

# Fact Sheet

U.S. Department of Labor  
Employee Benefits Security Administration  
August 31, 2020

## **Notice of Proposed Rulemaking on Fiduciary Duties Regarding Proxy Voting and Shareholder Rights**

*On August 31, 2020, the U.S. Department of Labor (Department) released a proposal under the Employee Retirement Income Security Act of 1974 (ERISA) to amend the “Investment duties” regulation at 29 CFR 2550.404a-1 and address the application of ERISA’s fiduciary duties of prudence and loyalty to the exercise of shareholder rights, including proxy voting, proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.*

### **Background**

- The “Investment duties” regulation currently covers the prudence duty in ERISA section 404(a)(1)(B) as it applies to fiduciary decision-making on investments and investment courses of action. The regulation does not specifically address the exercise of shareholder rights or the application of ERISA section 404(a)(1)(A), which provides that a fiduciary shall act for the exclusive purpose of providing benefits to participants and beneficiaries.
- Rather, sub-regulatory guidance and individual letters that the Department has issued over the years have consistently affirmed that in voting proxies, and in exercising other shareholder rights, plan fiduciaries must consider those factors that may affect the value of the plan’s investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives.
- Aspects of the guidance and letters, however, may have led to some confusion or misunderstandings. For example, there appears to be a view among some that the Department’s guidance requires fiduciaries to vote all proxies presented to them. As the amount and types of proxy proposals have increased and the investment landscape has changed, 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 investment. This misunderstanding also may result in use of plan assets on proxy proposals for purposes that have no connection to increasing the value of the plan’s investments.
- The Notice of Proposed Rulemaking (NPRM) is intended to address those concerns and help the Department develop a regulation that will ensure plan fiduciaries execute their ERISA duties when exercising shareholder rights in an appropriate and cost-efficient manner.

## Overview of Proposed Amendments to “Investment duties” Regulation

- The proposal retains the core principles in the current regulation that sets forth requirements for satisfying the prudence duty under ERISA section 404(a)(1)(B) when deciding on plan investments and investment courses of action.
- The proposal makes the following major additions to the Investment duties regulation in regard to proxy voting and the exercise of shareholder rights:
  1. New regulatory text to codify the Department’s longstanding position that ERISA requires plan fiduciaries when deciding whether to exercise shareholder rights and when exercising such rights, including the voting of proxies, to carry out their duties prudently and solely in the interests of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying the reasonable expenses of administering the plan.
  2. A list of obligations that fiduciaries must comply with when making decisions on exercising shareholder rights, including proxy voting, in order to meet their prudence and loyalty duties under ERISA section 404(a)(1)(A) and (B):
    - a. Act solely in accordance with the economic interest of the plan and its participants and beneficiaries considering only factors that they prudently determine will affect the economic value of the plan’s investment;
    - b. Consider the likely impact on the investment performance of the plan based on such factors as the size of the plan’s holdings in the issuer relative to the total investment assets of the plan, the plan’s percentage ownership of the issuer, and the costs involved;
    - c. Not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to any non-pecuniary objective, or sacrifice investment return or take on additional investment risk to promote goals unrelated to the financial interests of the plan’s participants and beneficiaries or the purposes of the plan;
    - d. Investigate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights;
    - e. Maintain records on proxy voting activities and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights; and
    - f. Exercise prudence and diligence in the selection and monitoring of persons selected to advise or otherwise assist with exercises of shareholder rights.
  3. A new provision on proxy voting that explains that fiduciaries must vote proxies only when the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan and are prohibited from voting proxies unless the fiduciary prudently determines that the matter being voted upon would have an economic impact.
  4. A provision that outlines certain “Permitted Practices” under which plan fiduciaries may adopt proxy voting policies and parameters reasonably designed to serve the plan’s economic interest. The proposal would require plan fiduciaries who adopt such policies

or parameters to review them at least once every two years. The proposal includes the following examples:

- a. A policy of voting proxies in accordance with the recommendations of management of the issuer on proposals or types of proposals the fiduciary has prudently determined are unlikely to have a significant impact on the value of the plan's investment.
  - b. A policy that voting resources will focus only on types of proposals that the fiduciary has prudently determined are substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment, such as proposals relating to corporate events (mergers and acquisitions transactions), corporate repurchases of shares, issuances of additional securities with dilutive effects on shareholders, or contested elections for directors.
  - c. A policy of refraining from voting on proposals or types of proposals when the size of the plan's holdings in the stock subject to the vote are below quantitative thresholds that the fiduciary prudently determines, considering its percentage ownership of the issuer and other relevant factors, are sufficiently small that the outcome of the vote is unlikely to have a material impact on the investment performance of the plan's portfolio (or assets under management in the case of an investment manager).
- A new provision under which plan fiduciaries must require that investment managers and proxy voting or advisory firms sufficiently document the rationale for proxy voting decisions or recommendations to demonstrate to the plan fiduciary that the decision or recommendation was based on the expected economic benefit to the plan.
  - The proposal states that Interpretive Bulletin 2016-01, 29 CFR 2509.2016-01, no longer represents the view of the Department on the proper interpretation of ERISA with respect to the exercise of shareholder rights by fiduciaries of ERISA-covered plans, and the Department intends to remove it from the Code of Federal Regulations when a final rule is adopted.
  - The proposal would benefit plans by ensuring that voting resources are expended on matters that have an economic impact on the plan. Cost savings and other benefits to small plans would flow to plan participants and beneficiaries in the form of more secure retirement income.
  - The Department estimates that the incremental costs of these provisions will be small or likely offset by cost savings on a per plan basis because the Department anticipates that most, if not all, plans will adopt policies that utilize the permitted practices and because the activities that would be required under the proposal are already reflected in common best practices. Nonetheless, because such practices are not universal, those plans who do not meet the requirements pertaining to shareholder rights would have to modify their processes.

### **Public Comment Period**

- The proposal has been posted on the Department's website. The comment period runs for 30 days after publication in the Federal Register and the proposal includes instructions on submitting comments through [www.regulations.gov](http://www.regulations.gov). Commenters are free to express views

not only on the provisions of the proposal, but on any issues germane to the subject matter of the proposal.

**Contact Information**

For questions about the proposed rulemaking, contact EBSA's Office of Regulations and Interpretations at 202-693-8500.