This document is scheduled to be published in the
Federal Register on 12/29/2016 and available online at
https://federalregister.gov/d/2016-31515, and on **FDsys.gov**

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2509

RIN 1210-AB78

Interpretive Bulletin Relating to the Exercise of Shareholder Rights and Written Statements of Investment Policy, including Proxy Voting Policies or Guidelines

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Interpretive bulletin.

SUMMARY: This document sets forth supplemental views of the Department of Labor (Department) concerning the legal standards imposed by sections 402, 403 and 404 of Part 4 of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to voting of proxies on securities held in employee benefit plan investment portfolios, the maintenance of and compliance with statements of investment policy, including proxy voting policy, and the exercise of other legal rights of a shareholder. In this document, the Department withdraws Interpretive Bulletin 2008-2 and replaces it with Interpretive Bulletin 2016-1, which reinstates the language of Interpretive Bulletin 94-2 with certain modifications.

DATES: This interpretive bulletin is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

Background

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries. The Department's longstanding position is that the fiduciary act of managing plan assets which are shares of corporate stock includes decisions on the voting of proxies and other exercises of shareholder rights. To assist plan fiduciaries in understanding their obligations under ERISA, the Department issued Interpretive Bulletin 94-2 (IB 94-2) in 1994 and updated that guidance in 2008 in Interpretive Bulletin 2008-2 (IB 2008-2).[1]

IB 94-2 noted that the duty to vote proxies lies exclusively with the plan trustee unless "the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers" pursuant to section 403(a)(2) of ERISA. IB 94-2 also explained that when the authority to manage plan assets has been delegated to an investment manager, "no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies." In addition, if the plan document or the investment management agreement does not expressly preclude the investment manager from voting

[1] IB 94-2 was codified at 29 CFR 2509.94-2 and published with an explanatory preamble in the Federal Register at 59 Fed. Reg. 38863 (July 29, 1994). The IB was presented as a restatement of views the Department had expressed in two letters addressing questions that arose concerning the voting of proxies on shares of corporate stock held by plans. The first letter was addressed to Helmuth Fandl, Chairman of the Retirement Board of Avon Products Inc. and dated February 23, 1988, and the second letter was addressed to Robert A.G. Monks of Institutional Shareholder Services, Inc. and dated January 23, 1990.

proxies, the investment manager has the exclusive responsibility for proxy voting. An investment manager is not relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. IB 94-2 pointed out that the maintenance of written statements of investment policy, including guidelines on voting proxies on securities held in plan investment portfolios, is consistent with Title I of ERISA and that compliance with such a policy would be required under ERISA to the extent that such compliance with respect to any given investment decision is consistent with the provisions of Title I and Title IV of ERISA.

IB 94-2 also recognized that fiduciaries may engage in other shareholder activities intended to monitor or influence corporate management where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. The bulletin observed that active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.

IB 94-2 reiterated the Department’s view that ERISA does not permit fiduciaries to subordinate the economic interests of participants and beneficiaries to unrelated objectives in voting proxies or in exercising other shareholder rights, but pointed out that a reasonable expectation of enhancing the value of the plan's investment through shareholder activities may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments or where a plan may not be able to easily dispose of such an investment. IB 94-2 explained that active monitoring and communication activities could concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues identified in the bulletin included such matters as consideration of the appropriateness of executive compensation, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans, the corporation's investment in training to develop its work force, other workplace practices and financial and non-financial measures of corporate performance.[2]

On October 17, 2008, the Department replaced IB 94-2 with Interpretive Bulletin 2008-2 codified at 29 CFR 2509.08-2.[3] The Department's intent was to clarify and update the guidance in IB 94-2 and to reflect interpretive positions issued by the Department after 1994 on shareholder activism and socially-directed proxy voting initiatives. On the same date, the Department published Interpretive Bulletin 2008-1 (IB 2008-1) to update Interpretive Bulletin 94-1 (IB 94-1), which addressed issues regarding fiduciary consideration of investments and investment strategies that take into account environmental, social and governance (ESG) factors.

The Department believes that in the eight years since its publication, the changes made to IB 94-2 by IB 2008-2 have been misunderstood and may have worked to discourage ERISA plan fiduciaries who are responsible for the management of shares of corporate stock from voting

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[2] The Department has not been alone in emphasizing the significance of proxy voting to the value of investments. *See* SEC Final Rule, Disclosure of Proxy Voting Policies and Proxy Voting Records by Registered Management Investment Companies, Release Nos. 33-8188; 34-47304; IC-25922 (Jan. 31, 2003) and SEC Final Rule, Proxy Voting by Investment Advisers, Release No. IA-2106 (Jan. 31, 2003). In addition, the SEC also adopted a rule requiring corporations to provide additional disclosure in proxy materials associated with the election of directors. *See* SEC Final Rule, Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175 (Dec. 16, 2009).

[3] Also published in the Federal Register at 73 Fed. Reg. 61731 (Oct. 17, 2008).

proxies and engaging in other prudent exercises of shareholder rights.[4] In particular, the Department is concerned that IB 2008-2 has been read by some stakeholders to articulate a general rule that broadly prohibits ERISA plans from exercising shareholder rights, including voting of proxies, unless the plan has performed a cost-benefit analysis and concluded in the case of each particular proxy vote or exercise of shareholder rights that the action is more likely than not to result in a quantifiable increase in the economic value of the plan's investment.

The essential point of IB 94-2, however, was to articulate a general principle that a fiduciary's obligation to manage plan assets prudently extends to proxy voting. As such, IB 94-2 properly read was meant to express the view that proxies should be voted as part of the process of managing the plan's investment in company stock unless a responsible plan fiduciary determined that the time and costs associated with voting proxies with respect to certain types of proposals or issuers may not be in the plan's best interest. IB 94-2 was also intended to make it clear that fiduciary duties associated with voting proxies encompass the monitoring of decisions made and actions taken with regard to proxy voting, and that it was appropriate for a plan fiduciary to incur reasonable expenses in fulfilling those fiduciary obligations. While there may be special circumstances that might warrant a discrete analysis of the cost of the shareholder activity versus the economic benefit associated with the outcome of the activity, the Department did not intend to imply that such an analysis should be conducted in most cases. In most cases,

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4 The Department reached a similar conclusion in rescinding IB 2008-1 on economically targeted investments (ETIs) and reinstating the language from its original 1994 guidance in IB 94-1. See Interpretive Bulletin 2015-1, 80 Fed. Reg. 65135 (Oct. 26, 2015). The Department noted that the ETI market which considers ESG factors had grown internationally as new tools and measures were developed leaving investors better equipped to evaluate the question of whether a given investment could both benefit the plan in financial terms *and* advance environmental, social or corporate governance goals. In fact, the new tools and measures have revealed that environmental, social and governance impacts can be intrinsic to the market value of an investment. Based on those developments, the Department concluded that its attempt to update IB 94-1 in 2008, rather than clarifying permissible ESG considerations, had in practice had a chilling effect on ERISA plans participating in the growth of economically targeted investing.

proxy voting and other shareholder engagement does not involve a significant expenditure of funds by individual plan investors because the activities are engaged in by institutional investment managers appointed as the responsible plan fiduciary pursuant to sections 402(c)(3), 403(a)(2) and 3(38) of ERISA. Those investment managers often engage consultants, including proxy advisory firms, in an attempt to further reduce the costs of researching proxy matters and exercising shareholder rights.[5] Thus, such a conclusion ignores the fact that many proxy votes involve very little, if any, additional expense to the individual plan shareholders to arrive at a prudent result and that, depending on the particular resolution and the extent of the plan's holdings, not voting, in fact, may in effect count one way or another.

The pervasiveness of US publicly-traded stock in ERISA plan investment portfolios, both direct holdings and through pooled investment funds, including index funds, is another factor that contributes to the importance of proxy voting and shareholder engagement practices. If there is a problem identified with a portfolio company's management, selling the stock and finding a replacement investment may not be a prudent solution for a plan fiduciary. As Vanguard founder John Bogle put it in the context of index funds, "the only weapon [index funds] have, if

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[5] In selecting an investment manager for a plan, the responsible plan fiduciary should include a review of any voting policies or guidelines that would be followed in the management of plan assets to ensure consistency with ERISA. Further, as plan fiduciaries, investment managers who utilize proxy advisory firms should engage in an objective process that is designed to elicit information necessary to assess the provider's qualifications, quality of services offered, and reasonableness of fees charged for the service. The process also must avoid self-dealing, conflicts of interest or other improper influence. The investment manager in considering any proxy recommendation should assure that it is fully informed of potential conflicts of proxy advisory firms and the steps the firm has taken to address them. *See generally* "Proxy Voting: Proxy Voting Responsibilities of Investment Advisers and Availability of Exemptions from the Proxy Rules for Proxy Advisory Firms," SEC Staff Legal Bulletin No. 20 (IM/CF) (June 30, 2014) (discussing issues that may arise under the federal securities laws for registered investment advisers in connection with selection and monitoring of proxy advisory firms, among other things).

we don't like the management, is to get a new management or to force the management to reform."[6]

The Department is also concerned that despite the guidance on ESG issues the Department recently provided in IB 2015-1, statements in IB 2008-2 may cause confusion as to whether or how a plan fiduciary may consider ESG issues in connection with proxy voting or undertaking other shareholder engagement activities. The Department has rejected a construction of ERISA that would render ERISA's tight limits on the use of plan assets illusory and that would permit plan fiduciaries to expend trust assets to promote myriad public policy preferences. Rather, plan fiduciaries may not increase expenses, sacrifice investment returns, or reduce the security of plan benefits in order to promote collateral goals. However, by focusing on a "cost-benefit analysis" demonstrating a "more likely than not" enhancement in the economic value of the investment, the Department believes that IB 2008-2 may be read as discouraging fiduciaries from recognizing the long-term financial benefits that, although difficult to quantify, can result from thoughtful shareholder engagement when voting proxies, establishing a proxy voting policy, or otherwise exercising rights as shareholders.

The existence of financial benefits associated with shareholder engagement is suggested by the fact that a growing number of institutional investors are now engaging companies on ESG issues. According to a 2014 survey by the US SIF Foundation, 202 institutional investors or money managers representing $1.72 trillion in US-domiciled assets filed or co-filed shareholder resolutions on ESG issues at publicly traded companies from 2012 through 2014.[7] The members

[6] Interview by Christine Benz with John Bogle, Founder, Vanguard (Oct. 10, 2010) (*available at* www.morningstar.com/videos/359002/bogle-index-funds-power-in-corporate-governance.aspx)
[7] US SIF FOUNDATION, REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS 2014.

of the Investor Network on Climate Risk (INCR), a network of institutions representing more than $14 trillion in assets, engage with companies in their portfolios on climate and sustainability issues. Members include BlackRock, California Public Employees' Retirement System, Deutsche Asset & Wealth Management, Prudential Investment Management, State Street Global Advisors and TIAA Global Asset Management.[8] Globally, over 1300 asset managers and asset owners have signed the Principles for Responsible Investment, the second principle of which states that the managers and owners will be active owners and incorporate ESG issues into ownership policies and practices.[9] Companies are also being required to be more transparent in the way they address ESG issues. For example, in 2010, the Dodd-Frank Act required publicly traded companies to allow shareholders an advisory vote on executive pay plans at least once every three years.[10] Similarly, in 2009 the SEC issued rules which required companies to disclose in proxy statements relating to the election of directors, among other things, their policy for consideration of diversity in the process by which candidates for director are considered for nomination by a company's nominating committee.[11]

Other market developments further substantiate the financial benefits from shareholder engagement. Companies themselves are seeking more engagement as a way of understanding and responding to their shareholders' views.[12] There have also been market events that were

[8] See INCR membership list at www.ceres.org/investor-network/incr/member-directory
[9] The Principles for Responsible Investment (PRI) has been supported by the United Nations since its launch. The PRI has two UN partners, the United Nations Environment Programme Finance Initiative and the United Nations Global Compact, which play an important role in delivering the PRI's strategy. See "About the PRI" for further explanation of PRI and their responsible investment effort at www.unpri.org/about.
[10] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111-203, 124 Stat. 1376 (2010), for section 951 requirements. *See also* SEC Final Rule, Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release Nos. 33-9178; 34-63768 (Jan. 25, 2011).
[11] SEC Final Rule, Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175 (Dec. 16, 2009).
[12] BLACKROCK AND CERES, 21ST CENTURY ENGAGEMENT: INVESTOR STRATEGIES FOR INCORPORATING ESG CONSIDERATIONS INTO CORPORATE INTERACTIONS (2015). *See also* Joseph McCahery, Zacharias Sautner & Laura (footnote continued)

catalysts for the growth of shareholder engagement. The financial crisis of 2008 exposed some of the pitfalls of shareholder inattention to corporate governance and highlighted the merits of shareholders taking a more engaged role with the companies.

This is not a trend unique to the United States. Other countries have recognized these developments and taken steps to provide guidance on proxy voting and shareholder engagement in the form of "stewardship codes." The first stewardship code was published in 2010 by the UK's Financial Reporting Council, which traces its origins to principles published by the UK's Institutional Shareholders Committee in 2002 and later the International Corporate Governance Network Principles on Institutional Investor Responsibilities in 2007.[13] Other such codes have followed, including in Canada, Italy, Japan, Singapore, South Africa, Switzerland, the Netherlands, and Malaysia.[14]

For all the above reasons, the Department is concerned that the changes to IB 94-2 in IB 2008-2 are out of step with important domestic and international trends in investment management and have the potential to dissuade ERISA fiduciaries from exercising shareholder rights, including the voting of proxies, in areas that are increasingly being recognized as important to long-term shareholder value. In fact, the Department believes the principles originally articulated in IB 94-2, with certain updates to reflect the trends on shareholder engagement discussed above, are a better expression of a fiduciary's obligations under sections 402(c)(3), 403(a) and 404(a)(1)(A) of ERISA on these issues. The Department therefore has

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T. Starks, *Behind the Scenes The Corporate Governance Preferences of Institutional Investors*, 71 THE JOURNAL OF FINANCE 2905-2932 (Dec. 2016).

[13] BLACKROCK AND CERES, *supra* footnote 12, at 34.

[14] Id.

decided to withdraw IB 2008-2 and replace it with Interpretive Bulletin 2016-1 which reinstates the language of IB 94-2 with minor updates.

The following Interpretive Bulletin deals solely with the applicability of the prudence and exclusive purpose requirements of ERISA as applied to fiduciary decisions with respect to voting of proxies on securities held in employee benefit plan investment portfolios, the maintenance of and compliance with statements of investment policy, including proxy voting policy, and the appropriateness under ERISA of shareholder engagement with corporate management by plan fiduciaries. The bulletin does not supersede the regulatory standard contained at 29 CFR 2550.404a-1, nor does it address any issues which may arise in connection with the prohibited transaction provisions under ERISA section 406 or the statutory exemptions under ERISA section 408 from those provisions. This Interpretative Bulletin is a restatement of IB 94-2 with certain updates to the examples of areas where monitoring or communication with management is likely to enhance the value of the plan's investment in the corporation.

List of Subjects in 29 CFR Part 2509

Employee benefit plans, Pensions.

For the reasons set forth in the preamble, the Department is amending part 2509 of title 29 of the Code of Federal Regulations as follows:

PART 2509 -- INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1-2003, 68 FR 5374 (Feb. 3, 2003). Sections 2509.75-10 and 2509.75-2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75-5 also issued under 29 U.S.C. 1002. Sec. 2509.95-1 also issued under sec. 625, Public Law 109-280, 120 Stat. 780.

§ 2509.08-2 [Removed]

2. Remove § 2509.08-2.

3. Add § 2509.2016-01 to read as follows:

§ 2509.2016-01 Interpretive Bulletin relating to the exercise of shareholder rights and written statements of investment policy, including proxy voting policies or guidelines.

This interpretive bulletin sets forth the Department of Labor's (the Department) interpretation of sections 402, 403 and 404 of the Employee Retirement Income Security Act of 1974 (ERISA) as those sections apply to voting of proxies on securities held in employee benefit plan investment portfolios and the maintenance of and compliance with statements of investment policy, including proxy voting policy. In addition, this interpretive bulletin provides guidance on the appropriateness under ERISA of active engagement with corporate management by plan fiduciaries.

(1) Proxy Voting

The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock. As a result, the responsibility for voting proxies lies exclusively with the plan trustee except to the extent that either (1) the trustee is subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), or (2) the power to manage, acquire or dispose of the relevant assets has been delegated by a named fiduciary to one or more investment managers pursuant to ERISA section 403(a)(2). Where the authority to manage plan assets has been delegated to an investment manager pursuant to section 403(a)(2), no person other than the investment manager has authority to vote proxies appurtenant to such plan assets except to the extent that the named fiduciary has reserved to itself (or to another named fiduciary so authorized by the plan document) the right to direct a plan trustee regarding the voting of proxies. In this regard, a named fiduciary, in delegating investment management authority to an investment manager, could reserve to itself the right to direct a trustee with respect to the voting of all proxies or reserve to itself the right to direct a trustee as to the voting of only those proxies relating to specified assets or issues.

If the plan document or investment management agreement provides that the investment manager is not required to vote proxies, but does not expressly preclude the investment manager from voting proxies, the investment manager would have exclusive responsibility for voting proxies. Moreover, an investment manager would not be relieved of its own fiduciary responsibilities by following directions of some other person regarding the voting of proxies, or by delegating such responsibility to another person. If, however, the plan document or the investment management contract expressly precludes the investment manager from voting proxies, the responsibility for voting proxies would lie exclusively with the trustee. The trustee, however, consistent with the requirements of ERISA section 403(a)(1), may be subject to the directions of a named fiduciary if the plan so provides.

The fiduciary duties described at ERISA section 404(a)(1)(A) and(B), require that, in voting proxies, the responsible fiduciary consider those factors that may affect the value of the plan's investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives. These duties also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions. The named fiduciary must carry out this responsibility solely in the interest of the participants and beneficiaries and without regard to its relationship to the plan sponsor.

It is the view of the Department that compliance with the duty to monitor necessitates proper documentation of the activities that are subject to monitoring. Thus, the investment manager or other responsible fiduciary would be required to maintain accurate records as to proxy voting. Moreover, if the named fiduciary is to be able to carry out its responsibilities under ERISA section 404(a) in determining whether the investment manager is fulfilling its fiduciary obligations in investing plans assets in a manner that justifies the continuation of the management appointment, the proxy voting records must enable the named fiduciary to review not only the investment manager's voting procedure with respect to plan-owned stock, but also to review the actions taken in individual proxy voting situations.

The fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that may affect the value of the plan's investment. This principle applies broadly. However, the Department recognizes that in some special cases voting proxies may involve out of the ordinary costs or unusual requirements, for example in the case of voting proxies on shares of certain foreign corporations. Thus, in such cases, a fiduciary should consider whether the plan's vote, either by itself or together with the votes of other shareholders, is expected to have an effect on the value of the plan's investment that warrants the additional cost of voting. Moreover, a fiduciary, in deciding whether to purchase shares for which this may be the case, should consider whether the difficulty and expense in voting the shares is reflected in their market price.

(2) Statements of Investment Policy

The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Since the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy. For purposes of this document, the term "statement of investment policy" means a written statement that provides the fiduciaries who are responsible for plan investments with guidelines or general instructions concerning various types or categories of investment management decisions, which may include proxy voting decisions as well as policies concerning economically targeted investments or incorporating environmental, social or governance (ESG) factors in investment policy statements or integrating ESG-related tools, metrics and analyses to evaluate an investment's risk or return or choose among equivalent investments. A statement of investment policy is distinguished from directions as to the purchase or sale of a specific investment at a specific time or as to voting specific plan proxies.

In plans where investment management responsibility is delegated to one or more investment managers appointed by the named fiduciary pursuant to ERISA section 402(c)(3), the named fiduciary responsible for appointment of investment managers has the authority to condition the appointment on acceptance of a statement of investment policy. Thus, such a named fiduciary may expressly require, as a condition of the investment management agreement, that an investment manager comply with the terms of a statement of investment policy which sets forth guidelines concerning investments and investment courses of action which the investment manager is authorized or is not authorized to make. Such investment policy may include a policy or guidelines on the voting of proxies on shares of stock for which the investment manager is responsible. In the absence of such an express requirement to comply with an investment policy, the authority to manage the plan assets placed under the control of the investment manager would lie exclusively with the investment manager. Although a trustee may be subject to the directions of a named fiduciary pursuant to ERISA section 403(a)(1), an investment manager who has authority to make investment decisions, including proxy voting decisions, would never be relieved of its fiduciary responsibility if it followed directions as to specific investment decisions from the named fiduciary or any other person.

Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the "documents and instruments governing the plan" within the meaning of ERISA section 404(a)(1)(D). An investment manager to whom such investment policy applies would be required to comply with such policy, pursuant to ERISA section 404(a)(1)(D) insofar as the policy directives or guidelines are consistent with titles I and IV of ERISA. Therefore, if, for example, compliance with the guidelines in a given instance would be imprudent, then the investment manager's failure to follow the guidelines would not violate ERISA section 404(a)(1)(D). Moreover, ERISA section 404(a)(1)(D) does not shield the investment manager from liability for imprudent actions taken in compliance with a statement of investment policy.

The plan document or trust agreement may expressly provide a statement of investment policy to guide the trustee or may authorize a named fiduciary to issue a statement of investment policy applicable to a trustee. Where a plan trustee is subject to an investment policy, the trustee's duty to comply with such investment policy would also be analyzed under ERISA section 404(a)(1)(D). Thus, the trustee would be required to comply with the statement of investment policy unless, for example, it would be imprudent to do so in a given instance.

Maintenance of a statement of investment policy by a named fiduciary does not relieve the named fiduciary of its obligations under ERISA section 404(a) with respect to the appointment and monitoring of an investment manager or trustee. In this regard, the named fiduciary appointing an investment manager must periodically monitor the investment manager's activities with respect to management of the plan assets. Moreover, compliance with ERISA section 404(a)(1)(B) would require maintenance of proper documentation of the activities of the investment manager and of the named fiduciary of the plan in monitoring the activities of the investment manager. In addition, in the view of the Department, a named fiduciary's determination of the terms of a statement of investment policy is an exercise of fiduciary responsibility and, as such, statements may need to take into account factors such as the plan's funding policy and its liquidity needs as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

An investment manager of a pooled investment vehicle that holds assets of more than one employee benefit plan may be subject to a proxy voting policy of one plan that conflicts with the proxy voting policy of another plan. Compliance with ERISA section 404(a)(1)(D) would require the investment manager to reconcile, insofar as possible, the conflicting policies (assuming compliance with each policy would be consistent with ERISA section 404(a)(1)(D)) and, if necessary and to the extent permitted by applicable law, vote the relevant proxies to reflect such policies in proportion to each plan's interest in the pooled investment vehicle. If, however, the investment manager determines that compliance with conflicting voting policies would violate ERISA section 404(a)(1)(D) in a particular instance, for example, by being imprudent or not solely in the interest of plan participants, the investment manager would be required to ignore the voting policy that would violate ERISA section 404(a)(1)(D) in that instance. Such an investment manager may, however, require participating investors to accept the investment manager's own investment policy statement, including any statement of proxy voting policy, before they are allowed to invest. As with investment policies originating from named fiduciaries, a policy initiated by an investment manager and adopted by the participating plans would be regarded as an instrument governing the participating plans, and the investment manager's compliance with such a policy would be governed by ERISA section 404(a)(1)(D).

(3) Shareholder Engagement

An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management, by the plan alone or together with other shareholders, is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved. Such a reasonable expectation may exist in various circumstances, for example, where plan investments in corporate stock are held as long-term investments, where a plan may not be able to easily dispose of such an investment, or where the same shareholder engagement issue is likely to exist in the case of available alternative investments. Active monitoring and communication activities would generally concern such issues as the independence and expertise of candidates for the corporation's board of directors and assuring that the board has sufficient information to carry out its responsibility to monitor management. Other issues may include such matters as governance structures and practices, particularly those involving board composition, executive compensation, transparency and accountability in corporate decision-making, responsiveness to shareholders, the corporation's policy regarding mergers and acquisitions, the extent of debt financing and capitalization, the nature of long-term business plans including plans on climate change preparedness and sustainability, governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations, the corporation's workforce practices (e.g., investment in training to develop its work force, diversity, equal employment opportunity), policies and practices to address environmental or social factors that have an impact on shareholder value, and other financial and non-financial measures of corporate performance. Active monitoring and communication may be carried out through a variety of methods including by means of correspondence and meetings with corporate management as well as by exercising the legal rights of a shareholder.

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Security Administration, Department of Labor.

BILLING CODE 4510–29–P

[FR Doc. 2016-31515 Filed: 12/28/2016 8:45 am; Publication Date: 12/29/2016]