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: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights: Notice of Proposed Regulation (RIN 1210-AB91)

Dear Acting Assistant Secretary Wilson:

On behalf of Americans for Financial Reform Education Fund ("AFREF") thank you for the opportunity to submit comments on the notice of proposed rulemaking entitled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" ("Proposal" or "NPRM"). AFREF is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry.[1]

AFREF is concerned that the NPRM imposes new burdens and costs on retirement plans and will undermine advances on corporations' integration of environmental, social and governance factors, including those that have a material financial impact on long-term investment performance. We therefore urge you to withdraw the Proposal.

Background

Under the Proposal, fiduciaries will essentially be required to conduct a cost-benefit analysis to determine whether participating in proxy voting will advance the economic interests of the plan prior to participating in proxy voting. ERISA plans already are required to analyze proposals to determine how to cast their vote to advance the interests of plan participants. Requiring them to conduct another layer of analysis to determine whether to vote at all imposes onerous analytical and recordkeeping requirements. It acknowledges that such a process will be costly to implement and recommends "permitted practices" that may allow fiduciaries to avoid this analysis including adopting policies that would establish that the:

- Default position will generally be to vote with management's recommendations;

[1] Members of AFR include consumer, civil rights,.investor, retiree, community, labor, faith based, and business groups. A list of our members is available at https://ourfinancialsecurity.org/about/coalition-members/

- Plan will only vote on types of proposals that are financially material; or
- Plan will only vote on proposals at companies where it has large holdings

The Proposal Forces ERISA Plans to Choose Between Costly Compliance Obligations or Disenfranchisement

The NPRM leaves fiduciaries with three basic options – engage in a very expensive process of conducting a cost-benefit analysis to determine when and how to vote on matters brought for a vote by shareholders, vote with management recommendations, or refrain from voting. These options will have a chilling effect on ERISA plans' involvement in the corporate governance of the companies they own. They could tilt the playing field dramatically in favor of management recommendations in a way that would seriously undermine the ability of shareholders and their fiduciaries to contribute to accountable governance and to address matters of fundamental importance to the long-term performance of firms and the state of our economy .

The Proposal would impose new, expensive procedural burdens on ERISA fiduciaries. The new cost-benefit analysis and recordkeeping requirements that would be imposed on ERISA fiduciaries determining whether and when to engage in proxy voting or the exercise of other shareholder rights are particularly problematic. For example, the Proposal would impose direct costs on ERISA plans by requiring them to engage in research and documentation, in some cases on a vote-by-vote basis, to determine the economic impact of each vote.

The Proposal downplays the impact of these costs on plan participants. It argues that many plans outsource investment management and, therefore, proxy voting duties to service providers.[2] While this is true, that does not mean that plan participants will not bear the costs of the cost-benefit analysis and documentation requirements imposed by the NPRM. To the extent that investment managers or other service providers are required by the Proposal to engage in extensive and costly research and analysis, those costs will be passed onto the plan and, ultimately, to working people and retirees.

The NPRM will also impose indirect costs on ERISA plans. The Proposal acknowledges this, stating that "externalities, public goods, or other market failures . . . might generate costs to society on an ongoing basis."[3] The Department requests commenters to respond to the question "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."[4] We believe that it would. If finalized in its current form, the Proposal would make it more costly for ERISA plans to participate in proxy voting and, in many cases, they might

[2] NPR, at 68.
[3] NPR, at 49.
[4] NPR, at 62.

refrain from participating at all. This will decrease public companies' accountability to investors, undermine efforts by shareholders to encourage companies to adopt financially material changes related to ESG factors, and undermine efforts by investors who often use the shareholder proposal process to encourage companies to provide enhanced disclosures that contribute to price discovery. These are potentially enormous costs with serious consequences for shareholders and firms.

The Proposal Would Undermine Progress On Value-Enhancing ESG Reforms

Many shareholder proposals that ERISA plans currently vote on each year relate to environmental, social and governance (ESG) factors. By discouraging participation in proxy voting and other forms of active ownership by ERISA plans, the Proposal is likely to undermine progress on ESG integration that is necessary to maximize long-term shareholder value and advance sustainable financial markets in the US.

There is a strong and growing body of research that makes clear that ESG integration by issuers improves shareholder value.[5] Participation by shareholders in voting on ESG matters ranging from climate resiliency and disclosure to policies that improve racial and gender diversity all have the potential to improve shareholder value. The NPRM, however, would impose new regulatory burdens and costs on ERISA fiduciaries seeking to participate in proxy voting to advance proposals on financially material ESG topics.

The Proposal questions the value of participation in proxy voting because many shareholder proposals call on the company to disclose additional information. We believe this skepticism is ill-founded. The evidence is now incontrovertible that ESG integration by investors increases shareholder value.[6] Consistent, comparable data on ESG matters from issuers is essential to investors' efforts to integrate ESG factors into their investment practices. By encouraging ERISA plans to refrain from participating in proxy voting, including on proposals requesting additional ESG data, the NPRM would undermine investors' ability to obtain consistent,

[5] 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) *See also* 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); https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf; 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); 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).
[6] See FN 4.

comparable data on ESG matters that facilitates analysis of material financial factors at individual firms.

The Department Fails to Present Evidence That the Proposal Is Needed

The Proposal fails to present evidence that the problems it is trying to correct actually exist and that the policy changes it put forward would advance the interests of plan participants. The Department's stated purpose for proposing this rule is to clarify what it views as a long-standing misunderstanding by fiduciaries as to the nature of their obligations in relation to proxy voting and the exercise of shareholder rights. According to the NPRM, policy pronouncements from the Department dating back to the 1980s have caused ERISA fiduciaries to believe that they are required to participate in proxy voting in nearly all circumstances.[7] The NPRM does not, however, cite any evidence to support the notion that fiduciaries hold this belief or that they are voting all proxies. This is data that the DOL would surely be able to compile if it had performed appropriate research prior to putting forward the Proposal.

The NPRM further states that as the fiduciaries' alleged notion that they must vote all proxies may be leading them to vote "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."[8] The DOL does not put forward any data to support the idea that plan assets are being used to advance non-pecuniary ESG goals and, as discussed above, many investors now pursue ESG goals because of the evidence that ESG integration contributes to positive financial returns.

Conclusion

By imposing new research and recordkeeping burdens on ERISA fiduciaries related to the execution of their shareholder rights, the Proposal will have a chilling effect on participation by ERISA plans in proxy voting and on the advancement of ESG integration by US public companies. Ultimately, US retirement savers will bear the burden as their plans face additional financial risk and diminished returns. We urge you to withdraw the Proposal.

Thank you for taking our views into consideration. If you have any further questions or would like to discuss our comments, please contact Heather Slavkin Corzo at heather@ourfinancialsecurity.org.

[7] NPR, at 14.
[8] NPR, at 8.