



International Union of Bricklayers And Allied Craftworkers

Timothy J. Driscoll
President

October 2, 2020

Submitted electronically to www.regulations.gov

Jeanne Klinefelter Wilson
Acting Assistant Secretary
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
Notice of Proposed Regulation (RIN 1210-AB91)

Dear Acting Assistant Secretary Wilson:

On behalf of the International Union of Bricklayers and Allied Craftworkers (the “BAC”), I am writing to provide comments on the U.S. Department of Labor’s notice of proposed rulemaking entitled “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights” (the “Proposed Rule”). If adopted, the Proposed Rule will create unnecessary and burdensome barriers that will disenfranchise pension and employee benefit plans from voting proxies in the interests of plan participants and beneficiaries.

The BAC represents approximately 75,000 trowel trade craftworkers in the United States and Canada. Our members participate in jointly trusted tax qualified multiemployer pension plans maintained pursuant to ERISA and the Internal Revenue Code. For over three decades, fiduciaries for these pension and employee benefit plans have been voting proxies subject to the duties of prudence and loyalty as has been instructed by the Department’s long-standing interpretive guidance. We urge the Department to withdraw or rework the Proposed Rule.

The Proposed Rule is a Radical Departure from DOL’s Longstanding Policy

For more than 30 years, the Department of Labor (DOL) has taken the position that ERISA plans were required to cast proxy votes in the exclusive interest of retirement plan participants and beneficiaries. In the 1988 “Avon letter,” DOL recognized that proxy votes were plan assets. That guidance was formalized in Interpretive Bulletin 1994-2, and has been updated in Interpretive Bulletin 2016-01.

Plans have been prudently voting under this guidance for decades. Proxy voting by ERISA plans has served the valuable purpose of holding corporate management accountable, and it is clear that monitoring corporate governance helps to ensure prudent investment.

The New Economic Analysis Requirement is Vague, Costly and Overly Burdensome

While the proposed rule reaffirms the right to vote proxies, it creates onerous barriers that appear to be designed to discourage plans from participating in the process. The Proposed Rule requires a cost benefit analysis for every single proxy vote. Moreover, the cost benefit analysis required for each proxy vote is subject to onerous record keeping requirements. These requirements are extremely bureaucratic and costly. The burden of complying with the cost-benefits analysis and record keeping requirements will almost certainly exceed the cost of simply voting.

The economic analysis contained in the notice of proposed rulemaking is speculative and impractical. As the notice of proposed rulemaking states, “the Department currently lacks complete data on plans’ exercise of their shareholder rights appurtenant to their stock holdings, including proxy voting activities, and on the attendant costs and benefits.” In place of actual facts to support the rulemaking, the Department’s proposed rulemaking relies on an analytical model that “is included for illustrative purposes as some of the assumption [sic] used are speculative. The following analysis should be viewed with the understanding of the high degree of uncertainty and the assumptions used.” This contrived economic analysis provides no factual support for the proposed rulemaking.

The Proposed “Permitted Practices” are Arbitrary, Illogical and Could Encourage Violations of Fiduciary Duties

The proposed rule creates three new “permitted practices” that are intended to be safe harbors for plans to use as default options:

- (1) A policy of generally voting all proxies in accordance with the voting recommendations of corporate management;
- (2) A policy to vote only on particular types of proposals (corporate mergers and acquisitions, share buybacks, stock issuances, and proxy contests); or
- (3) A policy of refraining from voting unless the plan holds a concentrated position in a company relative to the plans portfolio or relative to the plan’s ownership of the company.

These proposed “permitted practices” are arbitrary and illogical and could encourage violations of fiduciary duties.

The first permitted practice appears illogical on its face. Proxy voting is an opportunity for management to receive investor input on important issues. That input is lost if investors simply default to following management’s recommendations. Furthermore, there is no rational basis to assume that management is always right. Corporate directors may have conflicts of interest or may just exercise poor judgement. If plan Trustees do not exercise due diligence to hold management accountable, they may be in breach of their fiduciary duty under ERISA.

The second permitted practice provides that plans need only vote on specific items. This approach could violate the fiduciary duties of prudence and loyalty. DOL appears to be presuming that issues not cited have no impact on the plan. The Department does not provide any rationale as to why the items included in the list are considered to be more important to shareholders than other issues. In fact, there are numerous other issues that could have great importance to the value of ERISA plan investments.

The third permitted practice to refrain from voting unless the plan holds a concentrated position in a company would likely mean that we would never vote. In fact, the vast majority of asset owners would never be able to meet the thresholds suggested in the Proposed Rule.

Conclusion

Again, we urge the Department to withdraw or rework the Proposed Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Driscoll". The signature is fluid and cursive, with a long horizontal line extending from the start of the name.

Timothy J. Driscoll
President