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October 5, 2020

Office of Regulations & Interpretations  
Employee Benefit Security Administration  
**ATTN: Proxy Voting and Shareholder  
Rights NPRM**  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue N.W.  
Washington, DC 20210

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

I am writing on behalf of the Massachusetts Pension Reserves Investment Management Board (“Mass PRIM”). Mass PRIM oversees the Massachusetts Pension Reserves Investment Trust Fund (“PRIT Fund”), a pooled investment trust fund established to invest the assets of the Massachusetts State Teachers’ and State Employees’ Retirement Systems and the assets of county, authority, district and municipal retirement systems. The PRIT Fund holds approximately \$75 billion in assets. In its September 9, 2020 meeting, the Mass PRIM Board was advised of the Department of Labor (“DoL”) Proposed Rule on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights<sup>1</sup> (the “Proposed Rule”). After discussion, the Mass PRIM Board authorized the submission of this comment (the “Comment”) on its behalf.

The member plans of Mass PRIM are “governmental plans,” as that term is defined under the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and are

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<sup>1</sup> Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 F.R. 55219, (proposed Sept. 4, 2020)(to be codified at 29 C.F.R. pts. 2509, 2550).

therefore exempt from ERISA.<sup>2</sup> Nonetheless, given the extensive reliance of governmental plan fiduciaries on ERISA case law, as well as the regulatory and administrative guidance of the DoL, Mass PRIM seeks to register this Comment regarding the Proposed Rule.

## Discussion

The Proposed Rule provides that fiduciaries “must not vote any proxy” unless it determines that the matter has an “economic impact on the plan” after consideration of the “costs involved.”<sup>3</sup> We believe that the requirement of a cost/economic impact analysis for every vote is too restrictive as it does not account for the significant cost controls arising from a well-defined proxy voting policy.

The Mass PRIM Board, like many large public sector investment fiduciaries, has adopted a robust proxy voting policy (the “Policy”) addressing a broad array of issues that may be presented for proxy vote consideration.<sup>4</sup> The Policy supports Mass PRIM’s role as a leader in the evaluation of “environmental, social and governance” (“ESG”) investments.<sup>5</sup> The Policy focuses on twelve (12) major topics.<sup>6</sup>

Within the twelve topics, the Policy provides definitive “for” or “against” guidance on over 200 sub-issues. The policy further identifies approximately 25 sub-issues that mandate

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<sup>2</sup> See 29 U.S.C. §1002(32) (defining “Governmental Plan”); See also 29 U.S.C. §1003(b)(1) (providing that ERISA does not apply to a governmental plan, as defined in 29 U.S.C. §1002(32)).

<sup>3</sup> *Supra*, note 1 at 55225 (to be codified at 29 C.F.R. § 2550.404(a)-1(e)(3)(ii)).

<sup>4</sup> See PENSION RESERVES INVESTMENT MANAGEMENT BOARD – PROXY VOTING GUIDELINES (2020), [https://www.mapension.com/wp-content/uploads/2020/03/ISS\\_-\\_MA\\_PRIM\\_Custom\\_Proxy\\_Voting\\_Guidelines\\_Approved\\_by\\_Board\\_02262020.pdf](https://www.mapension.com/wp-content/uploads/2020/03/ISS_-_MA_PRIM_Custom_Proxy_Voting_Guidelines_Approved_by_Board_02262020.pdf).

<sup>5</sup> Mass PRIM has joined with the MIT Sloan School of Management to undertake a significant project to improve the quality of ESG data used to evaluate investments. While primary goal of the project is the development of standards for the measurement of ESG data, the project also aims to: reduce the variance in measuring specific ESG categories such as labor treatment, carbon emissions, and product safety; understand the effect of ESG-driven investment flows on stock price and firm behavior; develop smarter ways to aggregate ESG factors into composite indices; and reliably assess investor preferences to enable ESG indices to be more customized and attuned to investors’ values. <https://mitsloan.mit.edu/press/aggregate-confusion-project-mit-sloan-sustainability-initiative-and-mass-prim-announce-collaboration-to-improve-quality-esg-measurement-financial-sector>.

<sup>6</sup> The topics addressed in the Policy are: (1) Board of Directors, (2) Executive Compensation, (3) Consumer Lending, (4) Board Diversity, (5) Equal Employment Opportunity, (6) Sustainability & Climate Change, (7) Renewable Energy, (8) Tobacco Advertising, (9) Recycling, (10) Linking Executive Compensation to Non-Financial Factors, (11) Labor and Human Rights Standards and Human Rights Risk Assessment, and (12) Harassment Training.

“cases-by-case” analysis and may require incurring additional research costs.<sup>7</sup> The development of a comprehensive policy equips Mass PRIM to immediately vote on any covered issue without a significant commitment of time or resources. Moreover, given the broad range of issues that have been pre-evaluated, and the fact that the twelve (12) major topics invoke considerations applicable to multiple companies directly held by the PRIT Fund, the Policy renders the purported “cost” of any single proxy vote virtually negligible.

Mass PRIM further notes that the Proposed Rule identifies three “permitted practices,” that, if the Proposed Rule were to be adopted, would permit fiduciaries to avoid to individual cost/economic impact analysis. However, these practices could run counter to established fiduciary principles, such as the duty to monitor and the duty to diversify, and therefore could frustrate the fiduciary in the performance of these established duties.

One such permitted practice would permit a fiduciary to avoid the individual cost/economic impact analysis of individual proxy votes by automatically voting in accordance with the “recommendations of management.”<sup>8</sup> This permitted practice, if adopted, could induce fiduciaries to serve simply as a “rubber stamp” of management and divorce the fiduciary from its independent judgment in regards to proxy voting. This constraint would ultimately inure to the detriment of the fund’s participants and would be counter to the fiduciary’s obligation to act for the exclusive benefit of participants by enhancing the long-term value of the fund’s assets.

A second of the Proposed Rule’s permitted practices would prohibit proxy voting if the fund’s holdings in a single company, relative to the fund’s total assets under management (AUM), is below a quantitative threshold.<sup>9</sup> The preamble to the Proposed Rule notes “the Department believes that voting the shares of plan holdings that comprise a small portion of total plan assets rarely advances plans’ economic interests....”<sup>10</sup> (As an example, the preamble suggests a potential 5% threshold.<sup>11</sup>) Yet in a properly diversified fund, as required under ERISA and most state fiduciary laws, it is typically a breach of fiduciary duty to have any holdings in a single company that would approach such a threshold.<sup>12</sup> In effect, the Proposed Rule’s permitted practice would create a dilemma: if the fund’s holdings in a company were to

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<sup>7</sup> Typical case-by-case topics of the Policy include, for example: the consideration of a poison pill, the selection of director nominees, and election of directors in contested elections.

<sup>8</sup> *Supra*, note 1 at 55,224 (to be codified at § 29 C.F.R. 2550.404(a)-1(e)(2)(iii)(A)).

<sup>9</sup> *Supra*, note 1 55,242 (to be codified at § 29 C.F.R. 2550.404(a)-1(e)(3)(iii)(C)).

<sup>10</sup> *Supra*, note 1 at 55,234 (to be codified at 29 C.F.R. pts. 2509, 2550).

<sup>11</sup> *Id.*

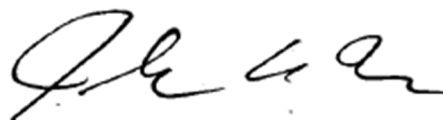
<sup>12</sup> 29 U.S.C. § 1104(a)(1)(C).

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meet the quantitative threshold, the fiduciary could then participate in the proxy voting process because the vote would be deemed to have a “material economic impact.” However, if a fund’s holdings in a single company were to be large enough to have such a material economic impact, it is likely that such holdings would represent a breach of the diversification requirement. Consequently, this permitted practice would effectively silence fiduciaries of larger funds that adhere to prudent diversification.

In closing, Mass PRIM believes that were the Proposed Rule to become finalized, it could have the potential to have a chilling effect on the exercise by covered fiduciaries of their fiduciary duty to enhance the value of fund assets through appropriate attention to proxy voting and to the proxy voting process.

Sincerely,

A handwritten signature in black ink, appearing to read "John A. Nixon". The signature is fluid and cursive, with the first name "John" being the most prominent.

John A. Nixon

JAN/dmb

cc: Deborah B. Goldberg, Treasurer and Receiver General, Chair  
Michael G. Trotsky, CFA, Executive Director and Chief Investment Officer  
Christopher J. Supple, Esq., Deputy Executive Director and General Counsel