

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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October 1, 2020

Submitted electronically to: www.regulations.gov

Mr. Joe Canary, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room # N5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

**RE: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights
(RIN 1210-AB91)**

Dear Director Canary:

The International Brotherhood of Teamsters (the “Teamsters”) is pleased to submit the following comments on the proposed rule (the “Proposal”) to amend the EBSA’s “investment duties” regulation regarding the prudence and exclusive purpose duties in Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”), 85 Fed. Reg. 55219 (Sept. 4, 2020). For the reasons set out below, we respectfully request that the Administration withdraw the proposed rule. As an alternative, the Administration may wish to re-propose a rule, but only after first analyzing public comments on the current Proposal and conducting a public hearing on the issues raised in the Proposal.

The International Brotherhood of Teamsters represents 1.4 million hardworking men and women in North America. Teamster-affiliated benefit plans hold approximately

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\$100 billion in assets on behalf of Teamster members and their families, who are participants and beneficiaries in these plans. In addition, some Teamster members participate in defined contribution plans offered by their employer. The Proposal raises serious issues for the retirement security and financial security of Teamster members and their families.

Our position, in brief, is that the Proposal errs by starting with a misconception, namely, that an ERISA plan's obligation to vote its shares is widely misunderstood, and that, as a result, too many shares are being voted in ways that are not cost-effective or economically beneficial to participants and beneficiaries. The problem is compounded, the Proposal continues, because of an increase in the number of shareholder proposals being voted. Rather than simply clarify any misunderstanding, however, the Proposal goes much further, and not in a way that benefits ERISA participants or beneficiaries.

The Proposal would actively discourage ERISA plans from voting their shares by adopting a vague "economic impact" standard against which individual voting decisions must be assessed and by imposing burdensome paperwork requirements unless the plan agrees (a) to vote with management on all items, (b) to vote only on significant corporate events (such as a merger or acquisition) or (c) to refrain from voting if the plan's holding in a company is so small (say, under five percent of outstanding shares) that the vote is unlikely to have a material impact on the investment performance of the plan's portfolio or on the assets under management of a plan advisor.

Let me give an example of the sort of dialogue between companies and its shareholders that this Proposal seeks to disrupt.

In recent years the Teamsters have used the shareholder proposal process to engage drug distributors and manufacturers about their role in one of the leading social problems in this country, the national opioid crisis. A November 2017 report of the President's Council of Economic Advisers put the economic cost of this crisis in a single year at \$504 billion or 2.8 percent of GDP.¹

¹ Council of Economic Advisors, "The Underestimated Cost of the Opioid Crisis", November 2017, available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/The%20Underestimated%20Cost%20of%20the%20Opioid%20Crisis.pdf> 10

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Since 2016, the Teamsters have used shareholder proposals and engagement to bring about vital improvements in oversight, monitoring and accountability at opioid-related companies. In mid-2017, the Teamsters co-founded the Investors for Opioid Accountability, a diverse global coalition of 57 members representing public, faith-based, labor, and sustainability funds, as well as investment managers, with \$4 trillion in collective assets under management and advisement.

In a two-year period, the coalition submitted over 50 shareholder proposals to 20 companies at different levels of the supply chain. Many proposals were withdrawn after the company agreed to change its practices; 22 proposals went to a vote, and seven of them received a majority of the votes of independent shareholders. All in all, these efforts persuaded a dozen companies to issue board risk reports related to opioid practices, three companies to separate the role of chairman and CEO and two companies to create board-level committees dedicated to the oversight of opioids. In addition, the group's actions have prompted the biggest money managers to also engage companies on the opioid crisis.

America's opioid crisis is not just a "social" issue. It is a shareholder issue. The wayward marketing and distribution of opioids have destroyed billions of dollars in shareholder value. Companies involved in the supply chain now collectively face over \$50 billion in possible settlement costs. Under the Department's Proposal, ERISA plans holding shares in these companies would face a choice: If they cannot quantify an immediate economic gain from voting for, say, a shareholder proposal on risk assessments, they would generally have to either (a) vote for management's director candidates, even those who failed to monitor this crisis as it grew, or (b) vote as they see fit, but only if they hold 5% of a company's stock, which for the drug distributor McKesson would require an ERISA plan to hold \$1.2 *billion* of McKesson stock.

How does stifling ERISA funds in this manner serve the interests of the workers and their families, the very people ERISA seeks to protect?

We offer below our more detailed concerns about specific aspects of the Proposal.

The Proposal's cost-benefit analysis understates the benefits of shareholder votes and over-emphasizes the short-term costs.

The Proposal seems to view shareholder votes as having no benefits or importance to ERISA participants and beneficiaries unless one can identify some short-term economic gain with respect to the company or item being voted.

This is a stunningly narrow view, namely, that shareholder voting is nothing but a “cost center” in an ERISA plan and that tight regulatory controls are needed to assure that the day-to-day costs of voting shares do not outstrip the benefits.

The problem with this narrow view of the “cost” of voting is *that the Proposal fails to consider the enormous value that is placed on the shareholder franchise*. The Proposal makes no attempt to assess the importance of this benefit, with a result that often occurs in the rulemaking process, namely, short-term costs that can be quantified are given prominence, while larger and long-term benefits that are harder to quantify are given short shrift.

If anything, the Proposal’s focus on short-term cost is surprising. ERISA plans, by their very nature, must plan for the long term. Workers deposit a portion of their earnings into an ERISA plan as deferred wages. They do so knowing that they will probably not withdraw money from the plan for decades to come. After all, the whole point of ERISA was to make sure that workers’ money will be there when it is needed. It is thus ironic to see the Proposal’s singular focus on short-term “economic impact” with no consideration of long-term gains and benefits.

Irony aside, a further reason why the Proposal is deeply flawed is because it misses the sea change in attitudes towards corporate governance that has occurred in recent years. Workers now have faith in management and then vote with management or not vote at all.² It appears that the Proposal is trying to resurrect that approach, at least as to ERISA plans. That development is particularly startling in light of events that began approximately 20 years ago, an experience that demonstrates the tremendous benefits of shareholder voting as a way to monitor management and the board – and thus preserve and enhance ERISA plan assets.

² That point of view was perhaps best summarized in Manning, *The Shareholder’s Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L. J. 223, 261 (1962) (“It is commonplace to observe that the modern shareholder . . . does not think of himself or act like an ‘owner.’ He hires his capital out to the [corporate] managers and they run it for him; how they do it is their business, not his, and he always votes ‘yes’ on the proxy.”).

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The bursting of the dot.com bubble and the spectacular failures of Enron and WorldCom drove home to many investors the importance of good corporate governance. This was particularly true with respect to pension investments. Enron employees who invested in Enron's 401(k) company stock plan lost an estimated \$2 billion when Enron collapsed; employee pension losses at WorldCom shares were estimated at \$1.1 billion; these direct losses, of course, exclude the losses suffered by outside pension funds that had invested billions in Enron, WorldCom or both.³

In the aftermath of these events, Congress passed the Sarbanes-Oxley Act of 2002 to improve corporate governance. In addition, investors – including pension funds – decided to take matters into their own hands by demanding and voting for additional reforms through “private ordering,” namely, engagement with portfolio companies, as well as through votes on shareholder proposals. These efforts collectively elevated the importance of shareholder monitoring and director accountability to shareholders. Key reforms over the past two decades include:

- The decline of plurality voting for directors and the emergence of a “majority voting” standard.
- The related fact that shareholders may now vote “against” a director, whereas in years gone by, the only way to register an objection about a director's service was to “withhold” one's vote.
- The revision of NYSE Rule 452 to treat uncontested director elections as “non-routine,” rather than “routine”; that change ended the practice of allowing brokers to vote shares in director elections, even if the broker had no instructions from the broker's client.
- The adoption by many companies of “proxy access” bylaws that allow shareholders to vote on the company-prepared proxy card for certain board director candidates nominated by shareholders in addition to director candidates proposed by the board.

³ Business Insider, *10 Years Later, What Happened To The Former Employees Of Enron?* (Dec. 2, 2011), available at <https://www.businessinsider.com/10-years-later-what-happened-to-the-former-employees-of-enron-2011-12>; Noguchi, *Workers' 401(k)s Lost \$1.1 Billion*, *The Washington Post* (July 10, 2002), available at <https://www.washingtonpost.com/archive/business/2002/07/10/workers-401ks-lost-11-billion/c19889ae-65eb-4075-9ade-3aa53b4ef133/>; Greenhouse, *Enron's Many Strands: Retirement Money: Public Funds Say Losses Top \$1.5 Billion* (Jan. 29, 2002), available at: <https://www.nytimes.com/2002/01/29/business/enron-s-many-strands-retirement-money-public-funds-say-losses-top-1.5-billion.html>.

The importance of shareholder votes as a monitor on corporate governance is underscored by the fact that the 2010 Dodd-Frank Act went so far as to mandate a shareholder vote on the company's executive compensation practices. Such a vote on a specific topic provides shareholder feedback that may be far more useful to directors on that specific issue than a vote on whether a director should serve for another term.

These measures give real meaning to a cardinal principle of corporate governance. As the Delaware Chancery Court stated in the leading case of *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988): "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."⁴ By tamping down the ability of ERISA funds to vote, the Proposal would upset that equilibrium in ways that do not benefit ERISA participants and beneficiaries, much less stockholders generally.

The reasons cited in the Proposal do not warrant adopting a regulation.

The Proposal purports to modernize the Department's guidance, yet the approach in the Proposal moves in the opposite direction of developments over the past 30 years, and the reasons given for this radical change are not persuasive.

Rationale: "Some" stakeholders misunderstand what ERISA requires.

The Department's initial guidance on voting appeared in the 1988 "Avon letter," which declared that "the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock."⁵ The Proposal claims that a regulation is needed because the Avon letter and subsequent Interpretative Bulletins (Nos. 94-2, 2008-02, 2016-01) "resulted in a

⁴ *Blasius* added that the shareholder vote "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own. Thus, when viewed from a broad, institutional perspective, it can be seen that matters involving the integrity of the shareholder voting process involve consideration not present in any other context in which directors exercise delegated power." *Id.* at 659.

⁵ Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. 1988 WL 897696 (Feb. 23, 1988). The Department reiterated that advice two years later in Letter to Robert Monks, 1990 WL 1085069 (Jan. 23, 1990).

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misplaced belief among some stakeholders that fiduciaries must always vote proxies, subject to limited exceptions, in order to fulfill their obligations under ERISA.” 85 Fed. Reg. at 55220, citing examples in note 12.

This claim is unpersuasive for multiple reasons. First, the Proposal quotes at length from the cited Interpretative Bulletins, but none of them says what the Proposal claims they say. Indeed, in each of them the Department makes it clear that economic considerations should enter into considerations of how and whether to vote.⁶ The suggestion in the Proposal that prior guidance is inadequate is not borne out by the facts.

Second, to the extent that “some” unspecified number of stakeholders may believe that they must always vote their proxies, the Department could address that concern by publishing an additional Interpretative Bulletin, as the Department has done in the past. That approach gives the Department the flexibility to fine tune and refine its guidance as events unfold. By contrast, a regulation can be amended only through the rulemaking process required by the Administrative Procedure Act.

Third, to the extent that share voting is more prevalent today than it was 30 years ago, the market has responded in a cost-effective way, with service providers such as Institutional Shareholder Services and Glass Lewis providing expertise and in-depth advice on a full range of issues on which shareholders may be asked to vote.

One would have thought that the Department would welcome this development. The availability of objective advice from a neutral third party enhances the ability of ERISA funds to carry out their fiduciary duties to monitor and vote on the performance of their portfolio companies in a low-cost and effective manner, particularly when these advisers provide full disclosure of the reasons for their voting decisions.

Instead, the Proposal casts doubt on the value offered by such service providers. To the extent that such concerns exist, the Proposal does not adequately explain why the proxy adviser rules recently adopted by the Securities & Exchange Commission do not address those concerns.⁷ At a minimum, it would seem prudent for the

⁶ *E.g.*, Interpretative Bulletin 94-2 (“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 will outweigh the cost of voting.”).

⁷ SEC Release No. 34-89372, Exemption from the Proxy Rules for Proxy Voting Advice, 85 Fed. Reg. 55082 (Sept. 3, 2020).

Department to wait until one can observe how these new rules work in practice before adopting regulations in this area.

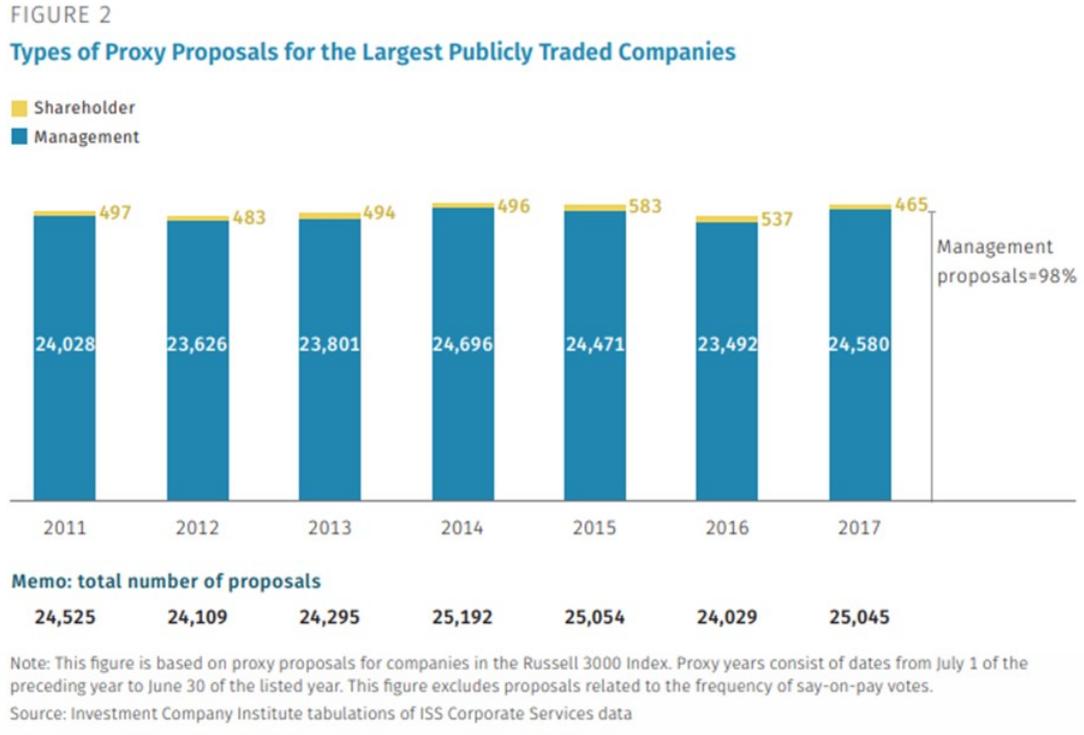
Rationale: Too many shareholder proposals are being voted.

In explaining the perceived need for new rules, the Proposal states: “The Department’s concerns about plans’ voting costs sometimes exceeding attendant benefits has been amplified by the recent increase in the number of environmental and social shareholder proposals introduced,” adding that it is “likely that many of these proposals have little bearing on share value or other relation to plan interests.” 85 Fed. Reg. at 55229.

What’s wrong with this analysis? The principal problem is that the Proposal’s statistics rely on an Investment Company Institute report covering the proxy years from 2011 to 2017,⁸ yet the ICI study does not support the conclusions the Proposal draws from that report.

Figure 2 of the ICI report, shown below, demonstrates that for the seven years surveyed (2011-2017), approximately 25,000 proposals are voted each year at Russell 3000 companies; 98 percent of these items were management proposals, and 70 percent of all proposals involved the election of directors. The remaining two percent consisted of shareholder proposals.

⁸ Morris Mitler, Dorothy Donohue & Sean Collins, *Proxy Voting by Registered Investment Companies, 2017*, ICI Research Perspective (July 2019), cited at 85 Fed. Reg. 55228 and notes 75 and 76. Although the ICI report only goes through the 2017 proxy season, more recent research covering the 2018 and 2019 proxy seasons confirm that a relatively low number of social and environmental proposals were voted in those years. The data are summarized in a January 28, 2020 Fact Sheet prepared by the Sustainable Investments Institute entitled *Social and Environmental Shareholder Proposals at U.S. Companies*, available at <https://siinstitute.org/reports.html>.

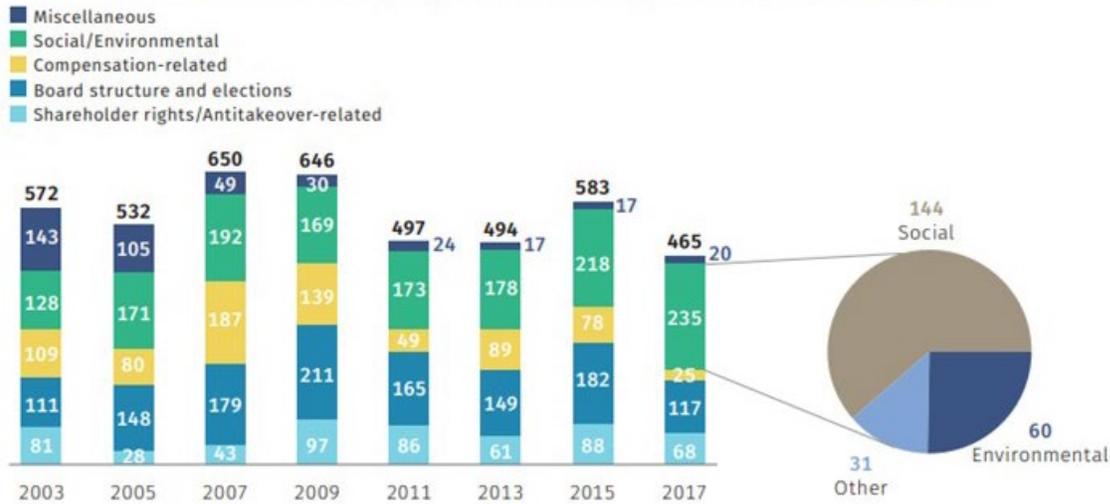


Contrary to the assertions in the Proposal, the number of social and environmental proposals has not increased in recent years, but instead has remained constant, as shown in Figure 5 of the ICI report, which is reproduced below. Over that seven-year period, an average of 162 environmental and social proposals were voted each year – roughly half of the total number of shareholder proposals voted each year, and less than one percent of the approximately 25,000 items voted annually at Russell 3000 companies.⁹ Differently put, the Department is proposing a radical revision of proxy voting guidance to address a perceived problem involving less than one percent of all items voted each year.

⁹ The other shareholder proposals that are voted each year involve corporate governance. Wisely, the Proposal makes no effort to claim that governance-related proposals are “likely” to have “little bearing on share value or other relation to plan interests,” as there is a wealth of literature correlating strong governance measures with increased share value. A sample of the literature is summarized in the comments filed in this proceeding by the Council of Institutional Investors, which we will not repeat.

FIGURE 5

Composition of Shareholder Proxy Proposals for the Largest Publicly Traded Companies



Note: Proxy years consist of dates from July 1 of the preceding year to June 30 of the listed year.
Source: Investment Company Institute tabulations of ISS Corporate Services data

But is it true that there is a “problem” with environmental and social proposals? If so, the Department does not produce any hard evidence, but instead sprinkles the Proposals with speculation on what “may” or “might” be the case. If anything, the Proposal’s view of what drives shareholder value appears to be rather myopic. Not so many years ago, one might have argued that concerns about diversity and sexual harassment has little impact on how corporations do business. In the wake of the MeToo and Black Lives Matter movements, can that still be the case?

Moreover, it is difficult to understand the critique in the Proposal that social and environmental proposals call for “disclosure, risk assessment, and oversight, rather than for specific policies or actions, such as phasing out products or activities.” 85 Fed. Reg. at 55229.

Why is that a bad thing? Particularly with respect to emerging issues, one would imagine that a shareholder proposal seeking a report or risk assessment on a given topic would be at little cost to the company, would take little time to evaluate and would, if successful, allow ERISA plans to make more informed investment choices. And if an ERISA plan concluded that such a report was unnecessary, it should be easy (and virtually costless) to vote “no” on the proposal.

Moreover, the Proposal ignores the SEC's "no-action" process, which companies frequently use to exclude many social or environmental proposals unless it can be shown that the proposals present issues that "transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote." SEC Release No. 34-40018 (May 21, 1998). The Proposal reflects no awareness of this filtering process or the fact that only proposals viewed as "significant" make it into a company's proxy materials.

The "permitted practices" raise significant problems.

These reasons should be enough to warrant withdrawing the proposal as unwise, unnecessary and contrary to sound ERISA plan management. The so-called "permitted practices" do nothing, however, to mitigate the problems with the Proposal.

The first alternative is for an ERISA plan to adopt a policy of simply voting with management all the time. This approach could call into question the plan's obligation of "loyalty" to plan participants. A number of proposals, particularly with respect to compensation matters, stand to directly benefit senior management, so there is a conflict of interests that is best resolved by making sure that all shareholders get to vote.

The Proposal suggests that voting in lockstep with management may be appropriate because corporate directors have their own fiduciary obligations of care and loyalty to shareholders. The flaw with this argument is that courts typically assess challenges to board actions under a deferential "business judgment" rule, which, as one court put it, can "protect well-meaning directors who are misinformed, misguided, and honestly mistaken."¹⁰ It is difficult to see how workers' interests are served by robotically voting for directors who will not be liable for any decisions that are "misinformed, misguided and honestly mistaken," so long as those directors are "well-meaning."

The second permitted practice – a policy to vote only on significant corporate events such as a merger, acquisition or contested director election – assumes that only those sorts of topics are material to investors. The Proposal does not adequately explain why the line should be drawn where it is.

¹⁰ FDIC v. Castetter, 184 F.3d 1040, 1046 (9th Cir. 1999).

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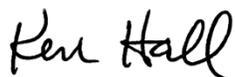
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For example, if a merger proposal is significant to investors, so too should be a shareholder proposal that a company take down a “poison pill” anti-takeover defense. Moreover, with the adoption of a majority vote standard for directors, every vote for individual director candidates can be significant – indeed, that was the reason for adopting a majority vote standard in the first place. Indeed, as discussed above, there are and have been a range of proposals on corporate governance and other topics that are significant to investors, yet these are not included in the second permitted practice.

The third permitted practice – adopting a policy of not voting unless the plan has a significant holding (say, five percent) – is inconsistent with the duty of prudence and the need to diversify the plan portfolio. Also, the Proposal cites no evidence to indicate how many ERISA plans have such a large holding in specific companies. It seems unlikely that the number is large, a factor that raises questions about whether this third option is genuinely viable.

I respectfully submit these comments for consideration of EBSA. If you would like to discuss this matter further, you may contact Louis Malizia, Assistant Director, Capital Strategies Department, by email at: lmalizia@teamster.org or by telephone at 202.497.6924.

Sincerely,

A handwritten signature in cursive script that reads "Ken Hall".

Ken Hall
General Secretary-Treasurer

KH/cz