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Via Federal Rulemaking Portal: https://www.regulations.gov

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
Advanced Notice of Proposed Rulemaking
RIN 1210-AB91

Dear Sir or Madam:

This letter provides comments of T. Rowe Price Associates, Inc. and its affiliates (collectively "T. Rowe Price") in response to the proposed rule entitled Fiduciary Duties Regarding Proxy Voting and Shareholder Rights. We appreciate the opportunity to provide our perspectives on the proposal but for the reasons outlined below, cannot support it.

T. Rowe Price Associates, Inc. serves as investment adviser to the T. Rowe Price family of mutual funds and collective investment trusts maintained by its affiliate, T. Rowe Price Trust Company. T. Rowe Price provides investment management services to retirement plans of all sizes through its mutual funds, collective investment trusts and separate account management services. T. Rowe Price is the largest provider of actively managed target date funds[1] and is known for its consistent investment process and strong investment performance at below average cost.[2] A substantial portion of T. Rowe Price's total assets under management (AUM) is held by retirement plans. More than half of T. Rowe Price's AUM as of 12/31/2019 was held in defined contribution

[1] The ranking is based on actively managed target date fund assets under management, as reported in Investment News, "10 Things to Know About TDFs" (May 9, 2019 Edition).
[2] As of June 30, 2020, over 59% of all T. Rowe Price mutual funds had outperformed the median fund in their Morningstar peer group on a 1-year basis, over 64% on a 3-year basis, and over 70% and 75%, respectively, on a 5- and 10-year basis. As of that date, 85% of our mutual funds for individual investors have expense ratios below their Lipper peer category average.

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retirement plans.[3] Approximately $159B of T. Rowe Price's AUM was held in collective investment trusts, and almost $314B in separately managed and sub-advised accounts.[4]

As with the recent Department proposal on Financial Factors in Selecting Plan Investment, the Department's proposed rule governing ERISA plans' exercise of shareholder rights and proxy voting does not result from any identifiable harm that must be remedied. Yet, the proposed rule would mandate a change from a "need not vote" standard to a novel "must not vote" standard for proxy votes on matters deemed non-financial. Such a striking change would impose substantial new burdens on plan fiduciaries, and new costs on ERISA plans without any demonstrable benefit in outcomes. In addition, the proposal suffers from misapprehensions about corporate governance, proxy voting practices, and real-world constraints on voting mechanics, all of which cause the Department to substantially underestimate the impact of the proposed rule on plans and on issuers. Further, the proposal's standards are unworkable, and will enmesh fiduciaries in a Catch-22 of potentially conflicting obligations. Finally, the proposed accelerated effective date reveals how poorly understood the practical ramifications of the proposal are. In light of these fundamental flaws, we urge the Department to withdraw the proposed rule, and to collect additional data on proxy voting before proceeding further.

Our specific comments follow:

1. **The proposal is not based on any substantial evidence of harm requiring regulation.**

The Department's stated motivation for the proposed changes to fiduciary proxy voting is its concern that some fiduciaries are confused and believe that ERISA requires them to vote on every issue.[5] The Department further has "reason to believe" that fiduciaries are spending more than is warranted in voting non-financial proxies.[6] A handful of commentators are cited for the first proposition, [7] but no evidence is cited for the latter "belief."

[3] Source: T. Rowe Price Group, Inc. Form 10-K (December 31, 2019) reflecting total AUM of $1.2 trillion, of which over $631B are held in defined contribution plans--$510B in "investment only" plans, and another $121B in plans for which T. Rowe Price provides recordkeeping services.
[4] Source: T. Rowe Price Group, Inc. Form 10-K (December 31, 2019). Note that the 10-K does not identify the portion of separately managed and sub-advised accounts for U.S. based clients.
[5] 85 Fed. Reg. 55220.
[6] 85 Fed. Reg 55228.
[7] The Department's evidence for confusion on the part of ERISA fiduciaries is slim. No empirical evidence is cited, nor is any actual ERISA fiduciary or ERISA legal expert quoted. Instead, the Department cites the following commentators: one investment management executive characterizing Department guidance at a very high level as "generally requiring" voting by ERISA plans, one SEC commissioner reflecting on the "outsized" influence of proxy advisory firms in 2014, an industry trade group comment letter on the SEC proposal on proxy advisory firms (quoting that same SEC commissioner), a European agency reporting on its understanding of US pension law, and a blog from a lawyer and adjunct professor at Harvard Law School describing fiduciary duties of institutional investors generally, and making no mention of ERISA or ERISA-governed plans. Strikingly, the Department finds support for its contention that some ERISA fiduciaries believe every proxy must be voted in a Department press release quoting then

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Even if some fiduciaries are confused about their obligation to vote every proxy, that confusion can be remedied with a simple, standards-based regulation that clarifies this basic point. The Department's unsubstantiated fears do not justify imposition of an expensive, new regulatory requirement that will impose significant added costs on plans and plan fiduciaries.[8]

2. **The proposed rule disregards practical realities of proxy voting that would make the new standards costly and time-consuming to implement**.

There is no mathematical formula for determining whether a vote will have material financial impact on an issuer, let alone a plan's stake in that issuer. "Say on pay" votes present an interesting example. These votes, required by Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[9] are advisory. Some might conclude that advisory votes are non-financial. Nonetheless, virtually every corporate board adheres to the outcome of these votes.[10] To the extent retention of executive personnel is critical to successful execution of the corporate strategy, the question can be pivotal to a corporation's future performance. In such a case, making a determination as to financial impact on the issuer is more nuanced (and potentially more costly and difficult) than making a prudent decision on the substance of the proposal under consideration. There is no current mechanism by which ERISA fiduciaries assess the financial impact of a vote on a specific plan, nor is there research assistance available to help with that task. ERISA plan fiduciaries would have to develop the processes and resources necessary to implement these new rules. Investment managers like T. Rowe Price Associates, with responsibility for voting on behalf of many different ERISA plans, would need to hire and train additional personnel to begin to implement rules prohibiting submission of proxy votes on certain matters. The analysis would actually be more difficult than substantive assessment of the proxy vote, because it would need to be plan-specific.

Further, the proposed rule does not account for the common practice among investment managers of administering proxy voting guidelines across multiple portfolios. Like many investment managers, T. Rowe Price declines to accept voting responsibility if an ERISA client wishes voting to occur in accordance with its own guidelines. Accordingly, all ERISA portfolios for which T. Rowe Price has accepted voting discretion are voted in accordance with T. Rowe Price proxy voting policies. These policies are not administered at a plan level, and do not take into account a

Secretary of Labor Robert Reich, noting the importance of proxy voting by plans unless the costs substantially outweighs the benefits.

[8] We share concerns of other commentators, such as the Investment Company Institute, about the quality of the cost benefit analysis. Because the Department has not pointed to any evidence for known harms that will be remedied by the regulation, it is difficult to conclude that there is a demonstrable benefit that counterbalances the substantial costs imposed by the proposed rule.

[9] P.L. 111-203 enacted July 21, 2010 (as amended through P.L. 116-136 enacted March 20, 2020).

[10] A review of the outcome of say-on-pay votes among the Russell 3000 universe over the past 5 years illustrates this phenomenon. Only 36 issuers out of that universe (1.2%) have experienced repeated failures of their Say on Pay votes. In contrast, 98.8% of companies either maintain a compensation program that meets with shareholder approval or they immediately address the concerns after a failed vote, ensuring that they do not experience another loss. Source: Proxy Insight data as of 9/30/2020.

specific plans' holdings. Requiring such an analysis on a plan-by-plan basis would impose significant additional cost (as well as development of new processes and systems that cannot be implemented instantly).

The proposed rule does not acknowledge these challenges, either in its proposed effective date or in its cost-benefit analysis. The failure to account for such fundamental challenges illustrates how far from the mark the proposal is.

3. **The proposal's failure to account for the proxy voting mechanisms and corporate governance principles will result in adverse consequences for the corporate issuer and its shareholders.**

Modern proxy voting processes do not allow a holder of securities subject to the proxy to vote on some but not all proposals. Accordingly, if a plan fiduciary is solicited to vote on a proxy that contains one financial matter and two non-financial matters, the plan fiduciary would be required to abstain on the non-financial matters. But abstentions can have an uncertain impact, as the Department noted in the proposed rule's preamble. Depending on the type of vote and the governing certificates of incorporation and by-laws, abstentions can make it easier for a proposal to pass (because they are ignored in the tally and simply lower the overall number of affirmative votes needed for passage) or can make it much harder for a proposal to pass (because they increase the number needed for a majority).

The proposal seeks to cure this dilemma by suggesting that plan fiduciaries could vote on non-financial proposals if it was determined that their vote was necessary for a quorum. But a shareholder cannot know in advance whether its vote is needed for a quorum. A quorum results from the independent actions of a number of different shareholders; there is no mechanism by which shareholders can understand the progress towards quorum before voting. Nor could such a system realistically be developed. In recent guidance, the SEC has encouraged registered investment advisers to hold off voting until an issuer has an opportunity to respond to proxy adviser assessments. Late voting by holders of larger blocks of stock held by professional investment managers will make it difficult for issuers to develop a system to predict the existence of a quorum. Accordingly, the failure to vote by plans will often require re-solicitation of proxies, and potentially the delay of holding annual or special meetings, adding costs, expense and confusion for issuers and shareholders.

Depriving plans of their right to vote for or against matters can have the impact of denying their ability to exercise control over matters that are not "financial" in the short run but can have dramatic impacts in the long run. For example, on occasion, corporations seek votes to classify its board of directors, so that terms are staggered. Conversely, if a board is already classified, shareholders may sometimes seek to de-classify the board. A classified board has the effect of making a change in strategic direction much more difficult. Unless there is an immediate financial decision facing the Board that will be impacted by the adoption (or removal) of a classified board structure, many fiduciaries would conclude that they were barred from voting on such matters under the proposed rule. Even so, board structure is critical to good corporate governance and entrenched boards may at some future time hinder the corporation's ultimate success. As noted, if this issue were included on a proxy with other financial matters, plan fiduciaries might be required to abstain if the proposed rule were finalized. In that case, depending on how an abstention on such a matter was treated, the plan's action might skew the outcome in ways that are not in the plan's long-term best interest. There is no reason to silence plan fiduciaries from weighing in on such important matters of corporate governance, especially where an abstention can have an uncertain impact on the outcome.

The application of the proposed proxy voting regime to mutual funds[11] illustrates the potentially damaging impact on an issuer if retirement plans fail to vote. Mutual funds, which are widely held by ERISA-governed plans, must seek both board approval and shareholder approval for changes to policies that are deemed to be "fundamental" under the Investment Company Act of 1940. What the fund board or the law deems fundamental, however, might not be considered financially impactful to a given plan in the view of the fiduciary responsible for voting.

A recent example experienced by a T. Rowe Price mutual fund illustrates this point. A T. Rowe Price fund's portfolio manager sought to change the fund from a diversified fund to a non-diversified fund in order to obtain greater flexibility in executing the fund's investment program, because a non-diversified fund is permitted to invest a greater percentage of its assets in a single issuer than diversified funds can. The fund board agreed and recommended the change. Because the Investment Company Act of 1940 treats diversification policies as fundamental, any change requires shareholder approval. The Department's proposed rule would present a significant impediment to such a change. If enough ERISA plans holding the mutual fund's shares were to consider the matter "non-financial" and thus conclude that they were prohibited from voting, the proposed change might not receive sufficient votes to pass. Such an outcome could cause the fund to adjourn the meeting and bear the substantial expense of new proxy solicitations. It is uncertain how many proxy re-solicitations would be necessary to convince ERISA fiduciaries that the matter was "financial." Each re-solicitation would impose costs on the mutual fund itself. In some cases, the mutual fund would simply be unable to make the change that was deemed appropriate by the

[11] There is controversy over whether the proposal would cover proxy voting of mutual fund shares. According to the preamble, the proposal governs voting of "stock holdings" in "individual companies" and not other securities. 85 Fed. Reg. 55234. Some, including the Investment Company Institute, conclude that this phrase is meant to exclude voting of mutual fund shares from the proposed rule, based on the economic analysis citing Form 5500 data derived from a form that distinguishes "stocks' from mutual fund shares. But, the phrase "individual companies" is not commonly used to distinguish mutual funds and other investment companies from equity securities of operating companies. Stocks are typically understood to be shares issued by a corporation. Many mutual funds—including T. Rowe Price mutual funds—are organized as corporations. If the proposal intends to exclude mutual funds, it should include precise language to that effect in the regulation itself. Any revised rule would need to go further to clarify that mutual funds should generally be voted regardless of financial impact. Otherwise, fiduciaries might voluntarily apply the "must not vote" standard to mutual fund proxies out of concern that such a standard embodies the only prudent approach to ERISA plan proxy voting, regardless of whether the vote relates to a mutual fund or an operating company issuer.

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board overseeing the fund. Such an outcome confers no benefit on participants whose individual plan accounts hold such shares and may ultimately harm them.

4. **The proposal creates a trap for fiduciaries seeking to apply its mandates.**

The proposal requires a fiduciary to determine the particular proxy's economic impact on the plan, taking into account consideration of costs, including the cost of research to determine how to vote. Yet, the fiduciary's ability to make that determination (and thus identify whether a vote is required or prohibited) will require expenditure of significant amounts in research and analysis. As a result, the fiduciary may not be able to conclude that the proxy has no economic impact on the plan until after it incurred costs in the examination. In such a scenario, the fiduciary will find itself in a no-win dilemma: it can expend funds to undertake the analysis only to learn that it incurred expenses on an issue that never had a financial impact on the plan, or it can decline to do the analysis and risk violating the rule by voting the proxy of a non-financial matter. Such a rule is at best, a waste of plan resources, and at worst, unworkable.[12]

5. **The proposal's approach to voting by pooled investment vehicles such as collective investment trusts is unworkable.**

Collective investment trusts are frequently held by ERISA and non-ERISA plans alike. These trusts do not allow plans to impose separate and potentially conflicting plan proxy guidelines, but instead typically require participating plans to delegate to the trustee the obligation to vote in accordance with the trustee's guidelines. While such an approach is permitted under the proposed rule, the trustee of such a vehicle is still required to have a proxy voting guideline that is "consistent with this section." In other words, trustees of collective investment trusts must determine the financial impact (or absence thereof) for each participating plan, using plan specific metrics, and then vote in proportion to each plan's economic interest in the pooled investment vehicle. As discussed above, the cost of implementing such plan specific voting is substantial, and the costs would be imposed on plans that are not governed by these rules. Even if the rule were to allow elimination of the plan-specific evaluation, the task would still be enormous. The trust's proxy voting guidelines would likely require revision, and once revised, would need to be presented, explained and accepted by each participating plan, including non-ERISA plans not subject to the rule. Such an effort would be expensive and time consuming; without any demonstrable improvement in financial outcomes for participants and beneficiaries, it would be difficult to justify changes, especially to non-ERISA plans.

[12] Although we address the dilemma in the context of proxy voting, the proposal creates a similar dilemma with respect to any exercise of shareholder rights. The proposal requires fiduciaries to "consider only factors that they prudently determine will affect the economic value of the plan's investment" in exercising shareholder rights, but no fiduciary can limit its consideration to such factors without first evaluating (considering) all factors to determine if they can be officially "considered."

6. **The proposal completely disregards common voting practices in participant-directed defined contribution plans, leaving fiduciaries uncertain of their obligations**.

The proposal completely ignores pass-through voting in participant-directed defined contribution plans, thereby leaving fiduciaries puzzled as to their obligations. Under regulations adopted by the Department to effectuate ERISA § 404(c), a plan fiduciary cannot qualify for liability protection under that section unless the plan allows participants to vote any shares of employer stock allocated to their plan account. The proposal is silent as to a fiduciary's obligations in such circumstances. It would be odd for the Department on the one hand to insist upon passing through voting rights, and on the other hand, imperil a fiduciary who opts to honor participant voting instructions instead of apply the "must vote/must not vote" lens of the proposed rule. Another common example of pass-through voting occurs with respect to shares held in self-directed brokerage accounts. The cost of offering such accounts would increase dramatically if fiduciaries were required to second-guess participant instructions about securities that were never designated for inclusion in the plan. The proposal should be clarified to exempt participant-directed voting from the prohibition against voting on non-financial matters.

7. **The proposal's insistence on enhanced documentation of voting rationales imposes cost and burden without any compensating benefits.**

The proposal requires plan fiduciaries responsible for voting as well as investment managers to whom voting duties have been delegated to maintain documentation sufficient to show that each vote placed met the "financial interests" test. The requirement is particularly odd when the Department itself is uncertain whether proxy voting even matters.[13] Documentation is no guarantee of appropriate fiduciary behavior, and certainly does not contribute to the goal of reducing unwarranted expense in connection with proxy voting.

8. **The proposal's accelerated effective date is unrealistic and illustrates that the proposal's impacts are not well understood.**

The proposed effective date 30 days after publication of a final rule does not allow adequate time for plan fiduciaries or investment managers to arrange the staff and resources necessary to implement the rule.[14] The accelerated effective date does not factor in time for investment managers to revise their proxy voting guidelines for plans, let alone for plan fiduciaries responsible for investment manager oversight to review such guidelines for compliance with the new policy. Such an effective date is powerful evidence that the Department has not understood the implications of its proposed rule and the challenges of compliance.

[13] The Department has noted that it proposed this rule in light of the reduction in stock held by plans, the change in proxy voting behavior, and "mixed evidence" on the effectiveness of shareholder voting. 85 Fed. Reg. 55222.
[14] T. Rowe Price estimates that it would need to train and hire additional staff, and develop processes and data sources to allow evaluation of financial impact at a plan level. The hiring, training and process changes required could not be implemented before the beginning of the proxy season (typically spring) 2022.

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In summary, we believe that the Department's proposed rule will increase costs of ERISA plan exercise of proxy voting rights substantially and will have a potentially significant adverse impact on corporate issuers. We see no reason for the Department to advance a proposed rule that unnecessarily deprives ERISA plans of their voice in corporate governance. We urge the Department to withdraw the proposed rule.

Sincerely,

Margaret Raymond

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