

To Vote, or Not to Vote, That is the DOL's Proxy Voting Question for ERISA Fiduciaries

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On September 4, 2020, the Department of Labor (“DOL”) published a [proposed rule](#) (the “Proposed Rule”) that would confirm its position that ERISA’s fiduciary duties of prudence and loyalty apply to an ERISA plan fiduciary’s exercise of shareholder rights, including proxy voting, proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

The Proposed Rule reflects the DOL’s attempt at clarifying its prior proxy voting guidance that “may have led to some confusion or misunderstandings.” In particular, the DOL acknowledged that there is a view among some that ERISA plan fiduciaries are required to vote **all** proxies – the Proposed Rule makes clear that is **not** the case. The Proposed Rule instead provides that an ERISA plan fiduciary is permitted to vote proxies only when it prudently determines that the matter being voted upon would have an **economic impact** on the plan after the costs of research and voting are taken into account, and that a fiduciary is prohibited from voting proxies otherwise. The DOL expressly states in the preamble that there is no presumption that abstaining from voting proxies is a per se fiduciary breach; rather, fiduciaries are required to vote proxies in a manner that is in the best interests of the plan, which requires a consideration of the likely impact on the plan’s investment performance in light of the size of the plan’s holdings in the issuer relative to the total investment assets of the plan, the plan’s percentage ownership in the issuer, and the costs involved.

Consistent with the DOL’s recent ESG guidance (summarized [here](#)) relating to the investment of plan assets, the Proposed Rule would amend the DOL’s “investment duties” regulation at 29 C.F.R. 2550.404a-1 and provide that, when exercising a plan’s shareholder rights (including proxy voting), an ERISA plan fiduciary is prohibited from subordinating the financial interests of the plan to any non-pecuniary objective or from sacrificing investment returns or taking on additional risks in order to promote non-financial goals. In addition, the Proposed Rule would require a plan fiduciary to:

- investigate material facts that form the basis for exercising such shareholder rights (e.g., a plan fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm without appropriate supervision and a determination that the firm’s guidelines are consistent with the economic interests of the plan);
- maintain records on exercises of shareholder rights, including records that demonstrate the basis for such decisions (in particular, it is the DOL’s stated view that fiduciaries must be prepared to articulate the anticipated economic benefit of proxy-vote decisions in the event they decide to vote); and
- exercise prudence and diligence in the selection and monitoring of persons selected to advise or otherwise assist with exercises of shareholder rights (and where the authority to vote proxies or exercise other shareholder rights has been delegated to an investment manager or proxy advisory firm, a responsible plan fiduciary shall require such manager or firm to document the rationale for proxy voting decisions or recommendations sufficient to demonstrate that the action was “based on expected economic benefit to the plan”).

The Proposed Rule specifically provides that:

- a plan fiduciary “must vote” any proxy where the fiduciary prudently determines that the matter being voted on would have an economic impact on the plan after considering the factors described above and costs involved in voting; and
- a plan fiduciary “must not vote” any proxy unless it prudently determines that the matter would have an economic impact on the plan after considering such factors and costs.

However, recognizing that determining whether or not to vote proxies may be resource-intensive and often will exceed the potential economic benefits to the plan, the DOL has proposed examples of permitted policies that fiduciaries may adopt that are intended to reduce the need for fiduciaries to consider proxy votes that are unlikely to have an economic impact on the plan, including:

- a policy of voting proxies in accordance with the recommendations of management (provided that fiduciaries may retain the right to “override” such a general policy if prudence so dictates in a particular situation);
- a policy to focus voting resources only on particular types of proposals that the fiduciary has prudently determined are substantially related to the corporation’s business activities or likely to have a significant impact on the value of the plan’s investment, such as proposals relating to corporate events, repurchases of shares, issuances of additional securities with dilutive effects on shareholders, or contested

director elections; and

- a policy of refraining from voting on proposals or particular types of proposals when the size of the plan's holdings in the issuer relative to its total investment assets is below a quantitative threshold that the fiduciary prudently determines, considering the plan's percentage ownership of the issuer and other relevant factors, is sufficiently small that the outcome of the vote is unlikely to have a material impact on the investment performance of the plan's portfolio (or plan assets under management in the case of an investment manager).

The Proposed Rule would require that these policies be reviewed at least every two years.

The Proposed Rule further provides that the DOL's Interpretive Bulletin 2016-01, which may be interpreted to permit consideration of a broader set of factors when making determinations regarding proxy voting, no longer reflects the view of the DOL and would be removed from the Code of Federal Regulations if the Proposed Rule is finalized.

The DOL has invited comments on all aspects of the Proposed Rule, which are due by October 5, 2020.

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In the meantime, ERISA plan fiduciaries should carefully review their proxy voting policies and practices – including those applicable to investment managers and proxy advisory firms that exercise these rights on behalf of the plan – and be prepared to make any necessary changes in the event the Proposed Rule is finalized.

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