



Occupy the SEC

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September 16, 2020

Office of Regulations and Interpretations
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
(RIN 1210-AB91)**

Dear Sir or Madam:

Occupy the SEC¹ (“OSEC”) submits this comment letter in response to the Employee Benefits Security Administration’s (“ESBA”) Notice of Proposed Rulemaking (“Proposal”)² seeking to amend the “Investment duties” regulation at 29 CFR 2550.404a-1 and address the application of ERISA’s fiduciary duties of prudence and loyalty to the exercise of shareholder rights. We believe that the Proposal, and the proposed regulations contained therein, are lacking a few interpretive clarifications that the EBSA should address in any final rule.

The proposed rule requires that plan fiduciaries act “solely in accordance with the economic interest of the plan.”³ The regulation vaguely defines the applicable timeline for consideration of such economic interests as “an appropriate investment horizon consistent with the plan’s investment objectives and the funding policy of the plan.”⁴ It is vital that the EBSA clarify that the appropriate investment horizon will be very long-term in many cases, especially given the fact that retirement plans are typically held for years or decades prior to termination. The Agency should disabuse members of the investment community of the prevailing notion that the Proposal requires consideration of only short-term economic interests. To the contrary,

¹ Occupy the SEC (<http://occupythesec.org>) is a group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public, not Wall Street.

² Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 Fed. Reg. 55,219 (proposed Sep. 4, 2020) [hereinafter Proposal].

³ Proposed § 2550.404a-1(e)(2)(ii)(A).

⁴ *Id.*

fiduciaries must continue to consider environmental, social, and governance (ESG) criteria that would have (typically long-term) economic impacts plans within their purview. Nowhere does the Proposal state that fiduciaries should restrict themselves to short-term economic considerations, and that fact must be emphasized to the public.

Furthermore, the Agency should also require that all fiduciaries give serious consideration to ESG criteria relating to climate change. Scholarly studies are fairly consistent in establishing that climate change is not only a scientific fact, but one that will have predictably deleterious impacts on economic productivity. One fairly conservative study estimates that by the time 4°C of warming is reached, 9% of annual economic output will be lost relative to the base with no warming effect.⁵ Such impacts would be felt across the global economy, with especial impact on industries such as insurance, agriculture and forestry. Some models predict far more dire economic consequences from lower levels of warming.⁶ In light of this reality, it behooves the Agency to advise fiduciaries that the “economic impact” standard established in the Proposal likely includes climate change related impacts.

Additionally, the Permitted Practice example contained at proposed § 2550.404a-1(e)(3)(iii) must be removed as it is inconsistent with the heightened obligations that apply to plan fiduciaries. The preceding subsection, § 2550.404a-1(e)(3)(ii), takes a more rational by allowing for the establishment of proxy voting policies that delineate certain proposals as presumptively valid, while also requiring the fiduciary to consider others proposals that present “heightened management conflicts of interest” or “significant economic impact.” Unfortunately, § 2550.404a-1(e)(3)(iii) lacks these fail-safes, and instead permits fiduciaries to blindly ignore proxy proposals that do not meet predefined criteria. In its current form, § 2550.404a-1(e)(3)(iii) would allow plan fiduciaries to ignore their clear obligations to “[a]ct solely in accordance with the economic interest of the plan.”⁷ Fiduciary obligations necessarily require case-by-case consideration of particular circumstances, and are wholly inconsistent with the kind of simplistic and short-sighted methodology that is proffered by § 2550.404a-1(e)(3)(iii).

We urge the Agency to take the above considerations into account, and send a clear signal to plan fiduciaries that the “economic interest” test that it has promulgated is wholly consistent with, in some cases, necessarily inclusive of ESG criteria.

⁵ Keith Wade, *The Impact of Climate Change on the Global Economy*, Schroders (Aug. 31, 2016), <https://www.schroders.com/de/SysGlobalAssets/digital/us/pdfs/the-impact-of-climate-change.pdf>.

⁶ *See id.*

⁷ Proposed § 2550.404a-1(e)(2)(ii)(A).

Thank you for your attention to this matter of great public interest.

Sincerely,

/s/

Occupy the SEC

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et al.