



October 2, 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 Director Canary:

Trillium Asset Management is a registered investment advisor with \$3.2 billion in assets under management plus over \$550 million in model-driven platform assets. Trillium’s investment process is focused on finding companies with strong growth prospects that are attractively priced. Our analysts conduct bottom-up fundamental analysis on the companies they cover, simultaneously reviewing both traditional financial metrics and ESG metrics that we believe can add value to the investment process. Trillium’s investment approach integrates in-depth ESG research and analysis with rigorous, fundamental financial diligence to help identify the companies best-positioned to deliver risk-adjusted, long-term outperformance. We consider it fundamental to our mission and our fiduciary responsibility to engage with the companies that we hold on behalf of our clients to press for positive change on ESG topics or opportunities that we believe will help improve their ESG policies, performance, or impact.

We believe that the proposed rule – “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” – misconstrues proxy voting and would increase costs for ERISA fiduciaries while not providing commensurate benefits. We, therefore, urge you to allow the existing ERISA guidance to remain in effect and not move forward with a final rule.

First, over the past few decades extensive research and analysis by a wide variety of market actors and observers makes it clear that ESG factors can be material investment considerations. That evidence alone is sufficient to justify not moving forward with a final rule because it leads to the conclusion ESG factors are important considerations in proxy voting. In contrast, the Department puts forward no evidence that plan fiduciaries are using plan resources excessively to conduct research and vote proxies. In fact, it would appear that the market has done its job through the emergence and ongoing use of proxy advisor services. Similarly, there does not appear to be any cost-benefit analysis of the proposed rule.

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For example, it appears that the rule fails to consider the impact of the rule on voting behavior across the market. By imposing these additional costs and clearly pushing investors to simply side with management, the proposed rule will likely concentrate voting power in the hands of fewer and fewer decision makers. The Department should consider these issues more fully and it stands to reason that the findings of such research would lead to the conclusion that corporate governance will become weaker as the independent judgement informed by specific views and insights of many investors will get lost under the proposed rule.

Second, it is abundantly clear that “mainstream” financial institutions have concluded that ESG factors are a useful tool in building and providing portfolios that provide competitive risk-adjusted returns. For example, US SIF: The Forum for Sustainable and Responsible Investment’s 2018 *Trends Report* showed enormous growth in financial institutions incorporating ESG factors.¹ Importantly, the report pointed out that client demand drove much of this interest. This strongly suggests that the proposed rule has failed to take into account a fundamental point: that beneficiary interests may very well be best realized in a significant number of scenarios through the incorporation of ESG factors. It also can lead one to the conclusion that the department may lack fundamental pieces of information and data that would be required before it can move forward with a final rule. It further supports the conclusion that the department’s proposed rule may in fact not further its policy mandate to foster and promote the welfare of retirees. Finally, this finding indicates that there is increasing interest in voting on ESG shareholder proposals as they may provide useful information.

The value of proxy voting is reinforced in a number of publications including a Goldman Sachs finding that shareholder proposals can provide information regarding emerging material risks and externalities and insights into management responsiveness.² Also, consider a paper in the Review of Finance for the European Finance Association which found that say-on-pay led to increases in companies’ market value and improvements in long-term profitability.³ Lastly, A 2019 report from Ceres entitled *The role of investors in supporting better corporate ESG performance*, shows that when investor engage companies on ESG-related risks and opportunities it is associated with better shareholder returns. It also provided evidence that investor engagement efforts enhance company management of material ESG issues.⁴ These findings are consistent with Trillium’s experience as we have seen many companies respond productively to shareholder votes even when votes are less than a majority. While some observers see this as a problem, those commentators appear to forget that the protection and consideration of

¹ <https://www.ussif.org/files/US%20SIF%20Trends%20Report%202018%20Release.pdf>

² <https://www.eticanews.it/wp-content/uploads/2019/06/Shareholder-engagement-in-the-age-of-transparency-1.pdf>

³ <https://ideas.repec.org/a/oup/revfin/v20y2016i5p1799-1834.html>

⁴ Ceres, Environmental Defense Fund, and KKS Advisors, 2019. *The role of investors in supporting better corporate ESG performance: Influence strategies for sustainable and long-term value creation.*

minority interests, particularly significantly large minorities, has always been an important component of corporate governance and corporate law.

Finally, the proposed rule seems to completely misunderstand the reality of proxy voting and the role of shareholder proposals. Shareholder proposals, contrary to the unsupported conclusion found in the proposed rule, are a modest yet important feature of U.S. corporate governance landscape. In fact, the number of shareholder proposals is shrinking, demonstrating a fundamental omission in the Department's justification for the rule. According to The Conference Board's 2019 Proxy Voting Analytics report:⁵

In 2019, shareholder proposal volume decreased by 6.6 percent in the Russell 3000 and 10.5 percent in the S&P 500. The declines came on top of the 8.9 percent and 11.6 percent drops The Conference Board documented last year. In the Russell 3000, shareholders filed a total of 596 proposals at companies with AGMs during the examined 2019 period, compared to 638 during the same period in 2018 and 700 in 2017. In the S&P 500, the number of shareholder proposals decreased from 550 in 2017 to 486 in 2018 and 435 in 2019.

...

Compared to the same examined period exactly ten years ago, the number of investor-sponsored resolutions submitted in 2019 is down more than 35 percent in the Russell 3000 and almost 40 percent in the S&P 500.

It is therefore our opinion that the proposed rule appears built upon misinformed assumptions about proxy voting and seems to ignore years of evidence that runs contrary to those assumptions. Accordingly, we recommend that the department not move forward with the proposed rule.

Sincerely,



Jonas D. Kron
Chief Advocacy Officer

⁵ <https://cclg.rutgers.edu/wp-content/uploads/Proxy-Voting-Analytics-2016-2019.pdf>