October 5, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
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
Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)

Dear Acting Assistant Secretary Wilson,

The Principles for Responsible Investment ("PRI") welcomes the opportunity to comment on the notice of proposed rulemaking titled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" ("NPR"; the changes proposed in the NPR are referred to herein as the "Amendments").[1] If adopted, the Amendments would significantly burden fiduciaries' exercise of proxy voting rights, with no compelling justification, with detrimental effects on the value of investments by plans governed by the Employee Retirement Income Security Act ("ERISA"). The NPR concedes that the Department lacks data on the costs currently associated with proxy voting. Such data is fundamental to this rulemaking, and we believe it is improper for the Department to propose the Amendments without it.

The PRI is the world's leading initiative on responsible investment.[2] It works to understand the investment implications of environmental, social and governance (ESG) factors and to support its international network of 3,000 investor signatories in incorporating these factors into their investment and ownership decisions. Launched in New York in 2006, the PRI's signatories manage over $103 trillion in AUM. The US is the PRI's largest market, with over 600 signatories.[3]

PRI signatories commit to be active owners and incorporate ESG issues into their ownership policies and practices, as well as investment decision making. For listed equities, active ownership includes

[1] See Appendix A for more information about the PRI.
[2] Principles for Responsible Investment (The PRI), *What are the Principles of Responsible Investment?* available at: https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment.
[3] As of July 1, 2020.

PRI US, Inc
Registered office: 45 Rockefeller Plaza, Suite 2000
New York, NY 10111
T: +212 332 3437 W: www.unpri.org E:info@unpri.org

proxy voting, with signatories reporting on their proxy voting decision making process,[4] and engagement with companies.[5]

The PRI requests that the Proposal be withdrawn for three reasons:

1. The Department would effectively disenfranchise ERISA plans with no justification.
2. The NPR is silent regarding most of the costs the Amendments will impose, including reduced accountability, the loss of value-enhancing ESG reforms, and decreased incentives to improve disclosure, all of which have the potential to harm value at portfolio companies as well as across industries and markets.
3. The analytical processes set forth in the Amendments are incoherent and would require fiduciaries to consider factors that are undefined or clearly not relevant to economic impact.

THE RATIONALE FOR THE AMENDMENTS IS UNPERSUASIVE

The Amendments impose massively increased costs on ERISA fiduciaries by requiring proposal-by-proposal economic analysis that could be avoided with the implementation of streamlined "permitted practices." These permitted practices, however, would require fiduciaries to refrain from voting or to vote in favor of management and would effectively disenfranchise ERISA plans. The DOL explains these drastic changes in ERISA's fiduciary obligations with two primary arguments, neither convincing, for why the Amendments are necessary.

First, the NPR asserts that fiduciaries suffer from a "misunderstanding" that ERISA's fiduciary duties require that all proxies be voted.[6] The Department offers no evidence, though, that fiduciaries hold this belief or are in fact voting all proxies, data that surely could have been obtained in the course of the Department's oversight activities prior to issuance of the NPR.

Nonetheless, the Department asserts that the alleged misconception that fiduciaries are obligated to vote all proxies "may be" leading fiduciaries to act "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 . . . and may in fact have unnecessarily increased plan expenses."[7] That statement reflects an outdated view of the role ESG factors play in value creation. There is ample evidence that ESG considerations can affect firm value and thus investment performance, as discussed more fully below; thus, proposals addressing environmental, social, and public policy matters are not by definition unrelated to value creation at portfolio companies.

What's more, the single source cited to support the Department's speculation contains no evidence regarding the ERISA fiduciaries' decisions. The NPR points to a document setting forth "highlights" of a 2011 report by the Department's Office of the Inspector General—Office of Audit ("OIG"; the report

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[4] https://www.unpri.org/Uploads/n/p/v/05.lea2019_831072.pdf at 39-49.
[5] https://www.unpri.org/listed-equity/introduction-to-active-ownership-in-listed-equity-/2719.article
[6] NPR, at 8.
[7] NPR, at 14.

is referred to herein as the "OIG report"). The OIG reviewed records of a sample of 43 ERISA plans related to proxy voting for calendar year 2009.[8] Importantly, the OIG did not find that particular proxy votes lacked economic justification, only that plans did not document their analyses for most votes, which was unsurprising given that such documentation was not required by the Department's rules.

The OIG Report included a response from the Department's Assistant Secretary for Employee Benefits Security, who stated that "[i]n light of our enforcement and regulatory experience with proxy voting decisions, we do not believe we have a public record at this time that would justify the administrative burden and expenses that would be imposed on plans by a more expansive recordkeeping requirement" than that described in the Department's interpretive bulletin.[9] The public record is no stronger now, nearly 10 years later.

Second, the Department argues that the Amendments are necessary because "research regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment in the corporation has yielded mixed results," pointing to a handful of studies.[10] But the Department ignores literature showing a positive relationship between shareholder voting and financial performance.

Appendix C to our comment letter on the Department's recent proposed rule, "Financial Factors in Selecting Plan Investments," sets forth some of those studies. In addition, a 2012 study in the Journal of Finance estimated that the passage of a single governance proposal causes a positive 2.8% cumulative abnormal return,[11] and a 2015 study found that implementing a corporate social responsibility ("CSR") shareholder resolution leads to an increase in value of about 1.77%.[12] A similar study of 4,624 shareholder initiatives found that companies that adopted CSR proposals experienced a persistent share-price increase of between 2.1% and 2.5% when the decision was announced.[13] "Vote no" campaigns against directors, in which shareholders withhold support from directors in uncontested elections, spur improvements in operating performance and an increase in disciplinary CEO turnover, according to a 2008 study.[14] The Department's failure to address this literature undermines the credibility of empirical research as a justification for the Amendments.

Moreover, the studies the NPR does cite do not support the Department's claim that research undertaken since the Department began issuing subregulatory guidance on proxy voting casts doubt on the value of shareholder voting.[15] A 2017 study by Matthew Denes et al. reviewing 73 studies on shareholder activism from 1994 to 2012 found that shareholder proposals and engagements with

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[8] U.S. Department of Labor, Office of Inspector General—Office of Audit, "Proxy-Voting May Not be Solely for the Economic Benefit of Retirement Plans," at 2 (Mar. 31, 2011) (https://www.oig.dol.gov/public/reports/oa/2011/09-11-001-12-121.pdf).
[9] OIG Report, at 19.
[10] NPR, at 13.
[11] See Vicente Cuñat, Mireia Gine, & Maria Guadalupe, "The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value," 67 J. Fin. 1943 (2012) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555961)
[12] Carol Flammer, "Does Corporate Social Responsibility Lead to Superior Financial Performance? A Regression Discontinuity Approach," Management Science, Vol. 61 No. 11 (2015) (https://www.researchgate.net/publication/256034233_Does_Corporate_Social_Responsibility_Lead_to_Superior_Financial_Performance_A_Regression_Discontinuity_Approach)
[13] Fernando Martins, "Corporate Social Responsibility, Shareholder Value, and Competition" (Aug. 14 2020) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3651240).
[14] Diane Del Guercio et al., "Do Boards Pay Attention When Institutional Investor Activists 'Just Vote No'?", at 3-4 (2008) (https://www.readcube.com/articles/10.2139%2Fssrn.575242).
[15] The studies appear in NPR, at 13 fn. 39.

management are associated with small or negligible changes in firm value or returns, and that shareholder proposals prompt governance changes,[16] which in our view can enhance long-term value creation. The study found that more recent studies showed a link to increased firm value from shareholder proposals, while older studies did not, suggesting improvement in effectiveness over time.[17] Proxy contests, on which shareholders also vote, were associated with significant changes in firm value.[18]

Similarly, David Yermack's 2010 paper cited in the NPR describes studies showing that governance changes that tend to reduce accountability to outside shareholders are associated with negative abnormal stock returns,[19] as well as studies finding that a larger proportion of votes withheld from directors is associated with improved operating performance, lower CEO pay, more CEO turnover, dismantling of takeover defenses, and value-increasing acquisitions.[20] All of the studies discussed in both Denes and Yermack's papers date from after the Department's 1988 Avon Letter, and nearly all were conducted after the 1994 Interpretive Bulletin on proxy voting.

THE DEPARTMENT FAILS TO ACCOUNT FOR MYRIAD NEGATIVE IMPACTS ON COMPANIES, MARKETS AND INVESTORS

The Department has not made the case that the ostensible benefits of the Amendments outweigh the substantial direct and indirect costs the Amendments will impose on plans, their service providers, and the value of plan assets. The NPR's analysis falls short by failing to discuss, much less quantify, the impact of reduced accountability, foregone ESG reforms and less transparency on portfolio companies, industries, and markets.

Direct Costs Associated with the Amendments

Direct costs to ERISA plans from the Amendments will stem from increased research and documentation costs associated with making determinations, in some cases on a vote-by-vote basis, about economic impact. The NPR concedes that the Department lacks data on the costs currently associated with proxy voting and asks commenters to submit data that "illuminate these activities," as well as information on how the Amendments would affect such costs. Such data is fundamental to this rulemaking, and we believe it is improper for the Department to propose the Amendments without it because commenters cannot provide their views on data that is not included in the NPR.

The Department does set forth what it characterizes as an "illustration" estimating that additional direct costs imposed by the Amendments would total approximately $535 million per year. Others with direct experience are better positioned to comment on whether the illustration's inputs for the number of service providers, issuers and votes affected by the Amendments, as well as the labor rates for

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[16] Matthew R. Denes et al., "Thirty Years of Shareholder Activism: A Survey of Empirical Research," 44 J. Corp. Fin. 405, 410, 413 (2017).
[17] Denes et al., at 409, 416, 419.
[18] Denes et al., at 406.
[19] David Yermack, "Shareholder Voting and Corporate Governance," at 6 (2010) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523562&download=yes).
[20] Yermack, at 10-11.

proxy voting analysis and documentation, are reasonable. We believe, however, that the Department's estimate that only 5.6% of votes would involve matters that fall outside the permitted practices and thus be more time-consuming to research is unrealistically low, which results in the substantial understatement of direct costs imposed by the Amendments.

The Department arrived at the 5.6% figure by assuming that all plans would adopt the most restrictive permitted practice, in which plans vote only on a narrow slice of proposals—essentially, fundamental transactions and proxy contests--the Department believes are relevant to firm value. Even assuming that all plans would elect to use permitted practices, it is unlikely that all plans would select that particular practice. The permitted practices do not themselves dictate types of proposals on which plans should vote with management or abstain from voting but leave it to fiduciaries to make those determinations.

A fiduciary could determine that uncontested director elections, for example, have an economic impact on the plan, given the importance of effective board oversight and the evidence from the "vote no" study described above, leading the majority of votes to fall outside of the permitted practices' coverage.[21] A decision to cast votes on compensation-related management proposals would result in approximately 15% of votes not being covered by permitted practices.[22] Only 2% of votes would be covered by a permitted practice of not voting on shareholder proposals.[23]

Because fiduciaries have discretion to identify types of proposals and issuers to be covered by permitted practices, there is no logical basis for the Department's claim that proposals "within the permitted practices" require less research and documentation "even if the permitted practices did not exist."[24] The resource-intensiveness of a voting decision depends on the complexity of the analysis required to cast an informed vote in accordance with proxy voting guidelines; it is therefore not possible ex ante to state that any proposal type a fiduciary might select for coverage by a permitted practice would necessarily involve a simplistic analysis.

The impact of the Department's nonsensical claim becomes clear if one calculates the likely cost burden using a permitted practice that requires the more involved analysis for more than 5.6% of votes. Without that lowball estimate, and the unsupported assumption that proposals eligible to be included in permitted practices are inherently less costly to analyze even if no permitted practice is adopted, the cost of the Amendments to ERISA plans increases substantially. If even 20% of votes require the more expensive analytical process, research costs would increase by nearly $200 million.[25] Accordingly, the Department must estimate costs imposed by the Amendments using more realistic and well-supported assumptions and allow public comment on those scenarios.[26]

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21 Director elections comprise approximately 70% of management proposals at U.S. public companies. See Investment Company Institute. "Proxy Voting by Registered Investment Companies, 2017." Vol 25, No. 5. July 2019, at 5 (https://www.ici.org/pdf/per25-05.pdf) (hereinafter, "ICI Report").
22 ICI Report, at 5.
23 ICI Report, at 4.
24 NPR, at 84.
25 This calculation uses the NPR's labor rates as well as its assumption that only 5% of research costs would be "new," which strikes us as low as some of the factors the NPR states should be considered, such as the identity of the proponent and the opportunity costs of voting, are new. See NPR, at 21.
26 Similar infirmities plague the NPR's exploration of the Amendments' benefits, so the Department should provide analyses of putative cost savings under multiple scenarios, not just the ones most favorable to the Department.

The NPR downplays the impact of increased direct costs, reasoning that many plans use investment managers which collectivize proxy voting services for many plans.[27] It is not reasonable to assume, though, that increased costs imposed on service providers would not be passed through, at least to some extent, to plans. Data on the likely response by service providers to the increased costs resulting from the Amendments should be obtained and made available to allow informed comment on the costs imposed by the Amendments.

Indirect Costs Associated with the Amendments

The NPR concedes that the Amendments would impose indirect costs, stating that "externalities, public goods, or other market failures…might generate costs to society on an ongoing basis."[28] The Department "solicits comments on whether the permitted practices included in this proposal might produce unintended costs by discouraging responsible fiduciaries from voting shares when voting may be economically beneficial."[29] In our view, substantially curtailing proxy voting would reduce accountability, decrease the likelihood that value-enhancing reforms will be adopted, and remove incentives for companies to improve disclosure, thus impairing investment decision making.

U.S. corporate law delegates responsibility for managing the "business and affairs" of a corporation to its board,[30] which in turn delegates day-to-day activities to management.[31] This separation of ownership from control gives rise to agency costs, as managers' and shareholders' interests are not fully aligned. Shareholder voting is a form of monitoring designed to reduce agency costs: shareholders elect directors; approve fundamental transactions, executive compensation arrangements, and changes to the charter and bylaws; and vote on shareholder proposals because they have the best incentives to maximize value.[32] In the now-famous words of the Delaware Court of Chancery, the "shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[33]

Imposing obstacles to shareholder voting or creating concern that a vote against management will be viewed as improper renders shareholder voting less effective as a check on manager and director self-interest and shirking. The NPR suggests that a policy of voting with management is sensible because "nearly all management proposals are approved with little opposition."[34] But management proposals are themselves shaped by the possibility of shareholder revolt. In an environment where dissent is less easily expressed, companies could start advancing less value-enhancing proposals, especially in areas like executive compensation where conflicts of interest are most acute, and taking

27 NPR, at 68.
28 NPR, at 49.
29 NPR, at 62.
30 E.g., 8 Del. Code section 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.").
31 See Marc I Steinberg & Matthew D. Bivona, "Disney Goes Goofy: Agency, Delegation, and Corporate Governance," 60 Hastings L.J. 201, 214 ("When delegation occurs, it is customary for the board to delegate such authority to officers, who act as agents of the corporation.").
32 Frank Easterbrook & Daniel Fischel, "Voting and Corporate Law," 26 J. L. & Econ. 395-427 (1983).
33 Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).
34 NPR, at 26.

other actions, like related party transactions, to extract private benefits. Such developments would erode shareholder value over time. Accordingly, ERISA funds' disengagement from proxy voting, and the potential impact on share value from less robust monitoring, should be considered as an indirect cost of the Amendments.

As well, many value-enhancing ESG reforms have been achieved through shareholder voting, whether on shareholder proposals or vote-no campaigns. For example, sustained shareholder pressure led the majority of large-capitalization companies to adopt majority voting standards for director election and say on pay was included in the Dodd-Frank reforms only after shareholder proposals seeking such votes had received substantial shareholder support.

Numerous studies have shown that governance arrangements limiting the efficacy of shareholder voting and thus accountability to shareholders, such as classified boards and supermajority voting requirements, are associated with poorer returns and lower firm value. Weaker shareholder rights, as measured through a multi-factor governance index, were associated with lower profitability and sales growth, and a strategy of buying stock in companies with the greatest shareholder rights and selling those with the weakest yielded significant abnormal returns of 8.5% per year in a 2003 study.[35] A more recent study using the index found similar results over a longer time period.[36] Classified boards are associated with lower firm value and less performance-sensitive compensation.[37] Five specific entrenching governance arrangements, pulled together in an index, are associated with lower firm value.[38] Shareholder voting, on both shareholder and management proposals, has been critical in reducing the number of companies with such arrangements.

Outside the shareholder rights arena, strong evidence supports the value-relevance of ESG performance. A 2018 study by Bank of America "found that firms with a better ESG record than their peers produced higher three-year returns, were more likely to become high-quality stocks, were less likely to have large price declines, and were less likely to go bankrupt.[39] Deutsche Asset & Wealth Management and researchers from the University of Hamburg concluded that 62.6% of meta-analyses showed a positive relationship between ESG and corporate financial performance.[40] It is thus unsurprising that investors, including PRI signatories, have embraced ESG integration. According to a survey by RBC Global Asset Management, 70% of institutional investors in Canada, the U.S. and the U.K. "apply ESG principles to investment decisions," with 53% of respondents citing mitigation of risk and higher returns as reasons for doing so.[41]

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35 Paul Gompers et al., "Corporate Governance and Equity Prices," Quarterly J. of Econ. 118(1), 107-155 (2003).
36 Martijn Cremers & Allen Ferrell, "Thirty Years of Shareholder Rights and Firm Valuation" (2013) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413133).
37 Olubunmi Faleye, "Classified Boards, Firm Value, and Managerial Entrenchment," 83 J. F. Econ. 501 (2007) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=877216).
38 Lucian Bebchuk et al., "What Matters in Corporate Governance," Rev. Fin. Stud., Vol. 22, No. 2, 783-827 (Feb. 2009) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=593423)
39 Robert G. Eccles & Svetlana Klimenko, "The Investor Revolution," Harvard Business Review, May-June 2019 (https://hbr.org/2019/05/the-investor-revolution)
40 Gunnar Friede et al., "ESG and Corporate Financial Performance: Mapping the Landscape," p.7 (Dec. 2015) (https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf)
41 Hazel Bradford, ""70% of Institutional Investors Apply ESG to Investment Decisions—Survey," Pensions & Investments, Oct. 16, 2019 (https://www.pionline.com/esg/70-institutional-investors-apply-esg-investment-decisions-survey).

Specific ESG issues can also have financial impact. For example, a Bank of America Merrill Lynch study "found that companies with high scores on gender/diversity measures, including board diversity, women in management and company policies on diversity/inclusion, generally saw lower subsequent price and EPS volatility and higher subsequent returns on equity than those with low scores."[42] Companies with one or more women on boards delivered higher average returns on equity, lower leverage, better average growth and higher price/book value multiples in a six-year Credit Suisse Research Institute study of 2,360 global companies.[43] Corporate leadership in the top quartile for racial and ethnic diversity was associated with 35 percent higher likelihood of financial returns above their national industry median in a 2015 McKinsey study.[44] Votes on shareholder proposals seeking improving diversity and inclusion, as well as director votes aimed at enforcing diversity goals, are potentially value-enhancing.

The NPR expresses skepticism about voting on shareholder proposals because many of them request disclosure. High-quality disclosure is critical to enable investors to integrate ESG factors into investment decision making, which entails the use of qualitative and quantitative ESG information in investment processes with the objective of enhancing investment decision-making. Implementation of disclosure requests contained in shareholder proposals, which seek information not contained in an issuer's SEC filings, facilitates ESG integration. More complete ESG information may also improve the functioning of the capital markets more generally by allowing investment to be directed to companies with the best long-term prospects. Loss of these important benefits would be another indirect cost of the Amendments.

Shareholder engagements, which occur against a backdrop of potential shareholder voting, have also been shown to improve firm performance. In a 2018 study of global engagements primarily on environmental and social issues, researchers found that successful engagements led to higher sales growth and that successfully engaged firms with low ESG scores prior to engagement had statistically significant excess cumulative abnormal returns compared with similar non-engaged firms in the year following closure of the engagement.[45]

Under the Amendments, the impact of reduced accountability and foregone ESG improvements and disclosure would not be limited to particular companies at which fewer proxies would be voted or where proxies would be voted with management. The NPR keeps the focus on economic impact at the individual company level.[46] But that approach is inconsistent with how many funds view proxy voting as well as evidence regarding the impact of votes on other similarly-situated companies. Many

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42 See https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf
43 Credit Suisse, "Does Gender Diversity Improve Performance?" (Jul. 31, 2012) (https://www.credit-suisse.com/us/en/about-us/research/research-institute/news-and-videos/articles/news-and-expertise/2012/07/en/does-gender-diversity-improve-performance.html).
44 Vivian Hunt, Dennis Layton & Sara Prince, "Diversity Matters," McKinsey & Company (Feb. 2, 2015) (http://www.diversitas.co.nz/Portals/25/Docs/Diversity%20Matters.pdf); see also Guido Giese, "Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk, and Performance," J. Portfolio Mgmt., at 4-5 (July 2019) (https://www.msci.com/documents/10199/03d6faef-2394-44e9-a119-4ca130909226) (finding that high ESG-rated companies paid higher dividends, earned more profits, and had fewer "idiosyncratic risk incidents" involving large stock price drops).
45 Tamas Barko et al., "Shareholder Engagement on Environmental, Social, and Governance Performance" (Sept. 2018) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219); see also PRI, "How ESG Engagement Creates Value for Investors and Companies" (2018) (https://www.unpri.org/download?ac=4637).
46 See NPR, at 19 ("Fiduciary should "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…") (emphasis added).

investors, especially those whose holdings are broadly diversified, aim to influence companies across industries or markets to adopt value-enhancing reforms. Indeed, governance arrangements and disclosure improvements have spread quickly after early adoption at a few companies.[47] Proxy voting may even affect an ERISA fund's assets in other asset classes. For example, a fund's vote supporting a proposal asking an issuer to provide additional ESG disclosure would make more information available for evaluating bonds issued by that issuer.[48] Accordingly, an analysis of indirect costs flowing from diminished proxy voting by ERISA plans that focuses only on individual companies would be incomplete.

Benefits

The ostensible benefits flowing from the Amendments consist of savings obtained by not voting on some ballot items because fiduciaries determine that the proposal would not have an economic impact and/or because they have adopted a permitted practice in which particular kinds of proposals or proposals at particular issuers are either not voted or voted with management's recommendations. The NPR asserts that this savings would boost returns, though that claim is weakened by the Department's observation that many funds use service providers for proxy voting and therefore are not shouldering the full cost of such activities.[49]

As it does for direct costs, the Department offers an "illustration" of the cost savings associated with the Amendments that suffers from the same infirmities. The illustration makes the arbitrary choice to assume that 10% of proxies are no longer voted as a result of fiduciaries' adoption of permitted practices. As discussed above, that number could range a great deal depending on the fiduciary's determinations regarding economic impact. The Department should therefore provide cost/benefit analyses using a range of permitted practices scenarios, as well as scenarios in which fiduciaries do not elect to adopt permitted practices.

THE ANALYSIS REQUIRED BY THE AMENDMENTS TO DETERMINE THE ECONOMIC IMPACT OF A PROXY VOTE WOULD BE UNWORKABLE

The NPR's discussion of how fiduciaries should determine the economic impact of a proposal on the plan is confusing and appears to require fiduciaries to weigh information not in their possession as well as factors that have no logical bearing on economic impact. As a result, the PRI believes that fiduciaries will be attracted to the certainty provided by the permitted practices, even if the fiduciary believes that retaining more flexibility best promotes long-term value creation.

Past interpretations by the Department, as recently as 2018, have stated that fiduciaries should determine whether the plan's exercise of shareholder rights, either by itself or together with other

47 E.g., Stephen J. Choi et al., "Does Majority Voting Improve Board Accountability?" at 1125-1127 (Nov. 2016) (describing rapid shift from plurality to majority voting standard among S&P 500 companies after introduction of shareholder proposals on the subject).
48 See https://www.unpri.org/an-introduction-to-responsible-investment/an-introduction-to-responsible-investment-fixed-income/4986.article.
49 See NPR, at 68.

shareholders, is expected to affect the value of the plan's investments.[50] The NPR does not appear to contemplate that a fiduciary can take into account the effect of other shareholders' actions in making determinations regarding economic impact. Because ERISA plans' equity investments tend to be broadly diversified, a plan will rarely if ever hold a stake large enough to bring about a particular outcome at the company. A plan's votes could, however, when aggregated with those of other investors, rise to that level. Not stating that other shareholders' actions can be considered is confusing to fiduciaries, given the Department's past practice, and if the Department intends to abrogate that interpretation it should do so explicitly and with adequate justification.

The NPR contemplates two separate analyses, the first whether a vote would have an economic impact and the second, if the answer to the first question is yes, how to vote. But that bifurcation ignores the real-world process for analyzing proxy proposals. To determine economic impact would require a fiduciary to analyze the proposal as well as proposal-relevant company information, which could range from straightforward—is there a reason the company's external auditor should not be ratified?—to much more complex matters including the performance of the board or particular board committees (in the case of director elections), compensation arrangements and pay-performance sensitivity, and the adequacy of existing disclosure on a subject. The economic impact of a proposal is impossible to disentangle from the factors informing whether a fiduciary should support the proposal. By the time a fiduciary has finished analyzing economic impact, the resources needed to decide and cast the vote are small.

The NPR's discussion of these factors muddles rather than illuminates. It lists types of information that "will better enable fiduciaries to determine whether or how to vote proxies," but does not identify which factors relate to whether and which to how (and which to both).[51] In addition, the NPR asserts that fiduciaries should consider "an analysis of the particular shareholder proponents,"[52] which has no relevance to the economic impact of the proposal or the appropriate vote to cast on it, and "voting recommendations of management," which could be germane to the substantive voting decision but would not seem to affect the economic impact determination. Fiduciaries are also recommended to consider costs associated with voting, "including opportunity costs."[53] No guidance is provided defining opportunity costs or explaining how a fiduciary might identify and quantify foregone opportunities relevant to economic impact. Given the centrality of this inquiry to fiduciaries' obligations under the Amendments, the Department should set forth a clear description of both analyses in a new NPR.

CONCLUSION

The Amendments, if finalized in their current form, will impose substantial additional costs on ERISA plans and their asset managers. They also discourage participation in proxy voting and other forms of active ownership by ERISA plans. This is likely to undermine progress on ESG integration that is necessary to maximize long-term shareholder value and advance sustainable financial markets in the

[50] Interpretive Bulletin 94-2; Field Assistance Bulletin 2018-01.
[51] NPR, at 20.
[52] NPR, at 21.
[53] NPR, at 21.

US. Ultimately, US retirement savers will bear the burden as their plans face higher administrative costs, additional financial risk and diminished returns. The PRI, therefore, urges the Department to withdraw the NPR.

Thank you for the opportunity to share our views. For further conversation and follow up, please feel free to contact our policy team:

- Heather Slavkin Corzo, Head of US Policy: heather.slavkin.corzo@unpri.org
- Colleen Orr, US Policy Analyst: colleen.orr@unpri.org

Yours sincerely,

Fiona Reynolds
Chief Executive Officer
Principles for Responsible Investment

APPENDIX A

The PRI is the world's leading initiative on responsible investment.[54] It works to understand the investment implications of environmental, social and governance (ESG) factors and to support its international network of 3,000 investor signatories in incorporating these factors into their investment and ownership decisions. Launched in New York in 2006, the PRI's signatories manage over $103 trillion in AUM. The US is the PRI's largest market, with over 600 signatories.[55]

The Principles for Responsible Investment are a voluntary and aspirational set of investment principles that offer a menu of possible actions for incorporating ESG issues into investment practice.[56] The Principles that signatories set out to achieve include incorporation of ESG issues into investment analysis and decision-making processes; engagement with companies around ESG factors; and seeking issuer disclosure on ESG factors. The Principles were developed by investors, for investors. In implementing them, signatories contribute to developing a more sustainable global financial system. They have attracted a global signatory base representing a majority of the world's professionally managed investments.

Signatories to the PRI aim to integrate all financially material factors, including ESG factors, into their investment processes. This is a risk management strategy, as evidence shows factors such as climate change and human capital management have a material economic impact on asset prices, especially when taking into account the risks that long-term, universal investors like pension plans face.

[54] Principles for Responsible Investment (The PRI), *What are the Principles of Responsible Investment?* available at: https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment.
[55] As of July 1, 2020.
[56] Principles for Responsible Investment (The PRI), *About the PRI* available at: https://www.unpri.org/pri/about-the-pri.