

# Special DOL proxy voting rules set to take effect on December 1, 2023 — potential action items for ERISA plan fiduciaries

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In late 2022, the U.S. Department of Labor (the “DOL”) issued final regulations (the “Final Rules”) which address the extent to which ERISA plan fiduciaries may consider environmental, social and governance (“ESG”) factors when making investment decisions and exercising shareholder rights, such as voting proxies, on behalf of ERISA-covered plans.<sup>1</sup>

Although the Final Rules generally became effective on January 30, 2023, certain special proxy voting-related rules are set to first take effect on December 1, 2023, and may require action by ERISA plan fiduciaries in advance of the effective date.

Those special proxy voting-related rules provide that, to the extent an investment manager of a pooled investment vehicle holding “plan assets” of more than one ERISA plan (a “Pooled Plan Asset Vehicle”) is subject to an investment policy statement (“IPS”) (which includes any proxy voting policy) that conflicts with another ERISA plan’s IPS, the investment manager must reconcile, insofar as possible, those conflicting policies (assuming compliance with each policy would be consistent with ERISA).

In the case of proxy voting, to the extent permitted by applicable law, the investment manager must vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each ERISA plan’s economic interest in the Pooled Plan Asset Vehicle.

Such an investment manager may, however, develop its own ERISA-compliant IPS and require participating ERISA plans to accept such IPS, including any proxy voting policy, before they are allowed to invest. In such cases, an independent ERISA plan fiduciary must assess whether such IPS and proxy voting policy are consistent with applicable ERISA requirements before deciding to retain the investment manager.

Accordingly, fiduciaries of ERISA plans that are invested in a Pooled Plan Asset Vehicle should confirm that, to the extent the ERISA plan was required to expressly or effectively agree to be subject to the Pooled Plan Asset Vehicle’s IPS (and, accordingly, that the ERISA plan’s IPS will not apply), a determination was made that the Pooled Plan Asset Vehicle’s IPS is consistent with applicable ERISA requirements and otherwise complies with the ERISA plan’s governing documents.

In our experience, it will often be the case that an ERISA plan will have expressly or effectively agreed to be subject to the Pooled Plan Asset Vehicle’s IPS at the time it invested. Even where such agreement was not express, the offering materials provided to investors in a Pooled Plan Asset Vehicle (such as a confidential offering memorandum) usually contain detailed information about investment objectives and guidelines and there is typically language in Pooled Plan Asset Vehicles’ governing documents (in particular, subscription documents) that potentially may be relied upon by the manager to establish that the Pooled Plan Asset Vehicle’s investment objectives, guidelines and policies have been accepted by the investor and control.

If a manager cannot get comfortable that ERISA plan clients have agreed to the Pooled Plan Asset Vehicle’s IPS, such manager may reach out to ERISA plans to request their affirmative agreement prior to the effective date, and ERISA plan fiduciaries can expect that such an affirmative agreement will likely be required by most Pooled Plan Asset Vehicles going forward.

In the alternative, to the extent the Pooled Plan Asset Vehicle’s manager agreed to comply with the ERISA plan’s IPS or proxy voting policy (and potentially other conflicting policies of other ERISA plans), the ERISA plan fiduciary may want to ensure that the manager understands that, effective December 1, 2023, it will have an obligation to reconcile, insofar as possible, those conflicting policies (assuming compliance with each policy would be consistent with ERISA) when voting proxies and otherwise exercising shareholder rights of the Pooled Plan Asset Vehicle.

ERISA plan fiduciaries that are considering investing an ERISA plan’s assets in a Pooled Plan Asset Vehicle should review the Pooled Plan Asset Vehicle’s IPS including any proxy voting policy (to the extent applicable) to ensure they comply with the requirements of ERISA and to determine whether there is a conflict with the ERISA plan’s IPS.

The special proxy voting-related rules also more generally provide that an ERISA plan or an ERISA fiduciary investment manager may (but is not required to) adopt and follow prudently designed proxy voting policies.

However, effective as of December 1, 2023, any such policy must not (i) prohibit voting on matters that the fiduciary prudently determines are expected to have a significant effect on the value of the investment or investment performance after taking into account the costs involved or (ii) require the fiduciary to vote when the fiduciary prudently determines that the matter being voted upon

is not expected to have such an effect after taking into account the costs involved. Accordingly, ERISA plan fiduciaries should ensure that their proxy voting policies comply with these requirements of the Final Rules as of December 1, 2023.

### Notes

<sup>1</sup> For a detailed discussion of the Final Rules, see here: <https://bit.ly/49iwxJD>

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