



October 5, 2020

Jeanne Klinefelter Wilson Acting Assistant Secretary
Employee Benefits Security Administration
U.S. 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:

On behalf of the California Federation of Teachers (CFT), AFT, AFL-CIO, I am writing to express strong opposition to the U.S. Department of Labor's (DOL) proposed rulemaking entitled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (RIN 1210-AB91)" (the "Proposed Rule"). In our view, the Proposed Rule demonstrates an unwarranted prejudice against fiduciaries' exercise of shareholder rights and would impose such burdensome obligations on fiduciaries that ERISA plans would be effectively disenfranchised. As that would negatively impact plan participants and beneficiaries, the CFT opposes the Proposed Rule and respectfully urges DOL to withdraw it.

The CFT is a union of 120,000 members, including pre-kindergarden through 12th-grade teachers; paraprofessionals and other classified school personnel; higher education faculty and professional staff. Most AFT members participate in public-sector defined benefit pension plans totaling an estimated \$3 trillion nationally, and a smaller portion of our members participate in private, defined contribution retirement plans. Many of these retirement plans have an established track record of making well advised investments that create collateral benefits for communities, while simultaneously producing competitive risk-adjusted returns to pay benefits. While the Proposed Rule will not directly apply to public pension plans, many of those plans look to the Employee Retirement Security Act of 1974 ("ERISA") for guidance and best practice, therefore the Proposed Rule will certainly impact the defined benefit pension plans that our members contribute to and rely on for a secure retirement.

1. The rationale for the Proposed Rule is flawed

The Proposed rule departs from prior proxy voting guidelines and imposes significant new compliance costs on ERISA plan fiduciaries. The DOL has not provided a pervasive rationale for the Proposed Rule. Rather, the Proposed Rule is premised on flawed assumptions about shareholder proxy voting.

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The CFT views the voting of proxies as an essential element allowing for the exercise of shareholder rights. Proxy voting allows shareholders to monitor and hold corporate management accountable, and to create and protect long-term value. Shareholder votes on the election of directors convey important information about shareholder views and can and do effect companies' decisions about who should serve as corporate directors.¹ Over the past three decades, shareholder votes on proposals, including proposals seeking majority voting for directors, declassified boards and proxy access, led to widespread voluntary adoption of these measures across the market.

Despite the importance of shareholder proxy voting, the DOL claims, without documenting a thorough review of research, that the evidence on the effectiveness of proxy voting is "mixed." Much evidence indicates that this claim is incorrect. Extensive evidence demonstrates shareholder proxy voting can, in fact, increase shareholder value:

- Shareholder resolutions can offer additional insight into emerging material risks and externalities;²
- Board adoption of governance-related shareholder proposals has been found to trigger positive short-term returns, as well as long-term performance improvements;³
- The adoption of majority voting was associated with positive abnormal returns and an increase in boards implementing majority supported resolutions;⁴
- "Say on pay" was shown to lead to increases in companies' market value and improvements in long-term profitability;⁵ and
- Competition over shareholder votes generates ex ante incentives for management to perform better.⁶

Each of these are examples of how shareholder voice can have an effect on the well-established problem of moral hazard in corporate governance structure. Even if it were true that research on proxy voting is mixed, that does not lend support for a new rule that effectively discourages proxy voting by plan fiduciaries. Instead, fiduciaries should be afforded the flexibility to make their own prudent determinations about the efficacy of proxy voting overall and in particular circumstances.

¹ See, e.g., Nichol Garzon, Blog, Regulatory Matters, Disenfranchising Shareholders and Reducing Corporate Accountability: Comments Due on DOL Proposal to Limit Shareholder Voting by October 5, Glass Lewis (Sept. 21, 2020), <https://www.glasslewis.com/disenfranchising-shareholders-and-reducing-corporate-accountability-comments-due-on-dol-proposal-to-limit-shareholder-voting-by-october-5-2020/>

² Derrek R. Bingham et al., Shareholder Engagement in the Age of Transparency, Goldman Sachs Equity Research (June 12, 2019), available at <https://www.eticanews.it/wp-content/uploads/2019/06/Shareholder-engagement-in-the-age-of-transparency-1.pdf>.

³ Vicente Cuñat et al., The Vote is Cast: The Effect of Corporate Governance on Shareholder Value, 67(5) J. of Fin. 1,943 (Oct. 2012), available at <https://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2012.01776.x>.

⁴ Yonca Ertimur et al., Does the Director Election System Matter? Evidence from Majority Voting, 20 Rev. of Acct. Stud. 1 (2015), available at <https://link.springer.com/article/10.1007/s11142-014-9284-9>.

⁵ Vicente Cuñat et al., Say Pays! Shareholder Voice and Firm Performance, 20(5) Rev. of Fin., Eur. Fin. Ass'n 1,799 (2016), available at <https://ideas.repec.org/a/oup/revfin/v20y2016i5p1799-1834.html>.

⁶ Yaron Nili & Kobi Kastiel, Competing for Votes, 10 Harv. Bus. L. Rev. 287 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541; see generally Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Office of Regulations and Interpretations, Employee Benefits Security Administration 4-5 (July 28, 2020),

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2. The Proposed Rule would effectively silence ERISA plan investors

Whether by design or by chance, the Proposed Rule would disenfranchise the collective voice of workers enrolled in ERISA plans while strengthening the power of individual wealthy investors, corporate boards and corporate management. The CFT is strongly opposed to this outcome.

The Proposed Rule would create an overly burdensome and unjustified process for the consideration of voting proxies that would, in many cases, effectively prohibit ERISA plans from exercising their shareholder rights. Under the Proposed Rule, every single proxy vote would require a fiduciary to not only analyze the importance of the vote to the economics of the investment but also conduct a second layer of detailed analysis to determine how the vote affects the plan as a whole. This second layer of analysis would be complex, difficult to conduct, and often be based on indeterminable facts. And it essentially tells fiduciaries for the first time that, in many cases, they cannot act to protect their investments and enhance long-term value.

The practical impact of the Proposed Rule's strong prejudice against proxy voting would be effectively to silence and disenfranchise ERISA plans.⁷ The Proposed Rule creates such a high bar for a fiduciary to determine that it is permissible to vote proxies that it will be difficult for fiduciaries ever to exercise their shareholder right, even if they determine that the vote is economically relevant to their investment.

For all of the above reasons, the CFT opposes the Proposed Rule and respectfully urges DOL to withdraw it. Thank you for considering our views on this matter. Please contact me with any questions.

Sincerely,



Tristan Brown
Legislative Representative
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⁷ See Ann Lipton, I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired (from typing) (Sept. 4, 2020), https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html ("The fairly transparent goal of these rules is to take ERISA plans out of the voting and engagement business, except for things in the mergers/spinoffs/contests category.")