

Monday, October 5, 2020

The Honorable Eugene Scalia  
Secretary  
U.S. Department of Labor  
200 Constitution Ave.,  
N.W. Washington, DC 20210

Dear Secretary Scalia:

Please accept this letter for the docket regarding RIN 1210-AB91, "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights." I write as President of Bowyer Research, a financial economics consulting firm which, among other things, produces in-depth quantitative analysis of the effects of various ESG factors for investment institutions.

Having extensively analyzed both the effects of ESG factors and the details of proxy-voting processes for two major proxy advisory services (in one case as a consultant to a client of one firm and in the other case as a consultant to another in vetting the service,) I conclude the following:

1. ESG factors are not generally additive. Some factors add returns, but only some do. There are clearly materiality issues with such factors. That is to say: factors which are proximate to, and directly relevant to, the firm in question are more likely to be helpful. Those which are not proximate and material are much less likely to offer any benefit to shareholders and frequently erode returns when used as screens.
2. ESG activism is grounded historically in ideological politics, not in financial analysis. Studies purporting to find additive value often are after-the-fact justifications for an agenda which was not designed to help shareholder returns, but rather to affect social and political change that traditional electoral politics had not delivered.
3. The proxy service processes that I've observed are opaque and politically unbalanced. The proxy service which I have been in dialogue with has been able to show no evidence whatsoever that they have made any effort to include a variety of political views in their process. In fact, the processes have baked-in features which hard-code group-think into the recommendations.
4. The comments in the DOL statement, if they miss the mark at all, perhaps underestimate the cost of the current system in that, not only are fees paid to proxy services and for internal human resources to interface with proxy services, but further, because these questions often involve highly polarized political issues, top-level management is often drawn into the process. A CEO, COO or CFO's most scarce commodity is attention. Polarized issues by nature get passed up to top managers and take up valuable attention-space which rightly belongs to the shareholders' goal of a decent and dignified retirement.
5. The Interpretive Bulletin 2016-01 at the time of issuance was widely interpreted as an unfunded mandate to vote proxies. This placed an undue burden on trustees and money managers to chase social goals which are orthogonal to the single focus of providing financial value to retirees.
6. That bulletin also functioned as a heavy de facto subsidy to proxy-advisory services, an industry riddled with conflicts of interest with its clients and with problems of opacity, extreme market-share concentration and rampant political imbalance.

Regarding some of the above points, I found the following from DOL to be particularly relevant:

*This document also states that Interpretive Bulletin 2016-01 no longer represents the view of the Department regarding the proper interpretation of ERISA with respect to the exercise of shareholder rights by fiduciaries of ERISA-covered plans, and notes that it will be removed from the Code of Federal Regulations when a final rule is adopted.*

From <<https://www.regulations.gov/document?D=EBSA-2020-0008-0001>>

*The SEC noted that the proxy voting advice industry in the United States consists of three major firms, (91) and is highly concentrated among the two leading proxy advisory firms, Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co., LLC (Glass Lewis). Clients of proxy advisory firms include investment advisers, banks, and insurers that may be voting ERISA plan shares.*

From <<https://www.regulations.gov/document?D=EBSA-2020-0008-0001>>

*This proposed rule would benefit plans by providing improved guidance regarding how ERISA's fiduciary duties apply to proxy voting. As discussed above, sub-regulatory guidance that the Department has issued over the years may have led to a misunderstanding among some that fiduciaries are required to vote on all proxies presented to them. This misunderstanding may lead some plans to expend plan assets unnecessarily to research and vote on proxy proposals not likely to have a material impact on the value of the plan's investments. The proposed rule is intended to eliminate that confusion and ensure ERISA fiduciaries execute shareholder rights in an appropriate and cost-efficient manner. The proposal clarifies the duties of fiduciaries in regard to proxy voting and the monitoring of proxy advisory firms. Plan fiduciaries would be better able to conserve plan assets by having clear direction and permitted practices to refrain from researching and voting on proposals that they prudently determine have no economic impact on the value of the plan's investment.*

From <<https://www.regulations.gov/document?D=EBSA-2020-0008-0001>>

It is somewhat difficult to tell from the statements of the DOL whether this proposed change is predominantly regulatory or predominantly deregulatory. On the one hand, it seems designed to free up resources which trustees believe they were mandated to expend by the prior administration. On the other hand, it imposes certain analytical and reporting costs onto trustees when they do vote. I would urge an approach which relieves the unfunded mandate of voting proxies, but is sensitive to cost

imposition. The detailed statement does indicate a desire to work with the industry to avoid imposing costs.

I would say that the key to reforming the process is the proxy-advisory business. Its business model is somewhat sustained by the mandates which the DOL is wisely rescinding. There are serious concerns about whether it is delivering what it promises—genuine risk reduction—as opposed to ideology dressed up as risk reduction.

In many ways the current eco-system—the mandate to vote which herds fiduciaries into the arms of a proxy industry dominated by ESG ideologies—amounts to a system analogous to an electoral process in which your local department of elections is run directly by a political party, which is in charge of deciding and then casting votes on behalf of citizens without their meaningful consent or even knowledge that these votes have been cast on their behalf.

As I write this, our nation is rightly concerned about citizenship and the integrity of our political elections. We want to make sure that every vote counts and that civic elections reflect the will of the voters. We should also be concerned about shareholder citizenship, which, as it stands now, is about as opaque and unreliable in capturing the will of the ‘voters’ as the worst of old-style machine politics.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jerry Bowyer". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jerry Bowyer  
President  
Bowyer Research