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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: RIN 1210-AB91: *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*

To whom it may concern:

The National Association of Manufacturers appreciates the opportunity to provide comments to the Department of Labor on RIN 1210-AB91, the Employee Benefits Security Administration's proposed rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.¹

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states, as well as the millions of men and women who make things in America. More than two-thirds of manufacturing workers participate in a workplace retirement plan.² These employees depend on sound investment decisions made on their behalf for a secure retirement.

The sole duty of plan managers making investment decisions on pensioners' behalf is to provide long-term returns that will support workers and their families in their retirement years. As such, the NAM appreciates that the DOL has promulgated a rule proposal reiterating that fiduciaries under the Employee Retirement Income Security Act have an obligation to act solely in the interest of plan beneficiaries—and that their fiduciary duties extend to decisions related to proxy voting.

Proxy voting decisions, like investing decisions, present both risks and opportunities for pension plan beneficiaries. Pension plan managers must remain diligent in exercising the voting rights appurtenant to the shares of stock the plan holds, acting for the "exclusive purpose" of "securing economic benefits for plan participants and beneficiaries."³ The proposed rule's guidance for ERISA plans on the factors that plan managers should consider when choosing whether and how to vote will support reasoned cost-benefit analyses and lead to thoughtful decisions for the benefit of pension plan participants. In particular, the proposed rule's emphasis on the importance of oversight of proxy advisory firms and other service providers hired to assist with proxy voting is a welcome acknowledgement of these firms' outsized influence on proxy vote decisions and of fiduciaries' obligation to oversee and account for them.

¹ *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, 85 Fed. Reg. 55219 (4 September 2020). RIN 1210-AB91, available at <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19472.pdf>.

² *National Compensation Survey: Employee Benefits*. Bureau of Labor Statistics, March 2018. Available at <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.pdf>.

³ Proposed Rule, *supra* note 1, at 55223.

The NAM applauds the DOL for proposing a rule to codify ERISA fiduciaries' responsibilities with respect to proxy voting and oversight of proxy service providers. We encourage the Department to work expeditiously to issue a final rule that provides clear guidance on fiduciaries' due diligence obligations, increases regulatory alignment with the Securities and Exchange Commission's recent rule and guidance on proxy voting advice, and ensures that pension plan participants are protected when plan managers rely on proxy advisory firms.

I. Proxy Voting under ERISA

A. Emphasizing ERISA plans' fiduciary duties in proxy voting decisions

In our July 2020 comment letter⁴ on the DOL's proposed investment duties rule,⁵ the NAM called on the Department to "promulgate a rule clarifying ERISA fiduciaries' obligations in considering proxy votes, proxy proposals, and proxy voting service providers, with an eye toward emphasizing the primacy of plan participants' long-term best interests and protecting their retirement savings."⁶ Specifically, we noted that proxy voting decisions "should be guided by the long-term best interests of plan participants."⁷

As such, the NAM appreciates that the proposed rule makes clear that ERISA plan managers' fiduciary duty extends to the management of voting rights associated with stock held by the plan. According to the rule, ERISA fiduciaries must "carry out their duties relating to the exercise of [voting] rights prudently and solely for the economic benefit of plan participants and beneficiaries."⁸ The NAM strongly supports this clarification, and we appreciate that the DOL has taken steps to ensure that manufacturing workers depending on their pensions for a secure retirement are protected when their plan managers are considering proxy votes.

B. Clarifying that ERISA plans need not vote every proxy

In explaining the appropriate exercise of a plan manager's fiduciary duty with respect to proxy voting, the proposed rule corrects the "persistent misunderstanding" that ERISA fiduciaries are required to vote every proxy for which they control voting rights on behalf of the plan.⁹ The rule does not discourage fiduciaries from casting votes when doing so would benefit plan participants; rather, it simply subjects the decision-making process around *whether* a plan's votes will be cast to the same level of due diligence already understood to apply to the decision of *how* the plan's votes will be cast.

This welcome clarification will ensure that plan resources are allocated only to proxy votes where the costs of researching an issue and casting a vote are outweighed by the benefits that accrue to plan beneficiaries as a result of the vote (accounting for both potential gains and the avoidance of potential losses). Currently, the presumption that ERISA plans must cast proxy votes in all cases leads to plan resources being expended on votes that have no economic impact on the performance of the plan or the business in question, enhances the probability of proxy votes being cast on the basis of non-pecuniary environmental, social, or governance factors, increases the likelihood of

⁴ NAM Comments on RIN 1210-AB95, 30 July 2020. Available at <http://documents.nam.org/tax/namesgcomments.pdf>.

⁵ *Financial Factors in Selecting Plan Investments*, 85 Fed. Reg. 39113 (30 June 2020). RIN 1210-AB95, available at <https://www.govinfo.gov/content/pkg/FR-2020-06-30/pdf/2020-13705.pdf>.

⁶ NAM Comments on RIN 1210-AB95, *supra* note 4, at 7.

⁷ *Ibid.*

⁸ Proposed Rule, *supra* note 1, at 55220.

⁹ *Ibid.*

proxy voting decisions being made by proxy advisory firms without proper fiduciary supervision, and enhances the power of proxy firms.¹⁰ Reminding fiduciaries that their exercise of voting rights “must be performed solely for the plan’s economic interests”¹¹ will ensure that votes are only cast when doing so would benefit pension plan participants.

Importantly, the proposed rule makes clear that an ERISA plan manager *must* vote any proxy if it “prudently determines that the matter being voted upon would have an economic impact on the plan.”¹² Correspondingly, the rule states that an ERISA plan manager *must not* vote if it cannot make such a determination. This decision hinges on factors critical to protecting pension beneficiaries, including an analysis of the issue’s impact on the plan’s investment performance, appropriate risk vs. return weighting, the investment’s time horizon, and the costs associated with researching and casting a vote. The proposed rule’s clear distinction between instances in which a fiduciary must or must not vote will provide certainty to plan managers and ensure that plan resources are only expended on proxy research and voting when necessary to protect the economic interests of plan participants.

C. Providing guidance on factors to consider in making proxy voting decisions

The proposed rule offers a series of standards to which proxy voting decisions by plan managers will be held. These tests are designed to help managers in deciding whether they must cast a vote to fulfill their fiduciary duty and in deciding how to cast any such vote. In brief, plans are required to A.) act solely for the economic benefit of the plan, B.) consider the likelihood of a given proxy issue impacting the investment performance of the plan, C.) not subordinate the interests of the plan to non-pecuniary goals, including by sacrificing returns or taking on additional risk to promote these goals, D.) investigate the material facts specific to the vote, without outsourcing this due diligence requirement to a proxy advisory firm absent appropriate oversight, E.) document the basis for a given vote, and F.) exercise appropriate due diligence in selecting and monitoring proxy advisory firms or other proxy service providers. The NAM strongly supports this due diligence framework, and we applaud the DOL for providing ERISA fiduciaries with a series of concrete steps they can take to protect pension plan participants when considering and casting proxy votes on their behalf.

As discussed, the DOL’s guidance to act solely for the economic benefit of the plan and consider an issue’s impact on plan performance are core components of an ERISA plan manager’s fiduciary duty. The proposed rule makes clear that the manager, in making voting decisions, can only consider factors “that they prudently determine will affect the economic value of the plan’s investment.”¹³ They are also encouraged to be mindful of the size of the plan’s holding in an issuer in assessing the economic impact of a potential vote. These tests underscore the primacy of financial returns for pension plan participants and beneficiaries.

Similarly, the guidance that ERISA fiduciaries cannot subordinate the interests of pensioners to any non-pecuniary goal, including ESG objectives favored by the plan manager, is critical to protecting plan participants’ retirement savings. The NAM strongly supported the DOL’s clarification in its investment duties rule that fiduciaries’ investing decisions must be “focused solely on economic

¹⁰ Proxy advisory firms depend on plan managers being overwhelmed by a deluge of proxy voting opportunities and relieving this burden by outsourcing their due diligence and voting authority to the firms. By clarifying that ERISA plans should only vote on matters with an economic impact on the plan, the proposed rule would allow plan managers to focus only on these important issues—obviating the need to outsource the entire ballot to a proxy firm.

¹¹ Proposed Rule, *supra* note 1, at 55222.

¹² *Id.* at 55242.

¹³ *Ibid.*

considerations that have a material effect on the risk and return of an investment.”¹⁴ As we said in our July 2020 comment letter responding to the proposed investment duties rule, “ERISA fiduciaries must forgo consideration of any non-pecuniary factors, including ESG considerations that are not material to the investment in question, when contemplating investment decisions”¹⁵—and we applaud the Department for making a similar clarification with respect to proxy voting decisions.

We also strongly support the proposed rule’s requirement that ERISA fiduciaries must understand and make voting decisions based upon the material facts relevant to a given issue or issuer. All too often, plans outsource the research and decision-making associated with proxy voting to unregulated proxy advisory firms. As the proposed rule notes, these firms are plagued by significant conflicts of interest and are often unable to “competently analyze” the issues under consideration.¹⁶ Furthermore, proxy firms rely on predetermined one-size-fits-all policies to guide their recommendations—in direct contravention of the DOL’s preference that ERISA plans “investigate material facts that form the basis for any particular proxy vote.”¹⁷ The NAM appreciates that the proposed rule prohibits reliance on proxy firm recommendations without appropriate oversight—but we would encourage the Department to go further in its caution against these one-size-fits-all policies. In order to ensure that issuer-specific decisions are made for the benefit of plan participants, we encourage the DOL to caution against an overreliance on proxy advisory firms’ predetermined vote recommendations, including the firms’ benchmark and specialty report policies, on proxy votes the plan manager has determined will have a significant economic impact on the performance of the plan.

Finally, we also appreciate the proposed rule’s guidance that a plan manager’s duties of prudence and diligence extend to the selection and monitoring of proxy advisory firms or other proxy service providers. As discussed, these firms have significant conflicts of interest and are prone to errors, one-size-fits-all policies, and a lack of transparency. Furthermore, these flaws inherent in the firms’ business model are often translated directly into voting power when plan managers allow their votes to be automatically cast in accordance with the proxy firms’ recommendations in a practice sometimes known as “robo-voting.” The NAM appreciates that the proposed rule clarifies that a fiduciary utilizing a proxy firm would be “responsible for ensuring that the proxy advisory firm’s practices with respect its services to the ERISA plan are consistent with the prudence and loyalty obligations that govern the fiduciary’s proxy voting actions” and specifically highlights robo-voting as a potential threat to these obligations.¹⁸

In addition to this welcome clarification, the NAM would further support targeted limitations on the practice of robo-voting to ensure that proactive decisions are being made on pension beneficiaries’ behalf. The Department should amend paragraph (e)(2)(ii)(D) to clarify that the requirement to investigate the material facts that affect a vote and the prohibition on outsourcing proxy decisions to a proxy firm without appropriate oversight both limit fiduciaries’ ability to rely on proxy firms’ robo-voting services. Similarly, the Department should amend paragraph (e)(2)(ii)(F) to note that an overreliance on robo-voting runs counter to the requirement that fiduciaries exercise prudence and diligence in their monitoring of proxy firms. Such limitations are necessary given the DOL’s important clarification that fiduciaries must carefully consider not only how to cast proxy votes on behalf of the plan, but also whether to vote at all. Addressing robo-voting more explicitly in the rule will ensure that the necessary cost-benefit analyses can be conducted with respect to a fiduciary’s decision of both whether and how to vote pursuant to the guidelines set forth in the proposed rule.

¹⁴ DOL Investment Duties Rule, *supra* note 5, at 39116.

¹⁵ NAM Comments on RIN 1210-AB95, *supra* note 4, at 3.

¹⁶ Proposed Rule, *supra* note 1, at 55224.

¹⁷ *Id.* at 55242.

¹⁸ *Id.* at 55224.

D. Easing regulatory compliance via “permitted practices”

The proposed rule provides for three “permitted practices” that plans can adopt in part, in full, and/or in combination with one another in order to ease the burden on plan managers and enable them to more easily fulfill their fiduciary duty to plan participants. The rule’s permitted practices are designed to make proxy voting decisions easier and focus plan managers’ attention on the issues with the most significant impact on plan beneficiaries’ financial returns. The NAM supports these commonsense safe harbors and encourages the DOL to retain them in the final rule. Under the proposed rule, fiduciaries would be empowered to:

- Vote proxies in accordance with company management’s recommendations on issues that are unlikely to have a significant impact on the value of the plan’s investment. Such a policy would rely on the fiduciary duties that company officers and directors owe to the business’s shareholders for these less-consequential decisions and allow plan managers to focus their attention on votes that are more likely to have an economic impact on the plan.
- Focus resources only on certain types of proposals that are likely to have a significant impact on the value of the plan’s investment. Allocating resources only to decisions related to, for example, major transactions, potential share buybacks, dilutive share issuances, and contested director elections would ensure that these clearly-material issues receive the attention necessary to make an informed decision for the benefit of plan participants.
- Refrain from voting when the plan’s holdings in an issuer are below predetermined quantitative thresholds. Deciding not to vote when a plan’s holdings are relatively insignificant would be appropriate for many plans given that their vote is unlikely to affect the outcome in such instances and, more importantly, the financial performance of the issuer is much less likely to impact the financial performance of the plan.

These permitted practices make the decision of whether to cast proxy votes easier and more cost effective, easing compliance with the proposed rule’s requirement that ERISA plans conduct appropriate due diligence in deciding whether to vote. By allowing plans to bypass immaterial or unimportant questions on the proxy ballot, these permitted practices protect plan participants by focusing plan managers’ attention and resources on critical decisions important to the long-term economic performance of the plan.

The NAM would also support an additional permitted practice to provide ERISA plans with cost savings via the common practice of “robo-voting” for a limited universe of proxy votes. As discussed, at present many ERISA plans rely on proxy advisory firms’ pre-population and automatic submission mechanisms for most or all proxy votes, effectively outsourcing their decision-making authority to the firms and endangering the financial health of plan participants. However, automatic vote submission on a carefully considered, limited group of non-controversial, uncontested proxy votes could free up resources for plan managers to make proactive decisions on more significant proposals that have a greater economic impact on the plan. A permitted practice to allow robo-voting in certain limited instances could save costs for plans while also underscoring fiduciaries’ obligation to avoid or disable robo-voting on significant, contested, or controversial matters.

II. Proxy Advisory Firms

As discussed, the “persistent misunderstanding” that ERISA fiduciaries are required to vote all proxies has increased the power and influence of proxy advisory firms. The NAM is hopeful that the DOL’s clarification that ERISA fiduciaries should only vote on proxy ballot questions that would have an economic impact on the plan will reduce plan managers’ overreliance on these unregulated third

parties, which lack the fiduciary obligations so critical to the protection of participants in ERISA plans.

As the proposed rule notes, the SEC recently promulgated a rule instituting oversight of proxy firms¹⁹ and issued guidance for asset managers that rely on the firms' voting recommendations and vote execution services.²⁰ These actions were a welcome complement to the Commission's withdrawal of its ISS and Egan-Jones no-action letters²¹ in 2018 and its issuance of guidance about both proxy firms²² and investment advisers²³ in 2019. In our comment letter on the DOL's investment duties rule, the NAM called for "regulatory alignment between the rules for SEC-registered investment advisers and DOL-regulated ERISA fiduciaries."²⁴ The proposed rule represents a strong step toward this regulatory alignment. We also believe that the proposal provides a critical opportunity for further alignment with recent SEC actions—in particular, the Commission's recent guidance for asset managers that utilize proxy firms' vote execution services.

A. Assessing the influence of proxy advisory firms

As noted in the proposed rule, proxy advisory firms have risen to prominence in the wake of increased institutional ownership of American stocks. According to one recent report, institutional investors now control nearly 80% of market value on U.S. exchanges.²⁵ Fund managers at institutions, including ERISA plans, have turned to proxy firms to shape and cast their votes in the face of an ever-increasing number of proxies. As a result, proxy advisory firms have enormous influence over the corporate governance policies of U.S. public companies—decisions that impact the direction of a business and the life savings of millions of pension plan participants and beneficiaries.

To be clear, the NAM does not object to proxy firms playing a role in providing accurate information to the marketplace. To the extent that their services provide ERISA plans with more complete information on which to base proxy voting decisions, the NAM believes that proxy firms can be constructive for the market. However, the firms' recommendations and services are notably problematic in a variety of ways. Indeed, the flaws embedded into the business model of proxy advisory firms are at this point well-documented:

¹⁹ *Exemptions From the Proxy Rules for Proxy Voting Advice*, 85 Fed. Reg. 55082 (3 September 2020). Release No. 34-89372, available at <https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16337.pdf>.

²⁰ *Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 85 Fed. Reg. 55155 (3 September 2020). Release No. IA-5557, available at <https://www.govinfo.gov/content/pkg/FR-2020-09-03/pdf/2020-16338.pdf>.

²¹ *Statement Regarding Staff Proxy Advisory Letters*. SEC Division of Investment Management, 13 September 2018. Available at <https://www.sec.gov/news/public-statement/statement-regarding-staff-proxy-advisory-letters>. (These no-action letters, like the DOL's Avon Letter, had led to a persistent misunderstanding that investment advisers were required to vote every proxy.)

²² *Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice*, 84 Fed. Reg. 47416 (10 September 2019). Release No. 34-86721, available at <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18355.pdf>.

²³ *Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers*, 84 Fed. Reg. 47420 (10 September 2019). Release Nos. IA-5325; IC-33605, available at <https://www.govinfo.gov/content/pkg/FR-2019-09-10/pdf/2019-18342.pdf>.

²⁴ NAM Comments on RIN 1210-AB95, *supra* note 4, at 7.

²⁵ McGrath, Charles. *80% of equity market cap held by institutions*. Pensions & Investments, 25 April 2017. <http://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions>.

- Proxy firms operate with significant conflicts of interest—as correctly identified by the proposed rule. Of the two leading firms in the space, Glass Lewis is owned by an investor that engages in proxy contests, while ISS operates a consulting business that counsels companies on the very corporate governance policies on which the advisory side of the firm makes recommendations.
- Proxy firms insist upon a one-size-fits-all approach to corporate governance that does not take into account differences in companies’ business models and the flexibility allowed under securities law. Increasingly, they also advocate for a normative agenda that seeks to shape rather than analyze and report on corporate behavior, particularly as it relates to ESG priorities.
- The process by which proxy firm recommendations are developed lacks transparency, and the firms’ one-size-fits-all policy guidelines are likewise established out of the public eye. In addition, the firms issue specialty reports developed using vague methodologies that depart from their standard benchmark policies.
- Proxy firm reports and recommendations feature a profusion of errors and misleading statements, ranging from specific incorrect facts to disingenuous assumptions about, for instance, a company’s peer group or compensation practices. The recommendations also feature terms with common market meanings like “total shareholder return” but often use opaque calculation methodologies that vary from traditional market practice.
- Proxy firms have been steadfastly resistant to engaging in a productive dialogue with issuers to correct errors and misunderstandings; indeed, one of the firms will only engage with companies in the S&P 500, while another charges issuers a fee to review their draft recommendations.
- Proxy firms often engage in the automatic submission of proxy votes on behalf of their clients, meaning that the flaws intrinsic to their recommendations are translated immediately into voting power, completely cutting ERISA plan managers out of the decision-making process and depriving issuers of a chance to correct the record or provide the market with additional information.

Despite this profusion of “red flags,” proxy firms’ advice is often an important factor in ERISA plans’ proxy voting decisions. In many cases, as mentioned, the firms actually cast proxy votes on a plan’s behalf without interaction with or confirmation from the plan manager.

B. Aligning the DOL’s proposed rule with the SEC’s new rule and guidance

As discussed, the NAM has called for regulatory alignment between the SEC’s standards for asset managers that utilize proxy advisory firms and the DOL’s rules for ERISA fiduciaries that do the same. The proposed rule notes that the DOL believes that the SEC’s actions “have similar relevance for fiduciaries under ERISA.”²⁶ The NAM applauds the proposed rule’s provisions that align the standards for SEC-registered investment advisers and DOL-regulated ERISA fiduciaries, and we encourage the DOL to go further in order to ensure that pension plan participants are appropriately protected if ERISA fiduciaries rely on the services of a proxy advisory firm.

²⁶ Proposed Rule, *supra* note 1, at 55223.

SEC Rule for Proxy Voting Advice Businesses

In addition to structural reforms applicable to the proxy advisory firms themselves (e.g., classifying their advice as a proxy solicitation under federal securities law and subjecting their reports to the SEC's anti-fraud rules), the SEC's recent rulemaking institutes key requirements that have direct relevance for ERISA plan managers.

First, the SEC rule requires that proxy firms provide specific, prominent disclosures of their conflicts of interest and of any policies and procedures designed to mitigate said conflicts. Notably, these disclosures must be specific to the company on which the proxy firm is issuing a report. The conflicts disclosures required of proxy firms by the SEC's recent rule will be an important tool for ERISA fiduciaries to fully understand the potential risk of relying on a proxy firm's services and recommendations.

The NAM appreciates that the DOL's proposed rule emphasizes the importance of due diligence regarding "whether the proxy advisory firm is able to...identify and address potential conflicts of interest."²⁷ To ensure that pension plan participants are fully protected from the firms' conflicts, the DOL should specifically require that fiduciaries review the newly mandated conflicts disclosures. Furthermore, the DOL should caution fiduciaries against relying on a proxy firm's recommendations if the disclosures reveal a conflict with respect to an issuer that calls into question the firm's ability to provide objective advice.

Second, the SEC rule requires that proxy advisory firms make their recommendations available to companies and notify their clients when the company files, or indicates an intent to file, additional materials (e.g., a statement in response to the proxy firm's recommendation) for investors' review. As discussed, proxy firm reports are often based on unreliable one-size-fits-all methodologies and may contain significant errors. The firms are generally unwilling to engage with companies to correct these mistakes and misunderstandings. As such, it is absolutely critical that ERISA fiduciaries review additional information provided by companies pursuant to the SEC rule. These company response statements will be crucial to understanding the issue under consideration on the proxy ballot, and plan managers can only fulfill their fiduciary duty, per the proposed rule, if they fully investigate the "material facts that form the basis for any particular proxy vote."²⁸

The NAM appreciates that the proposed rule cautions ERISA fiduciaries against following the recommendations of a proxy firm without appropriate supervision. However, we would encourage the DOL to go further and explicitly reference review of the newly required issuer response statements as part of a plan manager's investigation of the material facts relating to a vote. The NAM expects these filings to include significant, material information that could impact a voting decision (including decisions about both whether to vote and how to vote) that by definition would not be considered by the proxy firm in drafting its recommendation.

Requiring review of the full range of information made available to ERISA plan managers by the recent SEC rule would enhance regulatory alignment and ultimately ensure that better proxy voting decisions are made on plan participants' behalf.

SEC Guidance on the Proxy Voting Responsibilities of Investment Advisers

The recent SEC guidance on the proxy voting responsibilities of investment advisers is targeted specifically at asset managers' reliance on the vote execution services provided by proxy advisory firms. Under the guidance, investment advisers are encouraged to have policies and procedures in

²⁷ *Id.* at 55224.

²⁸ *Id.* at 55242.

place to consider the information available to them under the SEC's new rule (e.g., disclosures of proxy firm conflicts of interests) as well as any information that comes to light after they have received a proxy firm's voting recommendations (e.g., company response statements). The guidance further encourages asset managers to consider any additional information provided by companies and to ensure that their voting procedures, including with respect to automatic vote submission, allow for review of any such material.

The NAM appreciates that the proposed rule references this guidance and specifically notes its emphasis on the proxy firms' voting execution services. However, we believe that so-called "robo-voting" poses a unique threat to participants in ERISA plans, and we would encourage the Department to more fulsomely address the risks associated with an overreliance on these services in the final rule.

The DOL's proposed rule is clear that ERISA fiduciaries must make affirmative decisions about whether to vote and how to cast votes based on the six-part test described in paragraph (e)(2)(ii). It would be impossible to undertake the appropriate level of due diligence described by the proposed rule if the plan manager pre-determines that it will rely on a proxy firm's vote recommendations and will allow the firm to cast the plan's votes automatically without review by the manager. In particular, the requirement that fiduciaries "not adopt a practice of following the recommendation of a proxy advisory firm or other service provider without appropriate supervision"²⁹ would be difficult to square with a policy of allowing a proxy firm to automatically cast the plan's votes.

It is clear that automatic vote submission is suspect in the ERISA context given plan managers' duty to assess the financial costs and benefits associated with each decision of whether to vote and how to vote. To address this conflict, the NAM encourages the DOL to adopt language similar to the SEC's recent guidance in order to require ERISA fiduciaries to have policies and procedures in place to take into account the new information made available to them by the SEC's new rule for proxy firms—even if that information is made available after the fiduciary receives the proxy firm report. Because robo-voting usually takes place concurrent with or shortly after the dissemination of a proxy firm's vote recommendations, strong guidance against casting votes without reviewing company responses made public after a proxy firm recommendation is issued would significantly limit robo-voting on the issues most critical to protecting ERISA beneficiaries' financial security.

To further protect plan participants and beneficiaries, the DOL should specifically prohibit automatic vote submission for significant, contested, and controversial proxy votes. The proposed rule includes language noting that "certain proposals may require a more detailed or particularized voting analysis,"³⁰ representing an important step toward regulatory alignment with the SEC's 2019 guidance, which suggests a higher degree of analysis when matters under consideration are "highly contested or controversial"³¹ and "factors particular to the issuer"³² are at play. The DOL should require that ERISA fiduciaries disable any automatic vote settings for significant, contested, and controversial proxy votes like those on certain high-profile topics and in any instance in which a proxy firm's recommendation is contested by a company. Such a limitation would allow plan managers time to make a considered decision about whether and how to vote, as outlined by the DOL's proposed rule.

Most proxy ballot measures are non-controversial and would be unlikely to result in a negative proxy firm recommendation and corresponding issuer response statement, so a targeted limitation on

²⁹ *Ibid.*

³⁰ *Id.* at 55224.

³¹ SEC Guidance for Investment Advisers, *supra* note 23, at 47424.

³² *Id.* at 47423.

robo-voting is unlikely to increase costs for ERISA plans. Furthermore, the contested matters that do generate a response statement (and a corresponding prohibition on robo-voting) are the most significant to plan participants' financial returns—and thus the ones that would most benefit from specific analysis and proactive decision-making by plan managers.

The NAM respectfully encourages the DOL to explicitly address automatic vote submission in the ERISA context in order to protect pension plan participants and ensure that considered, proactive decisions are made on their behalf.

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The NAM applauds the DOL for proposing a rule designed to provide ERISA fiduciaries with clear guidelines on their obligations in exercising proxy voting authority on behalf of pension plan participants. We continue to support efforts to prioritize the financial health of participants in both defined benefit and defined contribution pension plans, and we thank you for your attention to these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a prominent loop at the end.

Chris Netram
Vice President, Tax and Domestic Economic Policy