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October 5, 2020

The Honorable Eugene Scalia
Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB91: “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights”

Dear Secretary Scalia:

The Department of Labor’s effort “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”¹ is a step in the right direction. I appreciate all the work you, Assistant Secretary Wilson, Mr. DeWitt, and your colleagues have done to date on this important issue.

In particular, the Department’s intention to reign in proxy advisors and their practice of automatic voting is commendable. This additional oversight is essential as some pension plan fiduciaries use this voting practice to keep their beneficiaries in the dark when it comes to their promotion of impact investing and non-pecuniary goals. As renowned economist, professor, and author Dr. Burton Malkiel wrote a few weeks ago in a column for the *Wall Street Journal*, “[H]ow do you know if your investments will have the desired social impact?... Good intentions aren’t credible without an appreciation of the costs.”² One of the costs Malkiel is alluding to is the health of retirees’ hard-earned savings.

Additionally, this Department of Labor ruling reinforces the guidance and ruling issued by the Securities and Exchange Commission (SEC) earlier this year. I note here what I wrote in a comment letter to the SEC on January 9 for its Proposed Rule, “Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice”:

“As I was reading through the rule, one specific issue related to conflicts of interest caught my attention: automatic voting, or “robo-voting”. The rate at which investment

¹ Employee Benefits Security Administration, U.S. Department of Labor, Proposed Rule: “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights”, September 4, 2020, <https://www.federalregister.gov/documents/2020/09/04/2020-19472/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights>.

² Burton Malkiel, “‘Sustainable’ Investing Is a Self-Defeating Strategy”, *The Wall Street Journal*, September 18, 2020, <https://www.wsj.com/articles/sustainable-investing-is-a-self-defeating-strategy-11600466998>.

managers automatically – in many cases “blindly” – vote according to an ISS or Glass Lewis recommendation is alarming. Proper due diligence must be enforced here. Additionally, as Tim Doyle pointed out in a research report for the American Council on Capital Formation, “Robo-voting seriously undermines the fiduciary duty owed to investors.” He continued, “[Institutions] don’t research the proposals before them or ensure the recommendation aligns with client interest...It can have lasting implications for corporate policy, profits, and disclosures.”³

However, your Department could codify something stronger than the SEC’s previous guidance. Since automatic voting has an impact on pension beneficiaries, this an excellent opportunity for the Department of Labor to go further. One way to impose a stronger check on automatic voting would be to prohibit this voting practice when contested proxy advisor recommendations emerge. In the SEC’s final ruling, the Commission has mandated that companies that retain a proxy advisor be granted access to rebuttals of those advisors’ proxy recommendations. The Department of Labor, therefore, could go one step further and direct pension funds to use the automatic voting process only when there is no company rebuttal.

This type of blind automatic voting that I referenced above impacts pension plan beneficiaries. These pensioners have entrusted their pension fund managers with their money based on the manager’s responsibility to generate returns. To fulfill this duty, these managers are also expected to undertake thoughtful analysis of each investment decision they make. But outsourcing their voting authority to a proxy advisor (i.e., automatic voting) without appropriate and clear guardrails, diminishes their fiduciary obligation. Simply, this third party, the proxy advisor, does not necessarily, and cannot be expected to, share the pension plan’s goal of maximizing returns for its beneficiaries.

For the past 40 years, I have been involved in the workings of pension funds and proxy advisory firms. What the Department has offered in this Proposed Rule will go a long way in not only helping pension plan fiduciaries protect their clients’ economic interests, but also will help stop influential proxy advisors from promoting non-economic agendas via automatic voting. This would create a greater peace of mind – and wallet – for retirees; and it is certainly welcomed.

³ Gregory Lau, Comment Letter to the U.S. Securities and Exchange Commission, Proposed Rule, ““Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice”, January 9, 2020, <https://www.sec.gov/comments/s7-22-19/s72219-6632602-203100.pdf>.

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Thank you for this opportunity to provide you these comments. I hope this Proposed Rule will be finalized quickly. It is high time that the outsized influence of proxy advisors be checked by the Department of Labor. If successful, then the future stability and growth of pension plan accounts across the country will be significantly improved for it.

With best wishes,

Respectfully,

A handwritten signature in black ink, appearing to read "G. Lau", written in a cursive style.

Gregory E. Lau
Former Executive Director
Global Compensation and Corporate
Governance
General Motors Company