

Mr. Jason A. DeWitt  
Office of Regulations and Interpretations Employee Benefits Security Administration,  
Room N-5655  
U.S. Department of Labor  
200 Constitution Ave., N.W.  
Washington, DC 20210

**Rule Number: RIN 1210-AB91**

Dear Mr. DeWitt:

Thank you for this opportunity to comment on the Department of Labor's proposed regulation concerning proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

I am an attorney and consultant with a deep interest in public and social policy. I was elected last year to be chairman of the board of the California Black Chamber of Commerce and serve on the Board of Directors American Association of Blacks in Energy. I serve or have served on several non-profit boards, including the St. Ignatius College Preparatory Board of Regents (Emeritus), Catholic Charities/CYO of San Francisco, Marin and San Mateo Counties (Emeritus), the Mission Dolores Academy, and I currently serve as a Board of Trustee of the University of San Francisco. I was formerly a Commissioner of the California Public Utilities Commission and was appointed by two Secretaries of the U.S. Department of Energy as a member of the National Petroleum Council. Prior to my public service, I was a counsel and chief compliance officer, advising major financial institutions, these institutions included Vice President and Senior Counsel of Bank of America, Vice President and Chief Compliance Officer, Wells Fargo Savings and Investment Group, which included Wells Fargo Nikko Investment Advisors, Principal and Senior Counsel Robertson Stephens Investment Bankers and other broker-dealers and hedge funds. In this capacity a considerable amount of my legal advice involved matters surrounding retirement savings and investment vehicles. I was also an Adjunct Professor of Law at the University of California Hastings College of Law and the Golden Gate University School of Law, where for nineteen years, I taught Securities Regulations, which included coverage of the Employment Retirement Income Security Act (ERISA), Qualified Plans and fiduciary obligations associated with the management of its assets. My comments reflect my professional experience and commitment to sound and just public policies.

**General Comments**

The Department of Labor's proposed rule on proxy voting in private retirement plans regulated under the Employee Retirement Income Security Act (ERISA) is timely and well-considered. As the proposed rule elucidates, the pension investment landscape has changed markedly in recent decades and participants in retirement plans have become increasingly vulnerable to political activism masquerading as investment strategy. The proposed rule complements recent actions by the Department and the Securities and Exchange Commission to protect these savers and investors.<sup>1</sup> However, to complete this reform initiative I believe some additional guidance is necessary with regard to so-called robo-voting and other matters.

## **Responding to Market Trends**

Two of the more significant changes in the pension investment marketplace in the last 30 years have been the increase in institutional investors owning corporations and the rise of shareholder activism. Institutional investors now own over 80 percent of the country's largest companies and the number of activist-backed investor resolutions submitted to shareholders for votes is double what it was 15 years ago.<sup>ii</sup> These institutional investors commonly outsource how to sort through and manage the voting on these resolutions. The duopoly of proxy advisory firms contracted to perform these functions too often have a bias in favor of these proposals, 90 percent of which promote environmental, social, and corporate governance (ESG) investing. This was summed up well in an analysis posted at Harvard Law School's Forum on Corporate Governance:

“Proxy voting is a key right of asset ownership—an opportunity for asset owners to influence the strategic direction and governance of the businesses they own. This right has increasingly been outsourced by asset owners to asset managers, who are often in turn advised by proxy advisors that provide recommendations to institutional investors on how to vote at shareholder meetings.”<sup>iii</sup>

In advance of proxy season, progressive activists routinely file hundreds of resolutions on ESG investing. The proliferation of proxy voting and use of the process by activists often perverts or ignores the views of most investors. Justin Danhof of the National Center for Public Policy Research recently highlighted the rigged vote by Chevron investors, requiring the company to abide by the Paris accord.<sup>iv</sup>

As these trends have become more fully established the government has properly taken action to affirm the fiduciary responsibility of investment managers to act in the best financial interest of investors. Democratic and Republican Administrations have updated regulations to set guidelines on shareholder activism.<sup>v</sup> It is evident the rules were too often either ambiguous or inadequate to keep pace with tactics and mechanisms institutional investors and activists have used to prevail in votes on resolutions. The result is that a major component of the country's retirement savings system is more and more at risk of serving the political and social priorities of an activist minority instead of the majority of investors who entrust managers only to secure solid investment returns on their retirement savings.

## **Proxy Voting Proscriptions**

I commend the Labor Department for stating clearly that retirement plan managers should not incorporate proxy voting unless proposals relate to economic benefits and performance of investments and merit the expenditures of plan funds for analytical scrutiny and implementation of proxy voting procedures. Stated simply, the proposed rules saves time and money. Given that activists push similar or identical ESG resolutions forward year after year,<sup>vi</sup> I urge DOL to be even more proscriptive.

Instead of imposing additional responsibilities on fund managers on proxy voting, shareholder activity should focus only on maximizing returns or enhance financial value for beneficiaries. The Labor Department should clarify precisely how a fiduciary plan determines whether a vote will have a positive economic impact.

## **Restricting Robo-Voting**

The proposed rule cites common practices of proxy advisory firms that likely effectuate voting results, such as “pre-populating” the adviser's proxies with voting recommendations.<sup>vii</sup> In June, the Securities and Exchange Commission adopted rules to limit this dubious practice and thus ensure timely access to more transparent, accurate and complete information on which to make voting decisions.<sup>viii</sup>

While DOL’s proposed rule refers to the SEC’s supplemental guidance on “robo-voting,”<sup>ix</sup> the Department should seize this opportunity to impose even more scrutiny of this practice or simply ban it altogether. It is not enough to merely note that DOL is bringing its regulatory guidance in line with that of the SEC. Ballots, questionnaires, and surveys that are partially completed in an automated process are inherently distorting and would not be considered under most circumstances. It is hard to envision guidelines that would render such irregularities legitimate.

Ending robo-voting altogether and making proxy voting process more transparent would give pension beneficiaries the assurance that the proxy voting process is more reliable. As long as robo-voting remains in place, it can be modified to stay a step ahead of rules. This makes it more likely that pensioners would continue to be disenfranchised.

## **Curtailing Conflicts of Interest in Proxy Voting**

The proposed rule would take an important step to make the costs of proxy voting more public and to monitor possible conflicts of interest proxy advisory firms might have. Again, I urge the Department to consider stating definitively that such conflicts are prohibited. Conflicts of interest by definition work against the ability of fund manager’s fiduciary responsibility and therefore keeps the door ajar for proxy voting practices that could hold back growth in the retirement savings of American workers and retirees. Instead of proposing that fund managers simply keep track of potential conflicts of interest it would be better to prohibit them and implement more stringent mechanisms for identifying them.

## **Conclusion**

I believe individuals should be able to construct their personal investment portfolios and make investment decisions aligned with their values. With pensions and retirement savings plans in which millions of people are invested the government has an obligation to uphold the principle of the fiduciary duty to seek maximum growth and set strict limits on the ability of outside activists and proxy advisory firms to steer investments toward ESG policies and away from growth. The proposed rule is the latest in a series of steps the government has taken in this regard. I encourage its adoption with some modifications to make it even more resilient.

Thank you for your consideration of these comments.

Sincerely,

Timothy Alan Simon, Esq.  
TAS STRATEGIES  
San Francisco, California

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<sup>i</sup> [https://www.realclearmarkets.com/articles/2020/07/10/the\\_proxy\\_voting\\_war\\_is\\_one\\_that\\_the\\_right\\_needs\\_to\\_engage\\_in\\_498593.html](https://www.realclearmarkets.com/articles/2020/07/10/the_proxy_voting_war_is_one_that_the_right_needs_to_engage_in_498593.html)

<sup>ii</sup> [https://corpgov.law.harvard.edu/wp-content/uploads/2018/06/ESG-Paper-FINAL\\_reduced-size-002.pdf](https://corpgov.law.harvard.edu/wp-content/uploads/2018/06/ESG-Paper-FINAL_reduced-size-002.pdf)

<sup>iii</sup> <https://corpgov.law.harvard.edu/>

<sup>iv</sup> [https://www.realclearmarkets.com/articles/2020/07/10/the\\_proxy\\_voting\\_war\\_is\\_one\\_that\\_the\\_right\\_needs\\_to\\_engage\\_in\\_498593.html](https://www.realclearmarkets.com/articles/2020/07/10/the_proxy_voting_war_is_one_that_the_right_needs_to_engage_in_498593.html)

<sup>v</sup> [https://www.weil.com/~media/mailings/2018/q3/weil\\_pcag\\_alert\\_18\\_10\\_03\\_03.pdf](https://www.weil.com/~media/mailings/2018/q3/weil_pcag_alert_18_10_03_03.pdf)

<sup>vi</sup> <https://www.pionline.com/governance/2020-proxy-season-includes-400-plus-esg-resolutions-report>

<sup>vii</sup> <https://www.federalregister.gov/documents/2020/09/04/2020-19472/fiduciary-duties-regarding-proxy-voting-and-shareholder-rights>

<sup>viii</sup> <https://www.sec.gov/news/press-release/2020-161>

<sup>ix</sup> <https://www.sec.gov/news/press-release/2020-161>