U.S. Department of Labor Employee Benefits Security Administration
Washington, D.C. 20210

Technical Release 2026-01

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SUBJECT: APPLICATION OF ERISA FIDUCIARY REQUIREMENTS AND PREEMPTION PROVISIONS TO PROXY ADVISORY SERVICES

I. PURPOSE AND OVERVIEW

This Technical Release provides guidance to plan administrators and other fiduciaries of plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) that rely on proxy advisory services, as well as to state legislators regulating proxy advisory services. It also reminds proxy advisory firms that certain actions that breach ERISA fiduciary duties may result in liability under ERISA.

This Technical Release addresses two issues. First, to the extent proxy advisory firms either: 1) exercise authority or control over shareholder rights attributable to shares that are ERISA plan assets, including the voting of proxies; or 2) provide advice for a fee to ERISA plans about how such plans should exercise proxy voting rights attributable to shares of stock they own, this Technical Release clarifies that such proxy advisory firms must meet ERISA's functional fiduciary requirements.

Second, and relatedly, where a state law mandates disclosure to investors by proxy advisory firms only when they make recommendations *other than for* the purpose of maximizing risk-adjusted return for the advisee, such laws are generally not preempted by ERISA. ERISA fiduciary provisions do not alter this result. ERISA's fiduciary duties require that actions be taken with respect to a plan investor *only for* the purpose of maximizing risk-adjusted financial return. For that reason, no plan governed by ERISA should ever receive a disclosure under such a state disclosure law, and, accordingly, no relationship between that law and any ERISA plan would be created. Consequently, such a state law neither has an impermissible connection with, nor makes a prohibited reference to, ERISA plans, and it generally would not be preempted by ERISA.

These issues are discussed in greater detail below, and their respective application to any particular proxy advisory firm or state law will depend on the relevant facts and circumstances.

II. BACKGROUND

i. PROXY VOTING

Proxy voting generally refers to the practice of casting ballots on behalf of those shareholders of a corporation who may not attend shareholder meetings in person to exercise voting rights appurtenant to their shares. In turn, proxy advisory firms provide advice or recommendations for a fee to shareholders to help inform decisions about how to vote regarding proposals and other

issues decided at shareholder meetings, and, in certain cases, may exercise discretion over the disposition of proxy votes by actually casting votes on behalf of clients.[1]

The Department has long recognized that voting rights and other shareholder rights attributable to shares held by ERISA-governed employee benefit plans are plan assets in their own right. Accordingly, management of those rights is subject to ERISA's fiduciary duties, including the duties of prudence and loyalty. The Department first issued guidance on this topic in the 1980s. For example, a 1988 letter (Avon Letter) noted that "it is the Department's position that the decision as to how proxies should be voted . . . are fiduciary acts of plan asset management."[2]

In 1994, the Department issued its first interpretive bulletin on proxy voting, Interpretive Bulletin 94-2 (IB 94-2).[3] IB 94-2 recognized that fiduciaries may engage in shareholder activities intended to monitor or influence corporate management if the responsible fiduciary concludes that, after taking into account the costs involved, there is a reasonable expectation that such shareholder activities (by the plan alone or together with other shareholders) will enhance the value of the plan's investment in the corporation.

In October 2008, the Department replaced IB 94-2 with Interpretive Bulletin 2008-02 (IB 2008-02).[4] IB 2008-02 stated that fiduciaries' responsibility for managing proxies includes both deciding to vote and deciding not to vote.[5] It further stated that the fiduciary duties described at ERISA sections 404(a)(1)(A) and (B) require that in voting proxies the responsible fiduciary shall consider only those factors that relate to the economic value of the plan's investment and must prioritize the interests of the participants and beneficiaries with respect to their retirement income rather than unrelated objectives. In addition, IB 2008-02 stated that votes shall be cast only in accordance with a plan's economic interests, and further explained that if the responsible fiduciary reasonably determines that the cost of voting (including the cost of research, if necessary, to determine how to vote) is likely to exceed the expected economic benefits of voting, the fiduciary has an obligation to refrain from voting.[6] The Department warned that "[p]lan fiduciaries risk violating the exclusive purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process."[7] The Department also reiterated in IB 2008-02 that any use of plan assets by a plan fiduciary to further political or social causes "that have no connection to enhancing the economic value of the plan's investment" through proxy voting or shareholder activism is a violation of ERISA's exclusive purpose and prudence requirements.[8]

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[1] As used in this Technical Release, the term "proxy advisory firm" includes any entity that offers advice or recommendations for a fee to shareholders on how to vote on corporate proxy ballots (including, but not limited to, board member elections, management proposals, and shareholder proposals), without regard to the form that advice is delivered or whether a particular entity styles itself as a proxy advisory firm.

[2] Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc., 1988 WL 897696 (Feb. 23, 1988) ("Avon Letter").

[3] 59 FR 38860 (July 29, 1994).

[4] 73 FR 61731 (Oct. 17, 2008).

[5] 73 FR 61732.

[6] *Id*.

[7] 73 FR 61734.

[8] *Id*.

In 2016, the Department issued Interpretive Bulletin 2016-01 (IB 2016-01).[9] IB 2016-01 reiterated and confirmed that "in voting proxies, the responsible fiduciary [must] consider those factors that may affect the value of the plan's investment."[10] The preamble to IB 2016-01 also stated that the Department rejects a construction of ERISA that would render the statute's tight limits on the use of plan assets illusory and that would permit plan fiduciaries to use trust assets to promote "myriad public policy preferences" at the expense of participants' economic interests, whether those preferences were promoted through shareholder engagement activities, voting proxies, investment policies, or otherwise.[11]

The Department subsequently addressed proxy voting in regulatory amendments to 29 CFR § 2550.404a-1 (Investment Duties Regulation), which was originally adopted in 1979 to provide guidance on ERISA's fiduciary duty of prudence under ERISA section 404(a)(1)(B) with respect to investments and investment courses of action.[12] In 2020, the Department published two final rules that amended the Investment Duties Regulation, one of which added provisions that address the duties of ERISA fiduciaries with respect to the exercise of shareholder rights (including shareholder engagement and proxy voting), adoption of proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.[13] Nothing in these rules undermined the Department's longstanding view that the management of proxy rights is fiduciary in nature and must be undertaken for the exclusive purpose of maximizing risk-adjusted return on investment in accordance with section 404(a)(1)(A) of ERISA.

In December 2022, the Department published another final rule amending the Investment Duties Regulation.[14] The 2022 final rule made a number of amendments to the 2020 final rules. However, the 2022 final rule also did not undermine the Department's longstanding view that the management of proxy rights is fiduciary in nature and must be undertaken for the exclusive purpose of maximizing risk-adjusted return on investment.

ii. FIDUCIARY STATUS

Advisors who are fiduciaries to an ERISA plan are required to abide by ERISA's duty of loyalty under ERISA section 404(a)(1)(A). In determining whether someone is a fiduciary, ERISA uses a functional test under which individuals or entities engaged in the activities described in the statute are fiduciaries—regardless of whether those individuals or entities formally acknowledge fiduciary status. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993) ("ERISA, however, defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan . . . thus expanding the universe of persons subject to fiduciary duties") (citations omitted). Of particular relevance to proxy advisory firms are ERISA section 3(21)(A)(i) and (ii).

[9] 81 FR 95879 (Dec. 29, 2016).
[10] 81 FR 95879, 95882.
[11] 81 FR 95879, 95881.
[12] 44 FR 37221 (June 26, 1979).
[13] 85 FR 81658 (Dec. 16, 2020).
[14] 87 FR 73822 (Dec. 1, 2022).

ERISA section 3(21)(A)(i) provides that a person is a fiduciary with respect to a plan to the extent he "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). As noted above, the Department has long held the position that shareholder rights attributable to shares that are plan assets are, in turn, plan assets in their own right. Consequently, an entity exercising discretionary authority over the management of those shareholder rights would be a functional fiduciary under ERISA.

ERISA section 3(21)(A)(ii) provides that "a person is a fiduciary with respect to a plan to the extent . . . he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so." 29 U.S.C. § 1002(21)(A)(ii). In 1975, the Departments of Labor and the Treasury promulgated a regulation interpreting the definition of investment advice fiduciary to require a five-part test. Under this five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that; (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and that (5) the advice will be individualized based on the particular needs of the plan.[15]

iii. PREEMPTION

Proxy voting is increasingly the subject of state legislation that may interact with ERISA's preemption provision. ERISA expressly preempts state laws insofar as they "relate to any employee benefit plan described in" ERISA. 29 U.S.C. § 1144(a). But the Supreme Court has explained that the preemption provision's expansive "relates to" language cannot extend "to the furthest stretch of its indeterminacy," because such an interpretation would preempt practically all state laws, as any law could "relate to" ERISA plans in some manner. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., 514 U.S. 645, 655 (1995). As a result, the Court has long held that a state law impermissibly "relates to" an ERISA plan in two circumstances: if it either has a "connection with" or "reference to" such a plan. *Id.* at 656 (*citing Shaw v. Delta Air Lines, Inc*., 463 U.S. 85, 96-97 (1983)). A state law may be preempted under either or both of these prongs. Under either thread, the preemption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Mackey v. Lanier*, 486 U.S. 825, 829 (1988).

Under the first prong, a state law has an impermissible "connection with" ERISA plans if it "governs a central matter of plan administration," thereby "interfer[ing] with nationally uniform plan administration." *Gobeille v. Liberty Mut. Ins Co*., 577 U.S. 312, 320 (2016). In *Travelers*, the Court explained that the purpose of the "connection with" prong was to ensure a uniform body of benefits law and to minimize the burden of complying with conflicting state directives. 514 U.S. at 656-57.

Under the second prong, a state law makes impermissible "reference to" a plan if the law "specifically refers" to ERISA-covered plans, *District of Columbia v. Greater Washington Bd. of*

[15] 29 CFR 2510.3-21(c); 26 CFR 54.4975-9(c)(1).

Trade, 506 U.S. 125, 130 (1992); if it acts "immediately and exclusively" upon ERISA plans, *Cal. Div. of Labor Stds. Enforcement v. Dillingham Const., N.A*., 519 U.S. 316, 325 (1996); or if the existence of ERISA plans is "essential to the law's operation", *id*.

Applying both tests, the Supreme Court has found that ERISA preempts statutes that forbid methods of calculating pension benefits that federal law permits, require employers to provide certain benefits, predicate a state-law cause of action on the existence of an ERISA plan, or single out ERISA plans for special treatment. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814-15 (1997) (collecting cases). But conversely, the Supreme Court has held that ERISA does not preempt laws that require one-time severance payments,[16] PBM rate reimbursement regulations with only incidental effects on ERISA plans,[17] and prevailing wage laws that had a minimal regulatory effect on ERISA-covered plans.[18] The specific function of the state law in question is critical in determining whether it will be preempted by ERISA. Moreover, state laws regulating banking and securities are explicitly carved out from ERISA's preemption provisions under ERISA's savings clause at section 514(b)(2)(A)[19]. 29 U.S.C. § 1144(b)(2)(A).

III. GUIDANCE

i. PROXY ADVISORY FIRMS AS FUNCTIONAL FIDUCIARIES UNDER ERISA

Shareholder rights, including the ability to vote proxies attributable to shares held by ERISA-governed employee benefit plans, are plan assets, and the management of these rights is subject to ERISA's fiduciary duties, including the duty of loyalty. 29 C.F.R. § 2550.404a-1(d)(1) ("The fiduciary duty to manage plan assets that are shares of stock includes the management of shareholder rights appurtenant to those shares, such as the right to vote proxies").

Proxy advisory firms frequently work with plans in a relationship of trust and confidence, providing investment advice about property of the plan. In describing their business model, proxy advisory firms frequently note that developing voting recommendations requires extensive discussions with plans. And, in some instances, the proxy advisory firms retain ultimate discretion and control over the voting policies and/or the casting of votes. The Department reminds and cautions plans and proxy advisory firms that to the extent a proxy advisory firm exercises any authority or control over the exercise of shareholder rights attributable to shares owned by an ERISA-covered plan, the proxy advisory firm will be a functional fiduciary under ERISA section 3(21)(A)(i).

Proxy advisory firms may also be functional fiduciaries under ERISA section 3(21)(A)(ii) by providing investment advice for a fee to plans with respect to property of that plan. In the normal

[16] *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).
[17] *Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020).
[18] *Cal. Div. of Labor Standards Enf't v. Dillingham Constr.*, 519 U.S. 316 (1997).
[19] The savings clause itself contains a carveout in the form of ERISA's deemer clause at section 514(b)(2)(B), which provides that an ERISA-covered plan shall not be deemed to be an insurance company or insurer, bank, trust company, or investment company, for purposes of state law purporting to regulate insurance, banks, trust companies, or investment companies. The deemer clause would not generally be relevant to state regulation of proxy advisory services.

course, proxy advisory firms prepare reports, perform research, and incorporate these materials into advice and proposals for clients, including ERISA clients, on how to exercise their shareholder rights. These practices may be a generalized policy or specific to each individual transaction or client.

Whether a proxy advisory firm is a fiduciary under the Department's five-part test in the 1975 regulation would be determined by the application of the test to the particular facts and circumstances of the proxy advisory firm in question. As noted above, under this five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that; (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and that (5) the advice will be individualized based on the particular needs of the plan.[20]

It is the view of the Department that, in general, proxy advisory services concerning how to exercise shareholder rights based on the particular needs of an ERISA-covered plan on an ongoing basis, if rendered for a fee pursuant to a mutual understanding, will ordinarily satisfy the five-part test, though the ultimate analysis depends on the facts and circumstances.

The existence of a contractual arrangement between a plan and a proxy advisory firm that the advisory firm will provide investment advice regarding plan assets for a fee may be a relevant factor in determining whether there is a mutual understanding between the parties that the advice will serve as a primary basis for investment decisions. Further, the Department reminds and cautions both plans and proxy advisory firms that mere written disclaimers of such understanding are not necessarily determinative. Where there is ambiguity in a contractual relationship, whether the five-part test is satisfied will depend on the specific facts of the service arrangement.

ii. STATE LAW PREEMPTION

Proxy advisory services have drawn increasing attention from state legislatures in recent years as regulators seek to protect the financial wellbeing of shareholders by limiting or regulating the use of non-financial objectives in securities recommendations or investment advice by financial advisors, including proxy advisory firms. Because proxy advisory firms include ERISA-covered plans among their clients, the Department believes it is important to offer guidance regarding the interaction of state regulation with ERISA's express preemption clause at section 514(a).

Whether any state law is preempted depends on the specific facts and parameters of the law in question. However, it is the view of the Department that, generally, a mere requirement to include disclosures to all of its investor clients when a firm's research or recommendations take non-financial factors into consideration that covers only proxy advisory firms, does not, in and of itself, have any impact on plan administration implicating "connection with" preemption. While the Supreme Court has held that ERISA's preemption provision "displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive

[20] 29 CFR 2510.3-21(c); 26 CFR 54.4975-9(c)(1).

requirements,"[21] not all state laws which touch upon plan service providers are preempted. And in the case of a law like the one described above, it is nonconvergent with ERISA or plans governed by ERISA. A proxy advisory firm covered by such a law is not permitted to come within its ambit when providing services to an ERISA plan because ERISA imposes even stronger consumer protections in the form of fiduciary protections, including a bar on taking into account anything other than the exclusive purpose of providing benefits to participants and beneficiaries by maximizing risk-adjusted returns—since such a law creates an obligation to provide disclosure only when offering nonfinancial advice (that is, advice based on considerations other than maximizing risk-adjusted returns). In other words, no proxy advisory firm providing advice regulable by the state law in question would ever be required to make any disclosure or take any act with respect to any ERISA plan—because the advisor's fiduciary duties under ERISA would preclude it from acting in a way that would trigger disclosure (providing nonfinancial advice) under such a law.[22] Moreover, when such laws apply equally to all of an advisory firm's clients, such laws plainly do not depend on the existence of an ERISA plan to begin with.

The Department cautions, however, that whether any particular state law is preempted inherently depends on the specifics of that particular law.

[21] *Mackey v. Lanier*, 486 U.S. 825, 829 (1988).

[22] Consequently, this is consistent with the Supreme Court's decision in *Gobeille v. Liberty Mut. Ins Co*., 577 U.S. 312, 319 (2016), which held that ERISA's regulation of "reporting, disclosure, and recordkeeping requirements" are the exclusive domain of federal law. *Id.* at 321. In finding Vermont's health reporting and disclosure law preempted, the Court highlighted the law's impact on plan recordkeeping, and the requirement on *plans* to report information on claims and plan members. *Id.* at 324. A law of general application that imposes disclosure duties on commercial actors with no obligations on or to ERISA-covered plans would not implicate these concerns.