



SUBMITTED ELECTRONICALLY

October 5, 2020

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

Re: RIN 1210-AB91 Proxy Voting and Shareholder Rights NPRM

Ladies and Gentlemen:

Fidelity Investments¹ (“Fidelity”) appreciates the opportunity to provide comments with respect to the proposed rule published by the Department of Labor (“Department”) in the Federal Register on September 4, 2020, which seeks to amend the “Investment Duties” regulation issued in 1979 to address 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 policies and guidelines, and the selection and monitoring of proxy advisory firms (the “Rule” or “Proposal”). Fidelity is committed to working with the Department on its rulemaking in the area of proxy voting, particularly in light of Fidelity’s role as directed trustee and recordkeeper supporting proxy voting by plan sponsors and plan participants as well as in Fidelity’s role as a discretionary investment manager.

Fidelity believes that the Department has not previously established the need for rulemaking in this area such that the costs and burden that would be imposed on plan fiduciaries to implement the Proposal is justified. Accordingly, Fidelity urges the Department to engage in information-gathering on proxy voting practices and to further consider whether rulemaking in this area is warranted, including considering the basis for, and implications of, requiring plan fiduciaries to refrain from voting “unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan.”

If the Department nevertheless determines to move forward with a rulemaking at this time, the Department should make a number of changes to the Proposal. As explained further below, the

¹ Fidelity was founded in 1946 and is one of the world’s largest providers of financial services. Fidelity provides recordkeeping, investment management, brokerage and custodial/trustee services to thousands of Code section 401(k), 403(b) and other retirement plans covering more than 25 million participants and beneficiaries. Fidelity is the nation’s largest provider of services to individual retirement accounts (“IRA”) with more than 7 million accounts under administration. Fidelity also provides brokerage, operational and administrative support, and investment products and services to thousands of third-party, unaffiliated financial services firms (including investment advisors, broker-dealers, banks, insurance companies and third-party administrators).

Department should better align the Proposal with Securities Exchange Commission (SEC) rules in this area. The Department should also abandon the Proposal's binary, point-in-time approach to voting which assumes that every vote will clearly have a discernable economic effect. Fidelity would also request certain other clarifications described below.

Finally, if the Department determines to move forward with a rulemaking at this time, Fidelity urges the Department to provide more time for affected plan fiduciaries to comply with the proposed changes before they become effective as further described below.

I. The Proposal Is Premature and the Department Should Engage in Further Research and Analysis Before Proposing Changes to Current Rules.

Similar to the Department's recent proposal to amend the "Investment Duties" regulation of Title I of ERISA concerning "Financial Factors in Selecting Plan Investments," the Proposal's prescriptive approach to mandate that fiduciaries engage in proxy voting only in circumstances where the fiduciary has documented that the plan was justified in doing so, and to forbid proxy voting unless burdensome requirements are met, is inconsistent with the deference the Department has historically afforded to the fiduciary decision-making process. For more than 40 years, ERISA's statutory framework and guidance thereunder has prohibited plan fiduciaries from subordinating the interests of plan participants and beneficiaries to the fiduciaries' interests or the interests of others. Moreover, ERISA has always required investment fiduciaries to act with the care, skill, prudence and diligence a prudent person familiar with such matters would use. However, ERISA does not establish specific or detailed requirements for carrying out these core duties. This approach has worked well for fiduciaries given the evolution of retirement plans and market dynamics which drives the varied nature of situations that need to be addressed.

Fidelity believes that the Department has not established why this long-standing framework is no longer sufficient and urges the Department to engage in further research and analysis before promulgating rules in this area. Fidelity believes this further rulemaking analysis would persuade the Department that no rulemaking is necessary or, at a minimum, to modify the Proposal to adopt a less prescriptive approach that allows fiduciaries to exercise discretion and flexibility in proxy voting determinations.

II. If the Department Determines to Move Forward with Rulemaking, the Proposal Should Be Revised in Several Significant Respects.

Fidelity supports the Department's intent to clarify that ERISA does not require plan fiduciaries to exercise the plan's voting or other shareholder rights in every circumstance. However, as explained above, we do not believe the Department has demonstrated why the many new requirements set forth in the Proposal are necessary to meet this goal. In addition, we have several concerns with the approach taken by the Department in the Proposal and would request several changes be made to address those concerns.

A. The Proposal Should Be Aligned with the SEC's Principles-Based Approach.

While Fidelity acknowledges the Department's explanation that prior proxy voting guidance may have created confusion and consumption of plan resources that are possibly not in the economic interests of plan participants and beneficiaries, the Proposal seeks to address this concern by imposing additional requirements that would require a fiduciary to expend additional plan resources in order to determine whether each vote would economically benefit the plan and prohibiting voting where it does not do so. This approach is premised on the assumption that it will always be clear whether a particular vote would have an economic benefit. However, that assumption and the proposed solutions to address these concerns are flawed as further explained below.

By contrast, the SEC's proxy guidance rules recognize that economic benefit is not always clear by providing that a manager may refrain from voting proxies if it determines that the costs of doing so outweigh the benefits. The SEC requires a reasonable voting process with oversight but does not currently prohibit the voting of a proxy if no economic benefit can be documented. This standard allows for more flexibility and acknowledges that often it is not possible to clearly establish whether costs or benefits are greater under the facts and circumstances. Moreover, it is also more consistent with the long-standing approach with respect to fiduciary decision-making described in Section I above.

Fidelity therefore urges the Department to revise the Proposal to provide guidance that when a fiduciary votes individual securities, the duties of prudence and loyalty apply and, further, to explicitly permit fiduciaries to vote proxy proposals if such vote would not result in significant additional plan costs. This approach is consistent with that taken by the SEC and would avoid the burden the Proposal would place on plan fiduciaries to: (1) evaluate and justify decisions for potentially large numbers of proxy proposals; (2) reconcile the applicability of the Rule with those of the SEC framework; and (3) monitor whether an investment manager's or proxy firms' proxy voting policy is consistent with the Department's proposed highly prescriptive approach.

B. The Department Should Abandon the Proposal's Binary, Point-in-time Approach to Proxy Voting.

As stated above, the Proposal appears to be premised on the assumption that fiduciaries will always be able to clearly determine which proxy votes would have an economic impact -- notwithstanding that "economic impact" is not defined by the Department -- and thus either vote or not vote a proxy on that basis. However, even where all relevant information is available, oftentimes it is not clear whether or how a particular proxy proposal will economically impact the issuer, much less the shareholder. And oftentimes, all relevant information may not be readily available to the responsible fiduciary. For instance, detailed investment and market knowledge that may be necessary may be outside the purview of any staff to ERISA plans, requiring additional expense to the Plan to perform the analysis the Proposal would require. Similarly, it is unclear how an investment manager would evaluate the economic impact to a plan of a particular proxy vote without information about the entire plan, about which an investment manager would likely not have access. Further, the current Proposal implies an objective mathematical analysis is readily

available in situations where such clarity rarely exists. In its current form, the Rule also fails to recognize that the impact of a proxy proposal is typically assessed by shareholders according to the potential impact to the security at issue and voted consistent with the best interest of shareholders. Although this logically translates into a benefit for the underlying participant, the Proposal needlessly imposes an entirely new review regime on plan fiduciaries and investment managers that is inconsistent with current practice that achieves the same objective.

When voting on proxy proposals, Fidelity believes that investment management and fiduciary interests are aligned to seek maximum return on performance based on issuer success. As an investment manager, Fidelity invests in companies that it believes will create value over the long-term and we believe that investors should have a direct stake in ensuring that the companies in which they invest adopt sound governance practices and conduct themselves in ways that are designed to enhance the value of their investment over the long term. Like many other financial institutions and investment management fiduciaries, Fidelity votes proxies based on an assessment of each situation. In evaluating proxies, we take into account information from many sources, including management and shareholders, and we vote proxies in a manner that is consistent with the best interests of shareholders, focused on maximizing long-term shareholder value. Fidelity also incorporates environmental, social, and governance considerations into our evaluation of an issuer's investment risk or return to the extent we believe those issues could affect long-term performance. We take the same approach when voting proxies as those issues are, or could become, indicators of a company's long-term performance. This helps to align the interests of management with those of shareholders.

Given Fidelity's belief that investment manager and fiduciary interests are aligned to maximize value and returns, Fidelity believes the Proposal's suggested framework is not necessary at this time and should be modified to avoid unintended consequences including, but not limited to, encouraging plans to adopt proxy policies that may result in a plan refraining from voting on many proposals. Additionally, further information-gathering could allow the Department to determine if the Proposal may inadvertently serve to empower and bolster the votes of other non-ERISA shareholders, likely elevating those shareholder's voting powers in excess of their corresponding economic interest. By virtue of the fact that it is often not possible to establish clear immediate economic benefits to the plan, plan fiduciaries may be discouraged from voting altogether and therefore could decrease the amount of votes tendered in support of management proposals and against shareholder proposals. This in turn could have the unintended effect of increasing the power and weight of shareholders and activists who are not subject to the Rule.

Finally, there can be benefits to plans engaging in the voting process beyond influencing the specific issue or matter that is the subject of a particular ballot. The process of proxy proposals often leads to further engagement with, and transparency by, the issuer, which can lead to enhanced disclosures and management of risks by issuers, resulting in increased value of investments over the long term. For instance, even proposals that are not successful can lead to enhancements or policy changes by the issuer that contribute to the overall value of the company. The impact of the Proposal in its current form would likely have unforeseeable consequences for issuers and the

Department should further investigate these consequences prior to moving forward with any rulemaking.

C. The Proposal Is Likely to Increase Plan Costs.

Fidelity believes the Department greatly underestimates the time and cost that would be required for plan fiduciaries to comply with the Proposal's new framework. The Proposal's current requirement that plan fiduciaries "demonstrate the basis for the particular proxy votes" and "document the rationale for proxy voting decisions... sufficient to demonstrate that the decision or recommendation was based on the economic benefit to the plan" would impose additional burdens on plan fiduciaries, without clear evidence that current proxy voting processes consume more costs than the Rule would impose. The additional analysis and recordkeeping requirements required by the Proposal with respect to all proxy votes posed to ERISA plans could even necessitate some plan fiduciaries to retain additional employees, particularly where the Rule also discourages the use of proxy voting firms and imposes increased oversight where proxy firms are engaged.

D. Investment Manager and Fiduciary Impact.

Fidelity further urges the Department to revise section 404A-1(e)(4)(ii) of the Proposal. Currently, Fidelity (and to our knowledge, most investment managers) do not apply different processes or policies or separately charge for voting proxies or exercising other shareholder rights appurtenant to plan assets held in pooled investment vehicles. However, the Proposal would necessitate that investment managers develop and adopt a separate approach to voting shares held in ERISA pooled vehicles than shares held for other non-ERISA customers and to fundamentally change the current proxy evaluation and voting process for ERISA plans. Accordingly, we believe the Department should eliminate the Proposal's requirement to reconcile conflicting ERISA plan policies and apply different voting policies and practices to ERISA and non-ERISA shareholders, particularly in light of the aligned interests for investment appreciation we described above.

From July 2019 to July 2020, Fidelity voted approximately 33,000 proposals at approximately 3,100 shareholder meetings in its role as a separate account and commingled pool ERISA 3(38) investment manager. Of the 33,000 proposals in which Fidelity exercised its right to vote, such voting decisions were determined to benefit Fidelity's investment process and overall objective to maximize long-term value for shareholders, even though such proposals may not have been economically determinative to each particular portfolio. This approach is used for reviewing such proposals and applies whether the security is held in an ERISA plan or not. Given an investment manager's clear objective to maximize long-term value of the investment, there is no reason to handle proxy voting differently for ERISA plans.

For these reasons, the Rule's new requirement to reconcile conflicting plan policies and "vote (or abstain from voting) the relevant proxies to reflect such policies in proportion to each plan's economic interest in the pooled vehicle" while simultaneously adhering to its own policies and

procedures for proxy voting would be virtually impossible to achieve as a practical matter and should be removed.

Although the Proposal would provide an alternative to this requirement that permits plans to accept the investment manager's proxy voting policy, we urge the Department to retain this alternative if it determines to move forward with rulemaking at this time. We further request this alternative be modified in section 404A-1(e)(4)(ii) to clarify that the investment manager's investment policy statement and/or proxy voting policy must be consistent with Title I of ERISA, but strike references to "and this section" in order to alleviate the burden on plan fiduciaries and investment managers to try to apply the Rule's highly prescriptive requirements to pooled vehicles as such applications would be unworkable.

E. Additional Clarifications Should Be Made.

Fidelity notes that the Rule does not discuss the applicability of the Proposal to shareholder rights that are passed through to plan participants and presumably the Rule would not apply in such instances. Accordingly, Fidelity requests the Department clarify that the Proposal does not apply when a plan passes through such rights to participants including, but not limited to, employer securities or securities held through self-directed brokerage offerings. Further, the Department should confirm that a plan trustee can rely on directions from participants related to the exercise of such rights.

In addition, the discussion of the Proposal in the preamble indicates that the Proposal does not apply to voting of shares of registered investment companies, but rather only applies to voting stocks of individual corporations. The preamble also states that the Proposal would not apply to stocks held in registered investment companies. Both of these points should be incorporated into the Rule itself.

III. The Proposal Should Not Become Effective Until Fiduciaries Have Time to Prepare.

As stated above, Fidelity requests the Department to engage in information gathering on proxy voting practices and to further consider whether rulemaking in this area is warranted. Should the Department determine proxy voting guidance is necessary at this time, however, Fidelity requests the Department to modify the current effective date of the Rule from 30 days after the date of the final Rule's publication to no less 12 months after publication of the final rule in the Federal Register in order to allow plan fiduciaries adequate time to prepare the documentation and analysis required by the Proposal, to review proxy voting policies and to avoid potential inadvertent violations of the revised Rules. This is particularly needed at a time when plan sponsors and plan fiduciaries are under unprecedented economic and regulatory pressures in the current global environment.

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We appreciate the opportunity to provide these comments and are available to discuss any questions you may have with respect to them.

Sincerely,

A handwritten signature in blue ink, appearing to read "James Barr Haines". The signature is fluid and cursive, with the first name "James" being the most prominent.

James Barr Haines

SVP & Deputy General Counsel