

# WORKER OWNER COUNCIL of the Northwest

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October 2, 2020

Jeanne Klinefelter Wilson  
Acting Assistant Secretary  
Employee Benefits Security Administration  
United States Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

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

Dear Acting Assistant Secretary Wilson:

Thank you for the opportunity to comment on the United States Department of Labor (DOL) proposed rule indicated above.

I am writing on behalf of the Worker Owner Council of the Northwest, (WOC) a labor council whose members include unions representing workers in the construction industry throughout the Northwestern United States, including the states of Washington, Oregon, Idaho, Montana, and Alaska. The WOC was established in 2002 to represent the ownership interests of workers participating in pension funds and for whom investments have been made in securities. These workers are participants in Employee Retirement Income Security Act of 1974 as amended (ERISA) pension plans including various Taft-Hartley defined benefit plans, 401-K plans and other private pension plans. Many of these plans have engaged in shareholder dialogue with companies the intention of encouraging creation of long-term shareholder value for the benefit of plan participants and beneficiaries.

The purpose of this letter is to share our views on the rule proposed by DOL related to fiduciaries' duties in the context of proxy voting and shareholder rights (Proposed Rule) under Title I of ERISA. The WOC believes the Proposed Rule shows an unjustified prejudice against fiduciaries' exercise of shareholder rights and would impose obligations and liabilities on fiduciaries of ERISA plans that would effectively disenfranchise them. We believe such disenfranchisement would have adverse consequences for our members' plans, the companies in which they have been invested,



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and investors at large. We also believe that any ERISA plan's adoption of the Proposed Rule's "safe harbors" could expose plan fiduciaries to unnecessary legal liability that they could avoid if permitted to maintain current practices under existing sub-regulatory guidance. We believe that the DOL has failed to recognize the beneficial effects of shareholder engagement and that implementation of the Proposed Rule would curtail future benefits of such engagement to the extent it is successful in extinguishing the process of shareholder engagement by ERISA plans.

We oppose the Proposed Rule and request that DOL should withdraw the Proposed Rule and reinstate the current guidance contained in Interpretive Bulletin 2016-01. Failing that, the DOL should withdraw the Proposed Rule until it has corrected the deficiencies we describe in this letter, after which it should propose a new rule and provide sufficient comment period on that rule including a public hearing and post-hearing comment period.

Since its founding in 2002, the WOC has advanced shareholder dialogue with public companies headquartered or doing business in the Northwest. This dialogue has included attendance at shareholder meetings, periodic conversation with company representatives and submission of non-binding or precatory shareholder proposals sponsored by pension funds associated with our affiliated unions. As a result of our work, almost all large public companies headquartered in the Northwest have been engaged in some way and most have adopted corporate governance practices generally regarded as "best practices" by experts in the field. These practices include:

- Shareholder ratification of the company's selection of auditor
- Majority vote requirement for the election of directors
- More extensive reliance on the use of restricted shares versus stock options in compensation packages for senior executives
- Elimination of post-employment "golden parachutes" for senior executives who have left company service.

These reforms have been implemented voluntarily through a process of private ordering and have enjoyed widespread support among the community of investors. We believe the dialogue has produced beneficial consequences for companies and investors not only due to the merit of our proposals but also due to the ability of shareholders to back up engagement with voting rights. We believe the votes cast by ERISA plans have made a meaningful contribution to that result and that the greater good has been engendered by this private process of engagement.

Other reforms that we and others have proposed, such as the practice of recording the expense of stock option grants to employees, have been implemented voluntarily,

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initially, by early adopters, but have later been more universally adopted as a result of corporate accounting standards revised to require the expensing of stock options by United States companies across the board. It is our opinion that the changes that have resulted from our work have been beneficial not only to the pension funds sponsored by our member organizations but to all investors of shares of US companies. We believe that these reforms have been beneficial to Northwest-based companies and their shareowners including Amazon.com, Microsoft and Starbucks - some of the most successful companies in the world today.

We believe that the DOL in its preparation of the Proposed Rule has demonstrated a failure to understand and appreciate the salubrious effect of this shareholder engagement and has failed to consider harmful consequences of the Proposed Rule that would in our opinion work to chill or prevent such engagement in the future. To the extent that these consequences may include adverse future financial outcomes for investors due to a removal the checks and balances on corporate management provided by shareholder voting, we believe the DOL has failed to analyze or account for the costs to ERISA plans and to other investors that could flow from this Proposed Rule if implemented.

We assert that the WOC's experience in fostering shareholder engagement over the last 18 years affords us a unique perspective on this Proposed Rule and ask that the DOL treat them as such and take our comments into consideration as it deliberates on the question of whether implement, modify or scrap the Proposed Rule.

We believe that the Proposed Rule is riddled with defects and appreciate the opportunity to briefly comment on at least some of the most egregious of these:

- We believe the Proposed Rule has been hastily prepared, and the 30-day comment period insufficient to give ERISA plans and others adequate opportunity to comment. The sub-regulatory guidance that the Proposed Rule intends to replace has been in effect since 1988 and a broad array of practices and other regulations have been established to operate in concert with it.
- We believe the Proposed Rule fails to harmonize its proposed interpretation of fiduciary duties for proxy voting with those that have been promulgated by other agencies such as the Securities and Exchange Commission and has failed to analyze the consequences of possible collisions between and among those conflicting duties.
- We are struck by that astonishing "safe harbor" offered under the Proposed Rule to ERISA plan fiduciaries, allowing an ERISA plan to adopt a policy of consistently voting with management. While such a policy might protect a plan from adverse scrutiny and enforcement action by the DOL it does nothing to

protect ERISA plans and their participants from management conflicts of interest in matters such as executive compensation where interests of investors and managers may be in conflict. Here, the manager operates under a weaker set of fiduciary obligations than the ERISA fiduciary, as she is protected from liability by the “business judgement” rule where the ERISA fiduciary, by contrast, is obligated to protect the interests of their plan and participants and, at least for now, may vote against and may be obligated to vote against such pay packages irrespective of management’s recommendations. We believe that the DOL has failed to analyze the possibility that ERISA plan fiduciaries might face liability for failure to meet their fiduciary duties in the event of litigation by participants in an ERISA plan that adopted this “safe harbor”.

- We are concerned that the disenfranchising effects of the Proposed Rule diminishes the value of ERISA plans by preventing them from realizing the value of an important plan asset- their voting rights. We ask the DOL to analyze the economic impact of this proposed taking by a federal agency and to analyze the impact and nature of any violation of constitutionally protected property rights that may result from implementation or adoption of the Proposed Rule or any remedy that a court of competent jurisdiction might order to address such a constitutionally prohibited taking.
- It is our view that the Proposed Rule, if implemented, would violate the First Amendment of the US Constitution by infringing on ERISA plans’ voting rights. In our opinion, a shareholder’s vote is a form of constitutionally protected speech.
- We believe that the Proposed Rule’s requirement that an ERISA plan conduct a cost-benefit analysis of each and every vote would work effectively as a poll tax and that the Proposed Rule is structured not so much to enable plans to determine the costs and benefits of voting as to cause them not to vote at all. We find this feature of the Proposed Rule to be coercive, arbitrary, and capricious. We interpret the absence of any guidance as to how a plan might conduct such an analysis as evidence that the intent of the Proposed Rule is to prevent voting and not to protect plans and participants from bad voting decisions or unnecessary expenses.
- We are concerned that the Proposed Rule’s expressed interest in preventing ERISA plan wasteful spending on voting neglects to account for the fact that a plan that follows the Proposed Rule’s recommendations to vote only on those matters deemed by the DOL to be material (e.g. mergers, acquisitions, sales, share repurchases and dilutive issuance of share), will likely incur the entire or greater part of their current expense which arises from the task of voting any part of the proxy. This failure suggests either a lack of understanding on the part of the DOL as to the nature of plan expenses incurred by voting shares or a lack of

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any actual concern as to wasteful spending by a plan- such as spending needed to comply with the Proposed Rule's per-vote cost-benefit analysis.

- We ask the DOL to analyze the consequence for ERISA plans that have adopted one of the "safe harbors" by adopting a policy of not voting on precatory shareholder proposals and who consequently fails to vote against a proposal that is harmful to the company or to plan participants.
- We ask the DOL to provide a more extensive explanation and justification of any methodology that ERISA plans could use to predict in advance whether or not any particular vote they might cast would be the deciding vote on any matter that should appear on any proxy statement.

Again, we appreciate the opportunity to comment on this Proposed Rule and respectfully ask that it be withdrawn, and that previous sub-regulatory guidance Interpretive Bulletin 2016-01 be preserved. Failing that, the DOL should withdraw the Proposed Rule until it has corrected the deficiencies we have described in this letter, after which it should propose a new rule and provide sufficient comment period on that rule including a public hearing and post-hearing comment period.

Sincerely,



Doug Kilgore

Executive Director