

October 1, 2020

The Honorable Eugene Scalia  
Secretary of Labor  
Office of Regulations and Interpretations,  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210  
Attention: Proposed Rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights

By Federal eRulemaking Portal

Re: RIN 1210-AB91

Dear Mr. Secretary:

I write in response to a request for comments by the Department of Labor on its proposed rule, “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” posted on September 4, 2020.

My name is Ellen R. Wald. I am a senior non-resident fellow at the Global Energy Center at the Atlantic Council, the founder and president of Transversal Consulting, and an adjunct professor at Jacksonville University. Past appointments include visiting assistant professor at the University of Georgia, Majewski Fellow in Economic Geology at the American Heritage Center at the University of Wyoming, Visiting Scholar at the University of Cambridge, and lecturer at Boston University. I am a columnist on the energy industry and investing at Forbes.com and investing.com. I earned my doctorate in history with a focus on the energy industry at Boston University, and my A.B. magna cum laude from Princeton University. The views I share in this letter are mine and do not represent those of any institution with which I am affiliated.

The rule is worthwhile and necessary. There is a movement afoot in investing that is necessitating a reiteration of the fiduciaries’ responsibilities, perhaps especially a clarification of the responsibilities of the fiduciaries of retirement plans to the beneficiaries of those plans. The proposed regulation serves to solidify protection for ERISA beneficiaries from decisions made for reasons other than pecuniary interests. In the current climate of voting based on amorphous environmental, social and governance (ESG) standards, it is crucial to ensure the protection of ERISA plan beneficiaries at multiple levels, including at the level of fund managers/ERISA plan fiduciaries.

This proposed regulation is an important move to provide protection for the financial interests of ERISA beneficiaries to ensure they are not adversely affected by the outsized influence of proxy advisory firms.

Robo-voting is a mechanized response to the opportunity for shareholders to participate in the governing decisions of a firm. When ERISA fiduciaries robo-vote in alignment with the recommendations of proxy advisors, they are assigning their power and neglecting their duty. It is important to minimize the impact of the robo-voting option, especially today in the age of corporate and investing decisions that are often based on interests other than performance and financial gain.

With this proposed regulation, the Department of Labor is clarifying that fiduciaries may decide to abstain from voting if, for example, the plan owns only a small percentage of shares in a firm or if investigating the vote is more costly than the financial benefit of a decision. This clarification is vital, because it allows plan fiduciaries to refrain from voting rather than casting an ill-informed and loosely-evaluated vote that might be contrary to the financial interests of the beneficiaries.

This proposed regulation would require an ERISA plan fiduciary to investigate material facts and make an independent determination of the vote based on the economic benefit to the beneficiaries prior to voting. Moreover, the fiduciary would have to maintain records for the decision-making. Now that ESG and non-financial criteria are en vogue in investing, standards for ensuring that the fiduciaries pursue financial success are crucial. It must be acknowledged that it is possible to make a financial argument in favor of any voting decision. However, the fiduciaries are hired for their prudence, experience, knowledge and wisdom so that they will, ideally, make the best decision. They are hired to make decisions, and the proposed regulation ensures that the onus is on them to make informed and reasoned decisions and to be able to demonstrate that. This protects beneficiaries from fiduciaries who delegate that power to proxy advisors, who are lax in handling their responsibilities or who prioritize interests such as ESG over the beneficiaries' financial interests.

It is problematic to vote based on ESG criteria or other non-pecuniary criteria in place of financial interests. This is true whether the vote is a robo-vote in alignment with the recommendations of a proxy advisor or whether it is an independent decision of the fiduciary of the ERISA fund.

For example, in the energy industry—my field of expertise—there is a growing segment pushing for less investment in oil and gas and more in alternative energies. BP recently issued a report stating that it believes “peak [oil] demand” is essentially upon us. This theory says that global demand in crude oil will no longer grow, and, therefore, it is time to invest in something else. Royal Dutch Shell has already begun its transition away from fossil fuels in recent years as well. Now, there are plausible economic arguments in favor of transitioning away from oil and gas (such as the peak demand theory), and there are arguments against it. However, there is also evidence that renewable energy projects offer significantly lower returns than traditional oil production. BP's new strategy to minimize its oil and gas production business is controversial and could result in lower profits. Simply rubberstamping a decision to reduce fossil fuel production at a time when fossil fuel demand is still strong—and, according to most analysts, is expected to grow—could run contrary to the financial interests of shareholders. In the case of a company like BP, it would be incumbent on ERISA fiduciaries to determine if they agree that

peak demand is here or not and to maintain records showing their work. Given the public and social popularity of alternative energy over fossil fuels, there exists the great risk of a fiduciary voting in such a way as to promote alternative energies even if that is the wrong financial decision.

Thus, an ERISA fiduciary may face public or social pressure or a personal conscience that pushes the fiduciary to vote for a certain, supposedly virtuous choice instead of the financially wise decision. Even for a simple vote for board members, an ERISA fiduciary may face public or social pressure to vote for the board members who would likely advocate for alternative energy investment over fossil fuel investment, for example. However, this may not be the best financial choice. Whether it is the best investment choice or not—and there are almost always arguments either way—this proposed rule would ensure that an ERISA fiduciary investigates the issue before voting, decides based on what she determines is best for the financial situation for the ERISA beneficiaries and maintain evidence to back up the decision process. This would serve to protect against votes made purely out of convenience (i.e. through robo-voting) or for social reasons as opposed to financial reasons.

It is crucial that the final regulation protect the interests of ERISA beneficiaries and their rights to have a say, or vote, in the companies in which their funds are invested. Blind robo-voting by ERISA fiduciaries must be prohibited, for when fiduciaries vote without attention to the beneficiaries' interests, they are neglecting their duties and disenfranchising the beneficiaries. Especially when there is a contested vote, blind robo-voting offers no benefit to the beneficiaries and can actually be detrimental. Blind robo-voting by ERISA fiduciaries should not continue.

A benefit of this proposed regulation is that compliance would not be overly burdensome. If the fund has a small interest in the firm holding the vote or if the research and investigation is too expensive, this rule clarifies that the fiduciary can abstain. Otherwise, the fiduciary is responsible for making an independent decision that promotes the interests of the beneficiaries based on investigation of the matter. And the fiduciary must maintain records of proxy voting activities. This is in-line with being a fiduciary and is necessary to ensure, for example, that the fiduciary makes a financial decision and not the easiest or most socially popular decision.

Sincerely,

Ellen R. Wald, Ph.D.