ProxyVote Plus, LLC

P.O. Box 2458 Northbrook, IL 60065-2458 Tel. 847.525.8472

Filed Electronically

October 5, 2020

Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

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

Dear Acting Assistant Secretary Wilson :

ProxyVote Plus, LLC ("ProxyVote") submits these comments in response to the above-referenced proposal (Proposed Rule) to amend the "Investment duties" regulation issued in 1979 to address the application of the prudence and exclusive purpose duties under the Employee Retirement Income Security Act of 1974 ("ERISA") to severely limit the exercise of shareholder rights, including proxy voting.[1] ProxyVote believes that the Proposed Rule is unnecessary; interjects confusion into a process that is currently functioning effectively; and is actually contrary to the long-term economic interests of the hundreds of thousands of participants and beneficiaries of Taft-Hartley benefit funds ProxyVote is privileged to serve as an ERISA fiduciary. We therefore request that the Proposed Rule be withdrawn.

Background

ProxyVote was formed in 2002 for the purpose of providing fiduciary proxy voting services to Taft-Hartley plans.[2] Our key employees have experience in proxy voting dating back more than 25 years. Our experience based on those years in the field is that corporations and shareholders have profoundly benefited from proxy voting and shareholder engagement. When we began serving as a fiduciary voting proxies, proxy statements lacked essential information concerning director independence, auditor independence, risk management, and executive compensation. Boards of directors were often dominated by insiders; even key committees were not always independent.

---

[1] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210-AB91, 85 Fed. Reg. 55,219 (Sept. 4, 2020) ("Proposed Rule").

[2] A "Taft-Hartley" pension plan is a collectively-bargained retirement plan maintained by more than one employer and a labor union, pursuant to the Taft-Hartley Labor Act of 1947. In addition to Taft-Hartley pension plans, ProxyVote provides proxy voting services to annuity and health and welfare funds.

The trustees who retained ProxyVote were aware that their funds' proxy votes were assets of the plan and needed to be voted in their participants' and beneficiaries' long-term economic interests. These trustees were also well aware that the systems currently in place were often perfunctory and that it was difficult, if not impossible, for them to fulfill their fiduciary duty to monitor the investment managers that were voting – or not voting – their proxies. If the funds did not retain a firm like ProxyVote, each of their different equity investment managers voted the proxies, often under a different set of guidelines, rarely focused on the needs of Taft-Hartley plans. Sometimes they held the same security in more than one portfolio and one of their investment manager's votes cancelled out that of another. The various investment managers might provide proxy voting reports without explaining their votes or might not report at all. Obviously, this made it difficult or impossible for the trustees to fulfill their fiduciary duty to monitor.

Since our inception, we have maintained a modestly-priced, efficient fiduciary service with the sole focus of voting our clients' proxies to protect and advance the long-term economic interests of their participants and beneficiaries. To this day, virtually every one of our approximately 135 clients is a Taft-Hartley plan. ProxyVote is registered with the SEC as an investment adviser pursuant to the Investment Advisers Act of 1940 ("Advisers Act"), under the registration category for pension consultants,[3] and is a fiduciary for purposes of ERISA.[4] We do not sell services to issuers or investment managers, nor do we have any operating affiliates.[5]

The vast majority of our clients have relied on our services for more than ten years, and many have been with us since our formation. The participants and beneficiaries in our clients' plans come from almost every state in the Union. They are hundreds of thousands of working men and women who are carpenters, drywallers, electricians, laborers, painters, plumbers, sheet metal workers and workers engaged in similar trades. Ensuring that they have dignified, financially secure retirements is a sacred trust. We are proud of the fact that we have kept our fees consistent and low because we recognize the extraordinary pressures Taft-Hartley and other pension plans face as they seek to protect the retirement income of these hard-working men and women.[6]

Our proxy voting process is cost-effective and focused on fulfilling our fiduciary duties in a way that allows our clients, Taft-Hartley trustees, to fulfill their fiduciary duty to monitor the proxy voting we perform on behalf of their funds. ProxyVote has developed a single set of proxy voting guidelines designed to protect the long-term economic interests of our clients' participants and their beneficiaries. These guidelines are reviewed and approved for use by each client, who designates ProxyVote as the fiduciary responsible for voting proxies appurtenant to shares owned by the plan. Investment decisions regarding these shares are made by other fiduciary investment managers, not by ProxyVote.

---

[3] Advisers Act Rule 203A-2(a). References to the Advisers Act are to 15 U.S.C. §§ 80b-1 *et seq*., and references to Advisers Act rules are to Title 17, Part 275 of the Code of Federal Regulations [17 C.F.R 275].

[4] ERISA, § 3(21), 29 U.S.C. § 1002(21).

[5] ProxyVote's ownership structure is disclosed on Schedule A of our Form ADV, which is available through the SEC's website at: https://www.adviserinfo.sec.gov/Firm/122222.

[6] ProxyVote's fees are discussed on our Form ADV Part 2 Brochure. As we explain there, our fees are based on the number of equity portfolios a client has and do not fluctuate based on the number of proxies within the portfolio.

When a ballot is received, we review the proxy statement and other publicly available information we deem reliable and determine the appropriate vote, consistent with our proxy voting guidelines, always solely focused on protecting the long-term economic interests of client funds' participants and beneficiaries. We cast votes on the complete range of management and shareholder proposals concerning contested and uncontested director elections, executive compensation, corporate governance, and enhanced subject matter disclosure proposals, each of which has a bearing on companies' long-term performance and viability. Voting to promote management accountability is a key factor in ensuring that the plans own companies that develop long-term strategic business plans to thrive and produce strong long-term investment results. While this often leads us to vote in favor of management proposals, we do not hesitate to vote against management when we determine that it is in plans' long-term interests to do so. We internally document the rationale for each vote cast and use these records to create detailed annual or semi-annual reports for our clients. These reports identify each proposal presented for a vote, how we voted, and the rationale for the vote decision. Plan trustees use these reports to monitor the services we provide, thus conferring an additional layer of fiduciary protection on plan participants and beneficiaries.

The DOL fails to identify a compelling basis to reverse thirty years of fiduciary guidance

The Proposed Rule reverses over thirty years of consistent DOL interpretive guidance on proxy voting and substitutes a presumption against fiduciaries' exercising their rights and fulfilling their duties under federal law and state corporate law to vote proxies on behalf of the participants and beneficiaries covered by ERISA plans. It takes a system that functions well and substitutes a new one that creates an expensive and confusing set of obligations that must be performed in order to justify exercising proxy voting rights. The DOL does this by hastily issuing a regulation without persuasively articulating why this 180-degree shift is necessary or in the interests of those it is charged with protecting. The DOL bases its action in part on a claimed "persistent misunderstanding among some stakeholders that ERISA fiduciaries are required to vote all proxies."[7] This assertion is unsupported and, in our experience, incorrect. ProxyVote, like other ERISA fiduciaries, knows well that proxy voting is a fiduciary duty that must be carried out in a prudent and cost-effective fashion. We also see no relevance to the Proposed Rule citing statistics that more money is being invested in mutual funds rather than individual equities. Surely that information is not being cited for the proposition that this lower investment in equities somehow translates to those assets of the plans being less worthy of full fiduciary consideration.

Independent evidence as well as our own experience demonstrate the value of proxy voting

Numerous commenters have eloquently articulated the value of proxy voting in enhancing director and management accountability.[8] In contrast, the DOL baldly asserts that "research

---

[7] Proposed Rule, 85 Fed. Reg. at 55220.

[8] *See, e.g.*, Nili, Yaron and Kastiel, Kobi, Competing for Votes, 10 Harv. Bus. L. Rev. 287 (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541 ("Shareholder voting matters. It can directly shape a corporation's governance, operational and social policies. But voting by shareholders serves another important function—it produces a marketplace for votes where management and dissidents compete for the votes of the shareholder base. The competition over shareholder votes generates ex ante incentives for management to perform better, to disclose information to shareholders in advance, and to engage with large institutional investors").

regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment in the corporation has yielded mixed results."[9] But the Department does not examine that "mix" of results or explain how that "mix" supports a presumption against proxy voting. Our experience and common sense demonstrate the value of responsible proxy voting to improving corporate accountability, corporate governance, and, most importantly, long-term corporate value.

We have seen first-hand the improvements in corporate governance that have made companies better long-term investments. Improvements in director and auditor independence, enhanced executive compensation disclosure, and the adoption of a majority vote standard for the election of directors have benefited long-term investors. Some may not remember and might not even believe that once companies failed to provide the most basic information about director independence, fees paid to outside auditors, or almost any information concerning executive compensation.

To this day, when we meet with trustees, our clients, they have trouble believing that once – and still at some laggard companies – only "For" votes were counted when tabulating the results for the election of directors. Yet prior to shareholder engagement on a majority vote standard for the election of directors that was the case. That bears repeating: Only the votes of shareholders voting for the nominees were counted in elections conducted under a plurality vote standard. In fact, many are still confused about the consequence of the different vote options in uncontested elections and incorrectly equate a "Withhold" vote with voting "Against" when it is actually an abstention.[10] Today, approximately 95% of the S&P 500 companies have voluntarily adopted a legal majority vote standard as the result of thoughtful shareholder engagement on the issue. At these companies, shareholders have the clear choice of voting "For," "Against," or to "Abstain."

The Proposed Rule is contrary to the interests of ERISA plans' participants and beneficiaries

The Proposed Rule replaces a cost-effective, prudent system with an unnecessary and burdensome process that would have to be conducted before every proxy vote.[11] ProxyVote has

[9] Proposed Rule 85 Fed. Reg. at 55222.

[10] We note that many shareholders, commentators, and even the Department of Labor incorrectly equate marking a proxy ballot "Withhold" as a vote "Against" when it is actually an abstention. The Proposed Rule states: "*Vote Categories* — Proxy votes can be tallied in four ways: for, against/withhold, abstain, and not voted." Proposed Rule, 85 Fed. Reg. at 55235. In fact, "withhold" is not an "against" vote but an abstention. *See* 44 FR 68764, 68765. A petition to address this confusion was filed almost ten years ago with the SEC but has never been addressed. *See* SEC File No. 4-630; United Brotherhood of Carpenters' Petition for Rulemaking Concerning Rule 14a-4 Requirements as to Proxy (May 20, 2011). ("The widespread adoption of a majority vote standard in director elections provides shareholders a valid opposition vote ('against') that has a 'legal effect' in determining whether a nominee is elected. The symbolic 'withhold' vote, a vestige of a plurality vote standard era, is not a valid vote option under any vote standard and its continued use contributes to confusing and misleading proxy communications that threaten the integrity of director elections.")

[11] *See* Letter from Jeffrey P. Mahoney, General Counsel, Counsel of Institutional Investors to Jeanne Klinefelter Wilson, Acting Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor (Sept. 4, 2020) ("Under the Proposed Rule, *every single proxy vote* would require a fiduciary to not only analyze the importance of the vote to the economics of the investment but also conduct a second layer of detailed analysis to determine how the vote impacts the plan as a whole. This second layer of analysis would be complex, difficult to conduct, and often be based on indeterminable facts. And it essentially tells fiduciaries for the first time that, in many cases, they *cannot* act to protect their investments and enhance long-term value.") (emphasis in original)

developed an efficient, effective fiduciary service to meet our clients' needs to protect their funds' participants and beneficiaries. We have the ability to review and analyze corporate proxy statements and other pertinent information and determine the appropriate vote to cast. To demonstrate the value of our proxy voting process and contrast it with the convoluted, unworkable process dictated by the Proposed Rule consider a recent annual meeting held at one of the largest companies in the world, Alphabet Inc.

Alphabet held its annual shareholder meeting on June 3, 2020. Ninety-four ProxyVote clients collectively held almost $200,000,000 in Alphabet Class A stock; the client with the smallest position held 7 shares (worth just over $10,000), while the client with the largest position held 24,151 shares (worth over $34.7 million).

Fourteen proposals were on the proxy ballot: four management and 10 shareholder proposals. We will briefly discuss how we voted on three of those proposals: The election of directors; a shareholder proposal to have one vote per share; and a shareholder proposal requesting Alphabet establish a legal majority vote standard.[12] We will then contrast the existing process, as best we can, with the one that would be mandated if the Proposed Rule were adopted.

The votes on these three proposals did not require lengthy analysis. When voting on the election of directors, our guidelines provide that we consider the standard under which the election will be held, the long-term financial performance of the Company, and other factors such as the independence of the board and key committees. We quickly determined that Alphabet had failed to adopt a majority-vote standard so shareholders could only vote "For" or "Withhold" and only "For" votes counted. Nevertheless, we withheld from voting for the nominees. We provided a concise explanation in the proxy voting report provided to the trustees charged with monitoring ProxyVote:

> We are withholding support from the nominees to register our disapproval of the Company's failure to adopt a majority vote standard for the election of directors or even a director resignation policy. While we recognize that election of all nominees is assured, this vote is intended to communicate to the Board that updating its director election vote standard is necessary and in shareholders' and the Company's long-term interest.

In this regard we were also mindful of what Alphabet's board of directors stated:

> Under our bylaws, directors are elected using a plurality vote standard. . . Stockholders can currently express dissatisfaction with an incumbent director's performance by withholding their vote. Alphabet's Nominating and Corporate Governance Committee also closely monitors and takes into consideration the vote tallies at each annual meeting, and considers seriously stockholder sentiment on the suitability of a director continuing to serve on the Board of Directors. Alphabet 2020 Proxy Statement at page 75.

[12] We selected these three proposals at Alphabet because the election of directors is both the most common management proposal and one of the most important ways to exercise shareholders' rights. The shareholder proposals on equal voting rights and adopting a legal majority vote standard are fundamental corporate governance proposals that allow shareholders to communicate with management the critical importance of shareholders' being able effectively and fairly to vote for nominees to the board.

We also determined that we would support the one-vote-per-share shareholder proposal as well as the majority-vote standard for electing directors proposal. Both are pillars of good corporate governance and have been widely demonstrated to enhance shareholder value over the long term. They enhance shareholders' ability to cast a meaningful vote on director nominees, who are charged with overseeing the endeavor, hiring, compensating, overseeing, and if necessary, replacing senior management. Voting for both shareholder proposals communicated to Alphabet's board that shareholders consider such rights critical. As one can see, the process was efficient and focused on making Alphabet's board and management more accountable to shareholders.

Contrast this effective and prudent, yet straight-forward, proxy voting process with what would be required of ProxyVote under the Proposed Rule. First, we emphasize that our current proxy voting policy is based on protecting the economic value of our clients' investments in corporate securities to ensure that the companies in which they invest will remain sound and thrive over the long term for which Taft-Hartley funds invest. Under the Proposed Rule, however, we would have had to expend tremendous time and resources to determine **whether** to vote, even though decades of experience have taught us that voting on most proxy proposals is the prudent thing to do. In our experience, proposals presented for vote at annual and special meetings are there for a reason. Many are mandated by federal or state corporate law. Others are presented by management seeking shareholder support. Others still are presented by shareholders seeking to reform or improve practices at the company for the benefit of the company, as well as its shareholders.

The Proposed Rule would have required us—separately, for each of our 94 clients who held Alphabet Class A stock—to "prudently determine [if voting on each director nomination] will affect the economic value of the plan's investment based on a determination of risk and return over an appropriate investment horizon consistent with the plan's investment objectives and the funding policy of the plan." We would have had to look specifically at each plan's investment policies before deciding if we could vote.

Next we would have had to "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 relative to the total investment assets of the plan, the plan's percentage ownership of the issuer, and the costs involved." In other words, we would have had to look at each plan's total investment assets and see what percentage Alphabet represented. (It is hard to imagine that any plan would put 5% of its assets into a single security.) Then we would have to determine what percentage of the one trillion dollar market cap company each plan held. Whether we look at our client with the smallest holdings worth $10,000 or the largest with almost $35 million it would challenge most calculators to determine the percentage held. Why it matters is difficult to determine.

Thankfully, it would be easy to determine the cost involved, because ProxyVote does not charge based on the number of proxies voted for a client, just on the number of equity accounts. So there would be no incremental cost to a client from our voting the proxy. We have no idea what effect the Department of Labor would say that has on the prudence of us voting.

Once we completed this laborious analysis, we would have been obliged to document our assessment and be prepared to articulate why we concluded that voting in each particular case was economically justified. Only then would we be permitted to analyze *how* we should vote on our clients' behalf.

And that is just for the first proposal. We would have been required to repeat the process for all the other proposals on the Alphabet ballot. With regard to the shareholder proposals, the two discussed here, like all of the shareholder proposals at Alphabet, are destined to fail because of the company's voting structure. Although founders Page and Brin own less than 13% of Alphabet stock, they have controlling voting power, which is the reason for the shareholder proposal on equal voting rights in the first place. [13] Because the proposal could not pass, one would assume that the Proposed Rule would have forbidden us to vote; but our prudent and loyal analysis of the situation leads us to the conclusion that even an advisory vote on the recapitalization plan would be in our clients' best interests. This presents us with a classic Catch 22.

Consider that for a moment. Can it really be that the Department of Labor's Employee Benefits Security Administration is telling a fiduciary to hardworking Americans that it cannot vote on a proposal it believes is critically important at a major company in its portfolio? As the fiduciary to clients holding approximately $200 million of stock in Alphabet this is hard to square with our duty to our clients, let alone reconcile with shareholders' rights under the federal securities laws and state corporate law.

Of course, the Proposed Rule offers a series of "permitted practices" to solve the problem. In order to satisfy the DOL, we could elect to vote with management, vote on only a limited number of proposals,[14] or vote only for clients who hold more than 5% of their investments in Alphabet. (We cannot imagine that any do.) The problem is that we do not consider it prudent not to vote, or to blindly support a board's position on all management and shareholder proposals on a meeting's agenda.

Ironically, for us to stay in business under the Proposed Rule, we would have to dramatically raise our fees, vote many fewer proxies, and ultimately provide less value to our clients. That

---

[13] *See 2019 Form 10-K at page 18. ("*Our Class B common stock has 10 votes per share, our Class A common stock has one vote per share, and our Class C capital stock has no voting rights. As of December 31, 2019, Larry Page and Sergey Brin beneficially owned approximately 84.3% of our outstanding Class B common stock, which represented approximately 51.2% of the voting power of our outstanding common stock. Through their stock ownership, Larry and Sergey have significant influence over all matters requiring stockholder approval, including the election of directors and significant corporate transactions, such as a merger or other sale of our company or our assets, for the foreseeable future. In addition, because our Class C capital stock carries no voting rights (except as required by applicable law), the issuance of the Class C capital stock, including in future stock-based acquisition transactions and to fund employee equity incentive programs, could continue Larry and Sergey's current relative voting power and their ability to elect all of our directors and to determine the outcome of most matters submitted to a vote of our stockholders. This concentrated control limits or severely restricts other stockholders' ability to influence corporate matters and we may take actions that some of our stockholders do not view as beneficial, which could reduce the market price of our Class A common stock and our Class C capital stock.")

[14] If we followed the Department's suggestion, we would vote on roughly less than 6 percent of the proposals presented to our clients. Proposed Rule, 85 Fed. Reg. at 55233 and note 127.

cannot possibly be the intent of this rule, since such an outcome so obviously conflicts with our fiduciary duty to act in the best interests of our clients' participants and beneficiaries.

In conclusion, we believe that the Proposed Rule is confusing, counterproductive and unnecessary and respectfully submit it should be withdrawn.

Sincerely,

Craig Rosenberg, Pres.
ProxyVote Plus, LLC