

October 5, 2020

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Ave, NW, Room N-5655  
Washington DC 20210  
*via Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov)*

**Re: Proxy Voting and Shareholder Rights NPRM–RIN: 1210–AB91**

Dear Department of Labor,

Plan Sponsor Council of America (PSCA), a part of the American Retirement Association appreciates the opportunity to provide our comments on the Department of Labor’s (DOL’s) proposed rule relating to Fiduciary Duties Regarding Proxy Voting and Shareholder Rights (Proposal).<sup>1</sup> As explained in further detail below:

- **PSCA believes that existing guidance regarding ERISA duties with respect to securities held by ERISA plans adequately informs fiduciaries regarding their responsibilities relating to the exercise of shareholder rights.**
- **PSCA is concerned that “giving fiduciaries clear directions”<sup>2</sup> for carrying out their duties contravenes ERISA principles.**
- **PSCA is concerned that the Proposal would increase litigation risks for plan sponsors and plans.**

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PSCA is a diverse, collaborative community of employee benefit plan sponsors, working together on behalf of millions of employees to solve real problems, create positive change, and expand on the success of the employer-sponsored retirement system. With members representing employers of all sizes, we offer a forum for comprehensive dialogue. By sharing our collective knowledge and experience as plan sponsors, PSCA also serves as a resource to policymakers, the media, and other stakeholders as part of our commitment to improving retirement security for millions of Americans.

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<sup>1</sup> 85 Fed. Reg. 55219 (Sept. 4, 2020).

<sup>2</sup> See News Release, “U.S. Department of Labor Proposes Rule on Employee Benefit Plan Proxy Voting and Exercises of Other Shareholder Rights” (Aug. 31, 2020), at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200831>.

PSCA appreciates the DOL’s commitment to safeguarding the security of retirement and other workplace-related benefits of America’s workers and their families. We share this goal and look forward to working with the DOL on rules that protect the value of plans’ investments and the interests of participants and beneficiaries in their retirement income.

### Discussion

The Proposal would amend the “investment duties” regulation (29 CFR § 2550.404a-1) regarding the prudence and exclusive purpose duties under sections 404(a)(1)(A) and 404(a)(1)(B) of ERISA in the context of proxy voting and other exercises of shareholder rights by ERISA fiduciaries. Generally, under the Proposal, where there is an issue under consideration for vote by shareholders, plan fiduciaries must consider its economic significance for the plan’s investment, research all material facts, and determine if the vote would have an economic benefit to the plan. After taking the costs into account, the fiduciary must vote a proxy if the issue could have an economic impact on the plan, but must not vote a proxy if the matter would not have an economic impact on the plan. That is, “the expenditure of plan resources is generally warranted only when proposals have a meaningful bearing on share value or when plan fiduciaries have determined that the interests of the plan are unlikely to be aligned with the positions of a company’s management.”<sup>3</sup>

PSCA’s primary concern with the Proposal is that it is not needed. Existing guidance regarding fiduciaries’ duties relating to securities held in portfolios of ERISA retirement plans, including proxy voting policy and other legal rights of a shareholder, provides clear principles informing fiduciaries’ understanding of their obligations. The experience of our members does not comport with the Department’s assertion that “aspects of [existing DOL] guidance and letters may have led to some confusion or misunderstandings” regarding the voting of proxies by fiduciaries.<sup>4</sup> Rather, PSCA members generally believe that ERISA plan fiduciaries consistently “execute their ERISA duties in an appropriate and cost-efficient manner when exercising shareholder rights.”<sup>5</sup>

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<sup>3</sup> 85 Fed. Reg. at 55231.

<sup>4</sup> See News Release, “U.S. Department of Labor Proposes Rule on Employee Benefit Plan Proxy Voting and Exercises of Other Shareholder Rights” (Aug. 31, 2020), at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200831>.

<sup>5</sup> 85 Fed. Reg. at 55225.

Importantly, we believe that DOL’s “concerns” and “reason to believe” that the Proposal is warranted merit reconsideration as a basis for its promulgation. By its own description, DOL “does not have supporting data for some key assumptions and estimates” of the Proposal<sup>6</sup> and its economic assessment is subject to uncertainty because it “lacks complete data on plan’s exercise of shareholder rights appurtenant to stock holdings, including proxy voting activities, and the attendant costs and benefits.”<sup>7</sup> Notwithstanding, the DOL asserts that proxy voting guidance to date has resulted in fiduciaries incurring proxy voting costs to plans unnecessarily<sup>8</sup> and acknowledges that the costs of proxy voting may not be fully understood.<sup>9</sup> Among other things, the Proposal casts costs borne by the issuer as a result of voting and engagement as costs to the plan.<sup>10</sup> The Proposal also suggests that opportunity costs are a relevant consideration, though it is unclear how a fiduciary could quantify or even assess any such costs.

PSCA also is concerned that by “giving fiduciaries clear directions” on matters related to carrying out their duties with respect to proxy votes, the Proposal contravenes ERISA principles. It is well-established that whether the actions of plan fiduciaries meet ERISA’s general fiduciary requirements is an “inherently factual” determination in almost any situation. Yet the “specific standards” of Paragraph (e)(2) of the Proposal, which fiduciaries must meet when deciding on exercises of shareholder rights, prescribe considerations for fiduciaries “which could in some cases be resource-intensive [and] may often burden fiduciaries out of proportion to any potential benefit to the plan.”<sup>11</sup>

Finally, PSCA is concerned that the Proposal’s prescriptive approach increases litigation risks for plan sponsors and plans themselves. While specifying the considerations fiduciaries must make while considering exercises of shareholder rights as a means to meet their duties of prudence and loyalty, it does not address the increased risks of second-guessing by participants. We believe that a straightforward principles-based process for evaluating whether to exercise shareholder rights is more consistent with ERISA prudence.

## Conclusion

PSCA very much appreciates the DOL’s commitment to safeguarding the workplace retirement savings plans of America’s workers. We share this goal and looks forward to working with the DOL on this rulemaking. PSCA would welcome the opportunity to discuss these issues with

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<sup>6</sup> *Id.* at 55233.

<sup>7</sup> *Id.* at 55233.

<sup>8</sup> *Id.* at 55221.

<sup>9</sup> *Id.* at 55229.

<sup>10</sup> *Id.* at 55224.

<sup>11</sup> *Id.* at 55225.



you. Please feel free to contact Allison Wielobob, General Counsel, at [AWielobob@USARetirement.org](mailto:AWielobob@USARetirement.org). Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM  
Executive Director/CEO  
American Retirement Association

/s/ Will Hansen, Esq.  
Executive Director  
Plan Sponsor Council of America

/s/ Allison Wielobob  
General Counsel  
American Retirement Association