



October 4, 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
Attention: Proxy Voting and Shareholder Rights NPRM.

Re: Proposed Rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights
RIN 1210-AB91

To Whom it May Concern:

On behalf of the Small Business & Entrepreneurship Council (SBE Council), I am writing to express the organization's strong support for the proposed Department of Labor (DOL) action intended to clarify and reform current rules regarding exercises of shareholder rights, including proxy voting.

The proposed rule dovetails with DOL's proposed rule on financial factors in selecting plan investments, which establishes clear guidance for ESG (environmental, social and governance) investing. Comparable to that proposal, the proxy rule proceeds from the principle that "ERISA mandates that fiduciaries discharge their duties 'solely in the interest' and 'for the exclusive purpose' of providing benefits to participants and their beneficiaries."¹

We share the conclusion of DOL that "Fiduciaries must not vote in circumstances where plan assets would be expended on shareholder engagement activities that do not have an economic impact on the plan, whether by themselves or after the costs of engagement are taken into account." But, as we note later in this letter, some improvements could be made to the proposed rule.

¹ <https://www.dol.gov/sites/dolgov/files/ebsa/temporary-postings/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights.pdf>

The Rule Makes It More Affordable for Small Business to Establish Retirement Plans

The SBE Council is an advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. For more than 25 years, we have worked on public-policy and private-sector initiatives to strengthen startup activity, investment, innovation, and small business growth.

DOL's proposed rule is very important for small businesses, which employed 48% of the private workforce and generated nearly \$6 trillion in economic activity prior to COVID-19. According to research by SCORE, a non-profit mentoring organization, about two-thirds of small businesses have retirement plans.² The smaller the business, the less likely it will have a plan. According to the research, 71% of businesses without a retirement plan say that setup is too expensive, and 63% say they do not have the resources to administer such plans.

One obstacle is a perceived requirement for proxy voting. As the proposed rule states, "The Avon Letter has been read by some...as creating a general presumption that ERISA fiduciaries...should always vote the proxies appurtenant to those shares. For fiduciaries with such an understanding, the letter presented them with an ambiguous duty that in practice was often very difficult to discharge without the assistance of third-party proxy advisory firms" – a significant burden for small businesses. The new rule rightly makes it clear that plans are not required to vote proxies.

The Rule May Mitigate the Decline in Listed Companies

Many startup and small company entrepreneurs aspire for their firms to be publicly-held companies. An IPO is an aspirational path that encourages entrepreneurs to take the risk of starting and scaling a business. The St. Louis Fed reports that the number of publicly listed companies in the U.S. per one million population has fallen from 30 in 1996 to just 13.3 in 2017.³ A major reason is regulatory expense, and the DOL action would provide relief for some of those costs.

What Does 'Prudently Determine' Mean?

In our organization's [July 30 comment letter](#) on the DOL's ESG investing rule, SBE Council expressed concern that "individuals could unknowingly forgo growth opportunities." Instead, investment decisions would be based on "the policy priorities of a small number of activist investors, regardless of whether employees share those views."⁴ We were pleased that the ESG investing rule addressed this danger.

² <https://www.planadviser.com/small-business-owners-need-nudge-offer-retirement-plans/>

³ <https://fred.stlouisfed.org/series/DDOM01USA644NWDB>

⁴ <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00569.pdf>

Similarly, the proxy voting rule states that “a plan fiduciary must *not* [italics in proposal] vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after...taking into account the costs involved.”

We applaud this approach, but we believe the rule can be greatly improved and strengthened. The main deficiency is that it is unclear how to establish whether an economic basis is strong enough to be justified. For example, the proposal reads that plans can only vote on proxy questions based only on “factors that they prudently determine will affect the economic value of the plan’s investment.” But what does “prudently determine” mean? It appears to be a large area of uncertainty that could undermine the purpose of the rule. The rule should be adjusted to say that a fiduciary must demonstrate that the vote will have a “material economic effect” on an investment.

Section on Robo-Voting Requires Strengthening and More Precision

SBE Council believes the section on robo-voting must be strengthened, which is the practice of automatically voting based on recommendations of the two dominant proxy-advisory firms, Institutional Shareholder Services (ISS) and Glass Lewis. The proposal refers in a footnote to a study in the Harvard corporate governance blog concerning the vast number of plans and funds that vote automatically without applying due diligence. It also refers to an SEC supplementary guidance document that addresses what it calls a “system that ‘pre-populates’ the adviser’s proxies with suggested voting recommendations and/or for voting execution services.”⁵

But a footnote and a reference to SEC guidance are insufficient for applying the needed oversight on this practice. DOL needs to take a firm stand explicitly against robo-voting, which is referred to by name only in Footnote 54. DOL should simply state that robo-voting is an abridgement of fiduciary responsibility, and is therefore prohibited. More importantly, DOL cannot follow through on its intended cost-benefit analysis for proxy vote if the department also allows robo-voting to proceed for contested issues.

Small Business Depends on a Thriving Economy

Why does the SBE Council care about the lack of backbone in the robo-voting discussion? Quite simply, we believe that non-economic considerations offer very limited value in decisions about investing or voting by pension plans. Our worry is that enshrining ESG decision-making in this way will almost certainly have an adverse effect on the U.S. economy, investment and on U.S. investors and retirees. Obviously, small businesses and robust entrepreneurship are dependent on a thriving economy.

Certainly, individuals must be free to exercise their own consumer choice when it comes to ESG investing for their own accounts. The issue, as DOL has stated clearly, is fiduciary responsibility under ERISA as well as the enormous power of proxy advisers to use their proxy recommendations to shape the course of business practices.

⁵ <https://www.sec.gov/rules/policy/2020/ia-5547.pdf>

The DOL's proposed rules will not discourage plans from exercising proxy rights if that exercise is strictly for economic purposes and if research and voting expenses do not exceed the benefits of votes. Those are the proper standards, and we applaud the DOL for its forthright stand. This approach will help to protect the interest of the millions of Americans who work in small- and mid-sized companies today – and in those that America's entrepreneurs will one day create.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Kerrigan". The signature is fluid and cursive, with the first name "Karen" and last name "Kerrigan" clearly distinguishable.

Karen Kerrigan
President & CEO

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Protecting Small Business, Promoting Entrepreneurship