MAJORITY OF PUBLIC COMMENTS OPPOSE DOL PROPOSAL CURTAILING SHAREHOLDER VOTING RIGHTS IN ERISA RETIREMENT PLANS

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INTRODUCTION

On August 31, 2020, the U.S. Department of Labor (DOL) Employee Benefits Security Administration issued a Notice of Proposed Rulemaking (NPRM) titled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights."[1] This followed upon the June 30, 2020 NPRM titled "Financial Factors in Selecting Plan Investments,"[2] known in the industry as "the ESG investing rule.

This second, more recent DOL proposal amends the "Investment duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), to confirm that ERISA plan fiduciaries do not have to vote every proxy, that they must meet a six-part test and perform a cost-benefit analysis for each proxy vote to determine whether and how to vote, and that they must vote a proxy only where the matter could have an economic impact on the plan. The proposal allows plan fiduciaries to model proxy voting policies and guidelines after the DOL's three suggested "permitted practices," which include voting with management on proposals unlikely to have a significant impact on the value of the plan's investment and refraining from voting unless the plan's holding of the company exceeds a quantitative threshold.

The proposal doubles down on DOL's widely opposed ESG investing rule first proposed in June, ignoring the value to plan beneficiaries of incorporating environmental and social considerations in investment, engagement, and proxy-voting decisions. Earlier this year we published the results of an examination of public comments on the ESG investing rule, which found that more than 95% of the comments opposed the proposed rule.[3]

As investment professionals who care about good public policy and whose organizations are invested in ensuring market integrity and investor protection, we wanted to examine the comment file and publish the results to contribute to the public discussion on this

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[1] 85 Fed. Reg. 55219 (September 4, 2020)

[2] 85 FR 39112 (June 30, 2020).

[3] Julie Gorte, Jon Hale, Bryan McGannon, Georges Dyer, Billy Gridley, Brandon Rees, Josh Zinner. "Public Comments Overwhelmingly Oppose Proposed Rule Limiting the Use of ESG in ERISA Retirement Plans" (August 20, 2020), available at https://www.ussif.org/Files/Public_Policy/DOL_Comments_Reporting_FINAL.pdf

important matter, especially as DOL and other regulatory agencies race to finalize "midnight rulemakings" prior the swearing-in of a potentially new administration in January 2021.

Once again, this NPRM drew keen public interest: 318 comment letters were submitted during the brief comment period, including several petition letters signed by thousands of individuals. More than a third of the comments originated from investors, investment managers and the financial services industry, the majority of whom overwhelmingly opposed the proposal: *96% of asset managers and investment advisers; 97% of investor organizations, multiemployer plans and labor unions; and 91% of financial services providers opposed the rule. Excluding individual comment letters, nearly 70% of all commenters opposed the rule. See Table 1 for a breakdown of comment letters by originator.*

Among notable commenters opposing the proposal are the Council of Institutional Investors, a nonprofit and nonpartisan association whose members' combined global assets exceed $4tn and whose associate members include a range of asset managers with more than $40tn in assets under management; the world's largest asset managers with combined assets under management of nearly $25tn (BlackRock, Vanguard Group, Fidelity Investments, State Street Global Advisors (SSGA), T. Rowe Price, TIAA, Wellington Management, AllianceBernstein),[4] of whom four are in the top 10; the world's largest proxy advisory and agent firms (Institutional Shareholder Services (ISS), Glass Lewis, Segal Marco Advisors, ProxyVote Plus); as well as leading industry associations like the Securities Industry and Financial Markets Association (SIFMA), the Investment Advisers Association (IAA) and the Investment Company Institute (ICI).

Our findings show the majority of filers agree the proposal is out of step with the realities of investor stewardship, poses material financial risk to retirement plan participants and beneficiaries, risks plan managers breaching their fiduciary duty, and undermines the integrity of U.S. capital markets. Significantly, many commenters were alarmed that the proposal is driven by unfounded skepticism of the value of active ownership, including shareholder engagement and proxy voting; and that the proposal's "solution in search of a problem" curtails meaningful exercise of the rights appurtenant to a security, namely by raising the regulatory burden to the point of effectively suppressing proxy voting. Simply put, many commenters saw the proposal as incompatible with U.S. corporate suffrage.[5]

Further, many commenters expressed great concern with the short 30-day comment period and the lack of opportunity for a public hearing on a matter of significant and growing interest to investors and retirement-plan participants and beneficiaries. They also opposed,

[4] Based on ADV Ratings (October 20, 2020), available at https://www.advratings.com/top-asset-management-firms

[5] We note that the Supreme Court has emphasized, "Fair corporate suffrage is an important right that should attach to every equity security bought on a public exchange." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970), *quoting* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13-14 (1934).

and many questioned the legality of, a 30-day effective period for a proposal of this magnitude.

A substantial portion of commenters questioned whether the proposal would withstand scrutiny under the Administrative Procedure Act, raising concerns about the lack of evidentiary support, including hard data, to justify the proposal and accurately assess its costs and benefits, as well as about the proposal's vague and contradictory requirements. Our report provides an overview of our methodology, the results of our findings, highlights from select comment letters, and key takeaways from comments opposing the NPRM.

Table 1: Breakdown of Comments Analyzed by Originator and Position

Commenter Type	In Favor	Mixed	Neutral/Make Changes	Opposed	Grand Total	% Opposition	% In Favor	Extension Request
Academic/Think Tank	20	—	—	7	27	**26**	**74**	—
Asset Manager/Owner/Advisor	2	—	—	46	48	**96**	**4**	1
Company	5	—	—	—	5	**0**	**100**	—
Financial Service Provider	—	—	1	10	11	**91**	**0**	—
Investor Organization	1	—	—	18	19	**95**	**5**	4
Labor Union/Multi-Employer Plan	—	—	—	13	13	**100**	**0**	2
Public Official	6	—	—	22	28	**79**	**21**	—
Trade Association	6	—	1	5	12	**42**	**50**	1
Other	19	2	—	7	28	**25**	**68**	—
Grand Total	**59**	**2**	**2**	**128**	**191**	**67**	**31**	**8**

DATA & METHODOLOGY

Our research proceeded in four steps:

1. We downloaded all 318 comment letters and two petitions from Regulations.gov.

2. Next, we assigned each comment to one of 10 commenter types, ranging from investor organizations to asset managers and public officials. We did not include in our examination letters submitted by individual commenters, leaving a total of 9 commenter types and 179 comment letters.

   We then removed extension requests and duplicates, counted each signature on multi-signatory comment letters submitted by public officials as one comment, which left a total of 191 comment letters.

   We note that the comment file also comprises petitions, one of which garnered more than 6,700 signatures (see petition from Green America) and which heavily skews individual comment letters against the proposal.

3. We characterized each comment as being in favor of or opposed to the NPRM, as well as those that took neutral or mixed positions.

   See Table 1 for a breakdown of comment letters examined.

4. Finally, we noted key takeaways found in the opposing comments, which we highlight in the final section of the report.

FINDINGS

Overall, 70% of Comments Oppose the Proposed Rule

We found the comments overall to be overwhelmingly opposed to the NPRM, with 67% of commenters expressing their opposition (128 of 191 comments), 31% expressing their support, and 2% expressing neutral or mixed views or recommending changes without clearly expressing support or opposition.

- **Comments from Investor Organizations: 97% opposed**
  Nearly 20% of the commenters (32 out of 191) represent investor organizations, multiemployer plans and labor unions. Among this group of sophisticated investors, opposition was nearly unanimous, with only one in 32 comments in favor. 95% of investor organizations and 100% of multiemployer plans and labor unions opposed the rule.

  Notable commenters include the Council of Institutional Investors (CII), a nonprofit and nonpartisan association whose members' combined global assets exceed $4tn; the International Corporate Governance Network (ICGN) whose members represent $19tn AUM; and the National Coordinating Committee for Multiemployer Plans (NCCMP), the only national organization devoted exclusively to protecting the interests of the job-creating employers of America and the more than 20 million active and retired American workers and their families who rely on multiemployer retirement and welfare plans.

  The Ceres Investor Network includes over 175 institutional investors, managing more than $30tn in assets. US SIF members represent more than $3tn in assets under management or advisement. Impax Asset Management manages and advises on more than $5.5bn in AUM.

  In contrast, companies that support the NPRM included Mercator Energy, Canary, ndp | analytics, and Cameron Stuart Associates.

- **Comments from Fund Managers, Investment Advisers: 96% opposed**
  Asset managers, investment advisers and asset owners represent 25% of the commenters. Among this group of professional investment managers, 96% expressed opposition to the proposed rule; only 2 out of 48 comment letters supported the proposal, one of which came from a private equity firm.

  Notably, the top three largest asset management firms (BlackRock, The Vanguard Group, State Street Global Advisors) opposed the NPRM, as did the Elliott Management Corporation, one of the largest activist funds. Other asset managers opposing the proposal included T. Rowe Price and Fidelity.

  The Investment Advisers Association (IAA) and the Investment Company Institute (ICI), representing SEC-registered investment adviser and mutual fund industries, also opposed the NPRM, as did the Securities Industry and Financial Markets Association

(SIFMA), an industry trade group representing securities firms, banks, and asset management companies. CFA Institute, an association with more than 80,000 U.S.-based investment analysts, advisers, portfolio managers, and other investment professionals also opposed the NPRM.

In contrast, trade associations that supported the proposal included the U.S. Chamber of Commerce and the National Association of Manufacturers (NAM).

- **Comments from Financial Services and Proxy Advice Providers: 91% opposed**
  Companies providing independent data, research and proxy advisory services overwhelmingly opposed the NPRM. Proxy advisory service providers included Institutional Shareholder Services, Glass Lewis, Segal Marco Advisors, ProxyVote Plus and Egan-Jones Proxy Services. Other commenters included MSCI and Morningstar, a leading provider of independent investment research.

- **Comments from Public Officials: 79% opposed**
  Public officials submitted a total of nine comment letters, some of which included up to 20 signatories. When examined by signature count, there were a total of 22 public officials who opposed the NPRM and 6 who supported it.

  Notably, SEC Commissioners Allison Lee and Caroline Crenshaw opposed the proposal; as did 20 Members of Congress, including Sen. Patty Murray, Ranking Member of the Senate HELP Committee; Rep. Bobby Scott, Chair of the House Education & Labor Committee; Rep. Maxine Waters, Chair of the House Financial Services Committee; Sen. Sherrod Brown, Ranking Member of the Senate Banking Committee; and Sen. Ron Wyden, Ranking Member of the Senate Finance Committee.

  Public officials who supported the proposal included West Virginia House Delegate Dianna Graves, Chair of the Pensions & Retirement Committee; Minnesota State Representative Tony Albright; Colorado State Senators Bob Rankin and Jack Tate; and Colorado State Representative Matthew Soper.

Key Takeaways from the Opposing Comments

Taken as a whole, we characterize the main points in opposition to the NPRM made in various comment letters, as follows:

1. **The NPRM misrepresents existing market practices and value of shareholder engagement, proxy voting.**

The proposal turns on a belief that there is "mixed evidence on effectiveness of shareholder voting;" that environmental and social shareholder proposals "have little bearing on share value or other relation to plan interests;" and that some plans "expend their assets unnecessarily on matters not economically relevant to the plan." The majority of commenters disagree:

SEC Coms. Lee and Crenshaw: "Shareholder engagement and oversight, including proxy voting by plan fiduciaries can focus the attention of corporate managers and drive valuable and needed change on this and many other critical issues. Regulators should be wary of stifling this kind of engagement."

Members of the U.S. Senate and House of Representatives: "Engagement with Management is Critical in Meeting ERISA's Fiduciary Obligations…. While many of the shareholder votes are advisory and a vote may not even garner a majority, this engagement has been recognized as a critical part of corporate governance and sends an important signal to corporate management about shareholder views. Being engaged and focused on increasing value is a hallmark of responsible ownership."

Fidelity: "The process of proxy proposals often leads to further engagement with, and transparency by, the issuer, which can lead to enhanced disclosures and management of risks by issuers, resulting in increased value of investments over the long term."

Glass Lewis: "DOL ignores the economies of scale that plans can achieve by delegating voting to asset managers, which, in turn, receive research and execution assistance from proxy advisors across their accounts."

NCCMP: "The SEC explicitly recognizes that shareholder votes influence the governance of the issuers and that these votes 'significantly affect the future of corporations, and, as a result, the future value of corporate securities.'"

AllianceBernstein: "…we believe proxy voting provides pecuniary value for shareholders as a mechanism to enforce accountability on corporates and create long- term shareholder value….As an ancillary benefit from proxy voting, engagement has become a more accessible tool for shareholders to drive meaningful economic governance changes as companies discovered that having a proactive dialogue prevents shareholder proposals that may highlight their gap in areas like climate risk management."

Trillium Asset Management: “…it is abundantly clear that “mainstream” financial institutions have concluded that ESG factors are a useful tool in building and providing portfolios that provide competitive risk-adjusted returns.”

2. **The NPRM harms plan participants and fiduciaries, effectively disenfranchises plan participants.**

Vanguard: “Curtailing Proxy Voting by ERISA Fiduciaries Will Harm Plan Participants and Beneficiaries.”

SEC Coms. Lee and Crenshaw: “…costs will be borne directly by fiduciaries and indirectly by the plans they manage.”

CII: “Proposed Rule demonstrates an unwarranted prejudice against fiduciaries’ exercise of shareholder rights and would impose such burdensome obligations on fiduciaries that ERISA plans would be effectively disenfranchised.”

International Union of Bricklayers and Allied Craftworkers: the proposal “will create unnecessary and burdensome barriers that will disenfranchise pension and employee benefit plans from voting proxies in the interests of plan participants and beneficiaries.”

Wellington Management: “In addition to increased costs, we are concerned that the Proposed Regulation would serve to disenfranchise ERISA plans from voting proxies….given the myriad of factors than can affect the value of an investment over time, there may or may not be a demonstrable correlation between a specific vote to support a split Chairman/CEO and the issuer’s investment returns over the short- or even medium-terms. Conditioning proxy voting on such a nebulous analysis will create a chilling effect on ERISA plan fiduciaries who would otherwise benefit from exercising their rights as shareholders.”

UN PRI: “The analytical processes set forth in the Amendments are incoherent and would require fiduciaries to consider factors that are undefined or clearly not relevant to economic impact.”

3. **The NPRM raises the regulatory burden, including time, costs and resources associated with shareholder engagement and proxy voting.**

BlackRock: “As drafted, the Proposal creates an overly prescriptive and burdensome standard that would deter plan fiduciaries from voting proxies even when they prudently determine that their votes are likely to have an economic impact on the plan.”

SSGA: “…the Proposed Rule would increase, rather than decrease, costs for ERISA plans, further eroding the long-term value that U.S. plan participants and their beneficiaries are able to realize.”

SIFMA: "…rather than reducing expenses, the Proposed Regulation will force plans to incur additional costs associated with thoroughly analyzing and documenting the costs and benefits of each proxy vote to determine whether there is an economic benefit to voting—this analysis itself will be more expensive than the current costs related to proxies."

Groom Law, on behalf of investment and administrative services clients: "…given that following the Department's 'permitted practices' do[es] not yield meaningful relief from fiduciary liability, the Group believes that the Department's economic analysis substantially underestimates the compliance costs attendant to establishing and implementing these procedures. Thus, while the Proposal appears to have been designed to ease proxy voting burdens and reduce related expenses, as drafted, the Proposal will have the opposite effect. Plan expenses related to proxy voting compliance will substantially increase."

Teachers Insurance and Annuity Association of America (TIAA): The proposal "would serve to make the proxy voting process even more costly and burdensome for plan fiduciaries – so much so that we anticipate many plan fiduciaries would be deterred from voting their plan proxies altogether, which could be a violation of their fiduciary obligations. In particular, we believe it is extremely unrealistic to expect plan fiduciaries to meet the six standards described in the Proposed Rule with respect to every proxy they are eligible to vote. And we question whether it is even possible for a plan fiduciary to ascertain the economic impact of every proxy vote in a detailed way that can be documented and articulated to the DOL, if necessary."

ProxyVote Plus: "The Proposed Rule reverses over thirty years of consistent DOL interpretive guidance on proxy voting and substitutes a presumption against fiduciaries' exercising their rights and fulfilling their duties under federal law and state corporate law to vote proxies on behalf of the participants and beneficiaries covered by ERISA plans. It takes a system that functions well and substitutes a new one that creates an expensive and confusing set of obligations that must be performed in order to justify exercising proxy voting rights. The DOL does this by hastily issuing a regulation without persuasively articulating why this 180-degree shift is necessary or in the interests of those it is charged with protecting."

4. **The NPRM cannot withstand scrutiny under the Administrative Procedures Act.**

    a. **Lacks evidentiary basis.**

SEC Coms. Lee and Crenshaw: "…the Proposed Rule does not provide objective quantitative or qualitative evidence of the problem it is intended to address."

Elliott Management: "The Department's asserted concerns about proxy voting costs are entirely theoretical, and rely on mere conjecture that "actual total proxy voting costs could be substantially higher" and that 'costs may not be justified.'"

T. Rowe Price: "The Department's unsubstantiated fears do not justify imposition of an expensive, new regulatory requirement that will impose significant added costs on plans and plan fiduciaries."

Glass Lewis: "…the SEC's actions do not provide any rational reason for DOL to impose further, different obligations on asset managers that are ERISA fiduciaries."

ISS: "…the Department fails to explain how it has the right to override state corporation laws which reflect a clear determination that shareholder voting does have value….The proposed rule is arbitrary and capricious for the additional reason that it singles out asset management decisions regarding shareholder rights for special treatment without a rational basis to do so."

CII: "In our experience, plan fiduciaries generally understand that voting proxies is a fiduciary obligation that must be carried out taking into consideration the costs and benefits to the plan. DOL offers no data, oversight experience, or other evidence that fiduciaries are voting proxies inappropriately."

TIAA: "We also question whether the DOL has conducted a sufficiently thorough analysis to fully understand the costs associated with proxy voting under the current regulatory regime, and the ways in which the Proposed Rule might impact those costs."

b. 30-day comment period and 30-day effective date are insufficient and underestimate significance of proposal.

T. Rowe Price: "The proposed effective date 30 days after publication of a final rule does not allow adequate time for plan fiduciaries or investment managers to arrange the staff and resources necessary to implement the rule…. Such an effective date is powerful evidence that the Department has not understood the implications of its proposed rule and the challenges of compliance."

Glass Lewis: "…Congressional Review Act provides that a major rule shall not be effective earlier than 60 days after publication of the final rule in the Federal Register."

In a letter requesting extension of the comment period and representative of many commenters' concerns with the short comment period, American Bankers Association, American Council of Life Insurers, Defined Contribution Institutional Investment Association Insured Retirement Institute, Investment Adviser Association, Investment Company Institute, Securities Industry and Financial Markets Association, SPARK Institute: "Proposed changes to this regulation have not received significant prior input…. The Department has never sought public input (nor input from the ERISA Advisory Council) on the question of proxy voting and the exercise of shareholder rights."

Notably, the Chamber of Commerce, which supports the NPRM, also acknowledged the short effective period: "… 30 day effective date does not provide sufficient time for a major regulations that would require plan fiduciaries to review and revise their current proxy voting policies, service provider contracts, service provider monitoring and overall processes and procedures as well as for service providers to engage and educate their clients and make appropriate customization to contracts and communications. At a minimum, plans would need at least six to 12 months to comply."

c. Creates unintended consequences.

SSGA: "…the Proposed Rule would, to the detriment of ERISA plan beneficiaries, reduce plan voting activity and shift influence to other investors that may not have the long-term, sustainable value creation objectives of most plan beneficiaries."

Segal Marco: "Market concentration among the largest three passive investment managers would make them the only likely candidates to vote on proxies for U.S. publicly traded companies if the standard became only those investors with a five percent stake or above should vote."

Wellington Management: "…these increased costs could result in fewer products and strategies available to ERISA plan investors. The increased compliance costs associated with the Proposed Regulation could serve as a disincentive for investment managers to accept ERISA plans as clients, at least for equity strategies. Investment managers, concerned about the incremental costs, could determine not to offer equity strategies to ERISA plans. As equity strategies are critical components of a long-term portfolio (especially for younger participants), limiting the universe of products available to ERISA plans would adversely impact their ability to maximize their beneficiaries' financial returns."

BMO Global Asset Management: "We are concerned that the Proposal will not only be detrimental to ERISA plans, which will be disenfranchised due to the unique new burdens they will face under the Proposal, but also to the broader U.S. capital markets as the proportion of engaged advocates of best practice is reduced."

SIFMA: "By regulating in a manner that restricts, or at a minimum, calls into question, fiduciaries' abilities to vote proxies (even where they believe a vote could positively impact long-term value, but are challenged in objectively determining and documenting this value), the Department is removing potential opportunities for ERISA investors to have a say on issues that could affect their investment returns and hold management responsible to the needs and concerns of their investors."

[i] Impax Asset Management LLC, the North American division of Impax Asset Management Group and investment adviser to Pax World Funds. Impax Asset Management manages and advises on more than $5.5bn in assets under management (AUM). Impax offers listed and private equity strategies to institutional clients. It has a long track record as a pioneer in sustainable investing.

[ii] Morningstar Research Services, LLC offers retirement plan, asset management, and financial advisory services. Morningstar is a leading provider of independent investment research and the world's largest provider of mutual fund data and ratings. Morningstar has a long history of advocating for transparency in global financial markets.

[iii] US SIF: The Forum for Sustainable and Responsible Investment is the leading voice advancing sustainable investing across all asset classes. US SIF members, comprised of investment management and advisory firms, mutual fund companies, asset owners, research and data firms, financial planners, advisors and broker-dealers, represent more than $3tn in assets under management or advisement. US SIF members integrate environmental, social and governance factors ("ESG") into their investment decisions and take their responsibilities seriously as shareowners, including voting proxies and engaging with companies.

[iv] Ceres is a nonprofit organization working with institutional investors and companies to build sustainability leadership and drive solutions throughout the economy. Ceres supports the Investor Network on Climate Risk and Sustainability, which consists of over 175 institutional investors managing more than $30tn in assets, who advance leading investment practices, corporate engagement strategies, and policy and regulatory solutions to address sustainability risks and opportunities. Ceres has worked closely with institutional investors since our founding in 1989, and with an expanding group of investors since the founding of our Investor Network 17 years ago.