated with higher firm value."[6] Another empirical literature review that the DOL cites as "collecting research regarding the 'equivocal results' of shareholder activism"[7] focuses on studies of shareholder activism that fall outside the purview of this rulemaking and, even so, does not conclude that shareholder activism harms firm performance.[8] Copland, Larcker and Tayan (2018) provides an overview of the proxy voting industry and explores its effect on voting behavior and corporate policy but does not actually explore the linkage to shareholder value.[9] The DOL quotes another author as saying: "In light of the fact that any investment in voting will likely generate higher costs than benefits for the fund, it is surprising that passive funds vote at all."[10] This author was referring exclusively to passively managed funds in that quote and her core argument holds that the "presence [of institutional investors and hedge funds] provides a check

[3] NPRM pg. 55222

[4] *Id.*

[5] Matthew R. Denes, Jonathan M. Karpoff, and Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research,* 44 J. Corp. Fin. 405, 407 (2017)

[6] Tracie Woidtke, *Public Pension Fund Activism and Firm Value: An Empirical Analysis,* Manhattan Institute (2015), https://media4.manhattan-institute.org/pdf/lpr_20.pdf

[7] NPRM pg. 55222, fn. 39.

[8] Maria Goranova and Lori Verstagen Ryan, *Shareholder Activism: A Multidisciplinary Review,* 40 Journal of Management (July 2014)

[9] James R. Copeland, David F. Larcker, and Brian Tayan, *The Big Thumb on the Scale: An Overview of the Proxy Advising Industry* (May 2018), https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-closer-look-72-big-thumb-proxy-advisory.pdf

[10] NPRM pg. 55222, fn. 39.

> against managerial slack, primarily because they identify underperforming firms as part of their investing strategy and are motivated to discipline wayward management."[11] Yermack (2010) offers qualified support for the benefits of proxy voting: "Many studies offer indirect evidence that firm values are higher when the shareholder franchise is more easily exercised; though, much of this evidence is confined to the area of mergers and acquisitions, with relatively less research supporting the idea that firms benefit from shareholder participation in areas such as executive compensation or social activism."[12]

Given the lack of evidence of significant problems in proxy voting, burdening and constraining proxy voting with new requirements is unwarranted. The proposed rule would inflate the cost of shareholder monitoring and engagement by requiring plans to conduct an economic analysis to determine whether to even vote on an issue. The safe harbors proposed by the DOL bias plans toward non-voting or voting with management, which limits shareholder monitoring, protects incumbents, and limits the tools shareholders have to hold corporations accountable. Plan fiduciaries have always known to balance the costs and benefits when deciding when and how to vote proxies. Plan fiduciaries remain better positioned to judge the economic interests of plan participants in the proxy voting process than the DOL's inflexible permitted practices. For these reasons, we strongly oppose the proposed rule.

Thank you for the opportunity to share our perspective.

Sincerely,

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[11] Dorothy S. Lund, *The Case Against Passive Shareholder Voting,* 43 J. Corp. Law (2018), fn. 39.
[12] David Yermack, *Shareholder Voting and Corporate Governance,* 2 Ann. Rev. Fin. Econ.