



Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5655
Washington, DC 20210

5 October 2020

Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights [RIN 1210-AB91]

Ladies and Gentlemen:

Baillie Gifford & Co. (“Baillie Gifford”) appreciates the opportunity to provide comments on the proposed amendments to the “Investment Duties” regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), published by the Department of Labor (the “DOL”) in the Federal Register on September 4th 2020, addressing the application of the prudence and exclusive purpose duties under the Employee Retirement Income Security Act of 1974 (ERISA) to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

We recognize the importance of preserving ERISA plan assets and having clarity around the role and duties of plan fiduciaries. However, we are concerned that the proposed rule would disenfranchise small shareholders and create confusion due to a lack of explanation of key terms such as “economic impact”. Additionally, we consider that evidence demonstrating the necessity for this rule is entirely lacking.

Background on Baillie Gifford and Its Clients

Founded in 1908, Baillie Gifford a privately-owned UK investment management firm based in Edinburgh, Scotland. As a firm, we have a long history focused on active investment management, and our client base is predominantly institutional in nature and located globally. Assets under management as at June 30th, 2020 were \$324 bn and clients based in the United States (“U.S.”) represent approximately 40% of client AUM. All U.S. clients are advised by either of two wholly owned subsidiaries, Baillie Gifford Overseas, Ltd (“BGO”), established in Scotland in 1983, with approximately \$126 bn under management, or Baillie Gifford International LLC (“BGI”), established in 2005 in Delaware with less than \$1 bn in assets

under management. BGO is authorized and regulated by the Financial Conduct Authority (“FCA”) in the United Kingdom (“UK”), and both of BGO and BGI are registered as investment advisers with the SEC in the U.S. and qualify as qualified professional asset managers (“QPAMs”) within the meaning of DOL regulations. Clients of BGO and BGI collectively include in excess of \$30 bn in each of ERISA plans, state plans and mutual funds. With reference to proxy voting, we analyze all meetings in-house and where voting rights have been delegated to us endeavor to vote every one of our clients’ holdings in all markets. Thoughtful voting of our clients’ holdings is an integral part of our commitment to stewardship, and the ability to vote our clients’ shares also strengthens our position when engaging with investee companies.

Rights of shareholders

It is our strong belief that the right of shareholders, and those exercising those rights on their behalf, to scrutinize the actions of management and hold them to account should not be interfered with. The right to vote is one of the most powerful tools that shareholders have. The restriction of this right would arguably devalue shares as shareholders would be deprived of a fundamental aspect of share ownership. We are not convinced that the DOL has justified the curtailment of shareholder rights as proposed.

Necessity of rule-making

The DOL has not provided any evidence of the alleged problem. No examples of cases of plan assets being expended inappropriately are provided, and there is no economic analysis of what the cost to plan members of such activities might be. The preamble to the proposed rule cites a paper from 2011 which suggests a lack of documentation of the economic rationale for proxy voting decisions. We note that no further action was taken in relation to that paper as it was not considered that proxy voting activities warranted specific legislative changes, specific documentation requirements, or increased enforcement activities. The relevance of the factors listed by the DOL under the heading “Changes in the Investment Landscape”, including increased diversification of ERISA plan assets and increased complexity of proxy voting policies, is not clear. Without justification of why this rule is now considered urgent and necessary, including real examples of plan assets being expended on activities at a cost which outstripped the benefits, the proposed rule-making should not proceed.

Permitted practices

We are surprised and concerned by the prescriptive nature of the proposed ‘Permitted Practices’. It is not obvious why it would be appropriate that votes should be cast in line with management where proposals are unlikely to have a significant impact on the value of the plan. If an interference with the rights of shareholders to vote is sanctioned within this rule, then we believe casting an ‘abstain’ vote or refraining from voting would be more appropriate in these circumstances. The suggestion that shareholders should vote in favor of management recommendations with no scrutiny is inappropriate. We are also disappointed by the

suggestion that voting should be based on the size of holding. This would systematically disenfranchise small shareholders. Not only is this an unjustified interference with the rights of shareholders, as noted above, but it would award large shareholders disproportionate influence and risks creating a culture of apathy on the part of both boards and fiduciaries, where companies are not regarded as accountable to shareholders below a certain threshold.

Lack of clarity

While the proposed rule refers to the “economic value of the plan’s investment... over an appropriate investment horizon” at paragraph A, it thereafter refers to “economic benefit” and “economic impact” without being specific about the meaning of these terms or how they are to be assessed. A short-term economic impact will be easier to prove or disprove in terms of share price or other similarly rudimentary indicators, but presumably the proposal does not intend to encourage fiduciaries to think only in terms of short-term economic gains. This would clearly be incompatible with the long-term outlook of pension plans, and the fiduciary duties of those managing ERISA plans. We are concerned that asset managers exercising proxy voting on behalf of clients will come under pressure to provide evidence of quantifiable economic returns expected in relation to matters voted upon. This would be unrealistic. There are many matters which may impact shareholder value but cannot be easily or accurately quantified. For example, it may not be possible to quantify the economic benefit derived directly from increasing the diversity of the board by electing a new director from a minority group, but there is growing evidence to show that there are long-term financial benefits arising from board level diversity.¹ For the same reason we are concerned about the groundless scepticism of the rule towards “environmental, social or public policy” matters. There is a clear assumption that these issues have no connection to the value of investments. However, the DOL will recall the volume of evidence presented to rebut that presumption in response to the recent proposed rule RIN 1210-AB95.² We urge the DOL to explain the meaning of “economic benefit” and “economic impact” to clearly encompass long-term shareholder value and acknowledge that this may not always be quantifiable.

* * * * *

We are available to discuss any questions you may have with respect to these comments.

Sincerely,

Andrew Cave
Head of Governance & Sustainability

¹ See, for example, ‘Delivering through diversity’, McKinsey & Company, January 18th 2018

<https://www.mckinsey.com/business-functions/organization/our-insights/delivering-through-diversity>

² See, for example, the empirical studies referred to in the letter from the Council of Institutional Investors on the link between environmental, social and governance issues and long-term financial performance

<https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00382.pdf>