GLASS LEWIS

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*; RIN 1210-AC03

Dear Acting Assistant Secretary Khawar:

Thank you for the opportunity to comment on "*Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*," the proposed rules recently issued by the Employee Benefits Security Administration of the Department of Labor ("DOL").

Glass, Lewis & Co., LLC ("Glass Lewis") applauds DOL for revisiting the amendments made late in the last Administration to ERISA's investment duties regulation and strongly supports the proposed changes. Glass Lewis' primary business consists of providing research and advice to investors, including retirement plan fiduciaries, to enable them to effectively and efficiently make and execute proxy voting decisions. As such, we appreciate the importance of retirement plan fiduciaries' managing plan assets, including voting and other shareholder rights, in the best interest of their plan participants.

Regrettably, however, the political origins, rushed process and substance of the rules adopted last year suggest that they were not a genuine effort to advance the interests of plan participants. Instead, they seemed to be a concession to certain companies that wished to curtail investors' considerations of ESG factors and to bias them against exercising their basic rights as shareholders. The proposed changes would eliminate the unwarranted skepticism of ESG considerations and proxy voting that pervaded the last rulemaking and free up fiduciaries to again act in the best interest of their plan participants. We encourage DOL to adopt the proposed changes expeditiously.

I. Background

A. Glass Lewis

Founded in 2003, Glass Lewis is a leading independent proxy advisor. As a proxy advisor, Glass Lewis provides proxy research and vote management services to institutional investor clients throughout the

world. While, for the most part, investor clients use Glass Lewis research to help them make proxy voting decisions, these institutions also use Glass Lewis research when engaging with companies before and after shareholder meetings. Further, through Glass Lewis' web-based vote management system, Viewpoint, Glass Lewis provides investor clients with the means to receive, reconcile, and vote ballots according to custom voting guidelines and record-keep, audit, report, and disclose their proxy votes.

Glass Lewis serves more than 1,300 institutional investor clients -- primarily public pension funds, mutual funds and other institutions that invest on behalf of individual investors and have a fiduciary duty to act, including through proxy voting, in the best interests of their beneficiaries. In 2020, Glass Lewis issued over 27,000 proxy research reports on over 21,000 companies headquartered in 87 countries around the globe.

A significant majority of Glass Lewis' clients today have their own custom voting policies. Glass Lewis helps these clients implement their policies by applying them to the circumstances presented by companies in their proxy statements and recommending how they vote accordingly. During the policy formulation process, an institution will review Glass Lewis' policies to assess the similarities and differences between the institution's views and Glass Lewis' "house policy." Glass Lewis engages extensively with institutional investors and aims to have policies that reflect the views of its clients. Accordingly, it is not uncommon for an investor client to elect to implement the same policy as Glass Lewis for some of the issues up for vote. Some Glass Lewis customers employ hybrid policies. Vote decisions of hybrid policy clients may be based on a combination of recommendations generated by the client custom policy, the Glass Lewis house policy, and issues that were "referred" for case-by-case analysis by the customer.

Glass Lewis also executes votes on behalf of investor clients in accordance with the specific instructions of those clients. Whether customers elect to receive vote recommendations according to a custom policy, a hybrid policy, or the Glass Lewis house policy, they control when and how votes are cast. To that end, Glass Lewis implements client voting policies on its vote management system so that each ballot populates with recommendations based on the specific policies of the client, enabling the client to submit votes in a timely and efficient manner. (Under no circumstance is Glass Lewis authorized to deviate from a client's instructions or to determine a vote that is not consistent with the policy specified by the client.) When a preliminary ballot is ready for review, the voting system will alert the client and provide such client with relevant disclosures and other information needed to review and evaluate the matters up for a vote. Clients can choose to restrict the submission of a ballot until after their authorized personnel have reviewed and approved the votes. Clients can also make — and often do make — changes to their preliminary ballots before signing off. And, assuming the voting deadline has not passed, they can even change their votes and resubmit them. Customers are responsible for designing and managing their vote management preferences, as well as assigning review and voting rights to users. Glass Lewis is responsible for ensuring that voting is conducted in accordance with customer instructions.

B. The Role of Proxy Advisors

Glass Lewis believes that proxy advisors play an important support role, providing resources and technical, subject-matter expertise to help institutional investors meet their fiduciary responsibility to vote securities on behalf of their participants and beneficiaries in a cost-effective way. As the U.S. Securities and Exchange Commission ("SEC") has explained, "When making voting determinations on behalf of clients, many investment advisers retain proxy advisory firms to perform a variety of functions and services…. Contracting with proxy advisory firms to provide these types of functions and services can reduce burdens for investment advisers (and potentially reduce costs for their clients) as compared to conducting them in-house."[1]

As an increasing share of investors own stock indirectly, such as through mutual and pension funds, these individual investors are dependent on those institutional investors to vote on their behalf and act in their best interest. In order to do so both effectively and efficiently, those institutional investors often leverage their resources by using the services of a proxy advisor. As the Council of Institutional Investors and a coalition of investors have explained:

> Retail holders now invest much of their capital with institutional investors because they understand that institutional investors' expertise and size bear the expectation of higher returns, lower costs and mitigated risks. Importantly, retail investors also understand that aggregating their individual holdings into larger, concentrated blocks through an institutional manager allows for more effective monitoring of company management.
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> Even so, institutional investors themselves face challenges in spending significant time and resources on voting decisions because the funds and other vehicles they manage receive only a portion of the benefits conveyed on all investors of the relevant enterprise.
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> Proxy advisors are a market-based solution to address many of these practical cost issues. Proxy advisors effectively serve as collective research providers for large numbers of institutional investors, providing these investors an affordable alternative to the high costs of individually performing the requisite analysis for literally hundreds of thousands of ballot proposals at thousands of shareholder meetings each proxy season.[2]

In addition, proxy advisors provide a viable solution for asset managers and other investors seeking a way to mitigate their own conflicts of interest when voting shares on behalf of their participants or beneficiaries. As the SEC has noted, an investment adviser "may look to the voting recommendations of a proxy advisory firm when the investment adviser has a conflict of interest, such as if, for example, the investment adviser's interests in an issuer or voting matter differ from those of some or all of its

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[1] U.S. Securities and Exchange Commission, Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, Release No. IA-5325 at 5 (Aug. 21, 2019) ("SEC August 2019 Guidance").

[2] Letter of Ken Bertsch, Executive Director, Council of Institutional Investors and 60 institutional investors to Former SEC Chairman Jay Clayton, at 2 (Oct. 15, 2019), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/201910015proxy_advisor_sign_on_final.pdf.

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clients."[3] While the ultimate responsibility of voting proxies in the best interest of its clients continues to lie with the investment adviser, the SEC has signaled that "this third-party input into such an investment adviser's voting decision may mitigate the investment adviser's potential conflict of interest."[4]

II. Analysis of the Proposed Rules

A. Proxy Voting and Exercise of Shareholder Rights

The rules adopted by DOL in 2020 on proxy voting and the exercise of shareholder rights were the result of a flawed regulatory process and risk depriving plan participants of the benefits of shareholder engagement. DOL should remove the bias and prescriptiveness of the 2020 rules and reaffirm the balanced approach in its prior proxy voting guidance by adopting the four changes proposed and making one other change to the current rules.

The Deficient Process of the 2020 Rulemakings

We appreciate that agencies do not often or lightly revisit their past rulemakings, even where, as here, those rules have not fully gone into effect and no significant reliance interests are at stake. Here, however, that institutional reluctance should play no role. Rather than a genuine effort to seek public comment and come to a sound and reasoned interpretation of ERISA that advances the interests of plan participants, the investment duties regulation adopted last year was instead a rushed, predetermined and politicized misuse of the regulatory process to entrench the preferred investor and shareholder behavior of certain companies into a DOL rule. Among other things --

- The origin of the rulemakings was an Executive Order, which was not intended to protect retirement plan participants, but to "promote private investment" in certain companies with adverse ESG profiles;[5]
- Even though both rulemakings resulted in the first ERISA regulations on the subject and OMB designated each of them a "major rule," both proposals were only exposed for comment for 30 days, half the time that is generally recognized as the minimum for the public to have a meaningful opportunity to comment on proposed rules;[6]

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[3] SEC August 2019 Guidance at 5-6.

[4] Id.

[5] Executive Order No. 13,868, 84 FR 15495, Promoting Energy Infrastructure and Economic Growth (Apr. 10, 2019) (directing DOL to determine whether existing guidance on the fiduciary responsibilities for proxy voting should be rescinded, replaced, or modified in order to "promote private investment in the Nation's energy infrastructure").

[6] Executive Order No. 12,866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993) ("In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.").

- Even though the proxy voting proposal involved myriad, important changes to DOL's then current guidance, those changes were not even acknowledged, let alone explained and justified, in DOL's preamble to the proposed rules;[7]
- The proxy voting regulatory impact analysis was based on what DOL called an "illustration." Compounding its failure to rely on any real data or evidence, the model used in this illustration was deeply flawed and therefore led to wildly-overstated assumptions about the cost of proxy voting;[8] and
- The final proxy voting rules were issued only two months after the comment period ended (and only five weeks before the transition to a new Administration), with little discussion of the points made in the numerous comment letters opposing the proposal and little, if any, explanation of key elements of the final rules.

Given these procedural infirmities, DOL is to be commended for reopening the rulemaking process and should not hesitate to reach its own determination, after conducting a new and reasoned deliberative process, of what is in the best interest of plan participants and beneficiaries.

DOL's Proposed Changes

DOL proposes to remove four specific aspects of the 2020 rules that added burdens and sought to discourage ERISA fiduciaries from responsible stewardship activities. For the reasons below, Glass Lewis strongly supports each of the changes and urges their adoption.

i. Eliminating language discouraging proxy voting.

First, DOL proposes to eliminate the statement added to the rule in 2020 that "[t]he fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right." This statement is both unnecessary and, in concert with the other 2020 rule changes and preamble discussion, misleadingly signaled to fiduciaries that proxy voting is costly and unimportant. We support its deletion from the rule.

This statement was purportedly added to the rules to prevent a "persistent misunderstanding" that ERISA fiduciaries must always vote proxies. But, as Glass Lewis explained in its comment letter on the 2020 rules, DOL's "evidence" of this supposed misunderstanding primarily consisted of a few assertions to that effect by management trade associations and their lawyers. DOL itself has clearly told fiduciaries they do not need to vote all proxies in its prior guidance and DOL provided no evidence from its industry oversight that ERISA fiduciaries are, in fact, voting all proxies out of some mistaken belief. Our experience is that plans and their asset managers recognize they do not need to vote when the costs of

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[7] See Letter of Kevin Cameron and Nichol Garzon-Michell, Glass Lewis, to DOL at 12-14 (October 5, 2020) (delineating all the changes that would be made without any acknowledgement or DOL explanation for them) ("Glass Lewis Comment Letter") (attached); see also *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-26 (2016) (agency "must at least display awareness that it is changing position and show that there are good reasons for the new policy") (internal quotations omitted).

[8] See Glass Lewis Comment Letter at 24-28.

doing so exceed its expected benefits, such as in certain situations involving foreign securities. This is no less true of other exercises of shareholder rights.

In addition to being unnecessary, the 2020 amendment was potentially misleading, particularly when read with the other 2020 rule changes and accompanying preamble discussion. As DOL now recognizes, including this statement in the rules might be understood to mean that fiduciaries should be indifferent to exercising their rights as shareholders. Avoiding this misunderstanding is particularly important, as DOL notes, "in circumstances where the cost is minimal as is typical of voting proxies."

Glass Lewis agrees that eliminating this statement will avoid potential misunderstandings that proxy voting is unimportant and costly. As Glass Lewis also noted in its previous comment letter, fiduciaries have increasingly focused on proxy voting and shareholder engagement because it adds value, both for the individual companies in their portfolio and for the portfolio as a whole. Shareholder votes on the election of directors (which constitute a majority of proxy votes) convey important information about shareholders' views and can and do affect companies' decisions about who should serve as corporate directors.[9] Active ownership can produce significant financial benefits to a retirement plan's participants.[10]

DOL's 2020 rules also ignored the important role of shareholder engagement in risk mitigation. DOL's own prior proxy voting guidance had recognized that the "financial crisis of 2008 exposed some of the pitfalls of shareholder inattention to corporate governance and highlighted the merits of shareholders taking a more engaged role with the companies."[11] And emerging academic research shows that shareholder attention to ESG issues can significantly reduce investment risk.[12] None of this was discussed or reconciled with the 2020 rules' repeated suggestions that proxy voting and engagement do not add value and are only being carried out to further managers' political preferences or out of a mistaken belief they are required. As the regulatory preamble to its proposed rule changes correctly notes, the "exercise of shareholder rights is important to ensuring management accountability to the shareholders that own the company…. In general, fiduciaries should take their rights as shareholders seriously, and conscientiously exercise those rights to protect the interests of plan participants."

It is also important for DOL to correct the repeated suggestions in the 2020 rulemaking that fiduciaries should opt out of voting to save costs. For example, in proposing its 2020 rules, DOL professed, with no

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[9] See for example Yaron Nili & Kobi Kastiel, Competing for Votes, 10 Harv. Bus. L. Rev. 287 (2020) ("Shareholder voting matters. It can directly shape a corporation's governance, operational and social policies. But voting by shareholders serves another important function—it produces a marketplace for votes where management and dissidents compete for the votes of the shareholder base. The competition over shareholder votes generates ex ante incentives for management to perform better, to disclose information to shareholders in advance, and to engage with large institutional investors."), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541.

[10] Letter from Jon Lukomnik, Keith Johnson et al. to the Department of Labor on the Proposed ESG Rule (July 21, 2020) ("Lukomnik Letter"), available at https://corpgov.law.harvard.edu/2020/07/21/comment-letter-on-proposed-regulation-of-esg-standards-in-erisa-plans/.

[11] Interpretive Bulletin 2016-01, 81 Fed. Reg. 95,879, at 9 (Dec. 29, 2016) ("2016 Interpretive Bulletin").

[12] Hoepner, Andreas G. F., Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks and Xiaoyan Zhou, "ESG Shareholder Engagement and Downside Risk," AFA 2018 paper (Aug. 10, 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2874252.

cited basis, to be "concerned that the costs for fiduciaries to prudently exercise proxy voting rights often will exceed any potential economic benefits to a plan." But DOL never tried to reconcile this professed concern with its prior recognition that "[i]n most cases, proxy voting and other shareholder engagement does not involve a significant expenditure of funds by individual plan investors."[13] In fact, DOL's 2020 regulatory impact analysis vastly overstated the costs of proxy voting through the illogical and unrealistic assumption that each retirement plan would conduct all its own research and analysis of each proxy vote. As DOL previously recognized, however, most proxy voting and engagement "are engaged in by institutional investment managers [who] often engage consultants, including proxy advisory firms, in an attempt to further reduce the costs of researching proxy matters and exercising shareholder rights."[14] In other words, DOL ignored basic economies of scale and efficiency that can be achieved through outsourcing aspects of stewardship.[15] As DOL's current regulatory preamble correctly notes: "The solution to proxy-voting costs is not total abstention, but is, instead, for the fiduciary to be prudent in incurring expenses to make proxy decisions and, wherever possible, to rely on efficient structures (e.g., proxy voting guidelines, proxy advisers/managers that act on behalf of large aggregates of investors, etc.)."

In sum, DOL's proposed change is an important corrective to the unbalanced emphasis on costs and minimization of the benefits of proxy voting in the 2020 rulemaking and we encourage its adoption.

ii. Eliminating special monitoring obligations.

Next, DOL proposes to eliminate a provision in the 2020 rule that imposed a specific monitoring responsibility "[w]here the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person who performs advisory services as to the voting of proxies." Because it is redundant, unnecessary, and unclear, we support DOL's proposal to eliminate this aspect of the rule.

First, this change avoids redundancy in the rule and related uncertainty for ERISA fiduciaries. As DOL notes, another part of the rule already imposes a more general duty of prudence and diligence in the

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[13] 2016 Interpretive Bulletin.

[14] See id. ("**In most cases, proxy voting and other shareholder engagement does not involve a significant expenditure of funds by individual plan investors** because the activities are engaged in by institutional investment managers . . . . Those investment managers often engage consultants, including proxy advisory firms, in an attempt to further reduce the costs of researching proxy matters and exercising shareholder rights. . . . **[M]any proxy votes involve very little, if any, additional expense to the individual plan shareholders to arrive at a prudent result.**) *(emphasis added; footnote omitted)").*

[15] See Michael Cappucci, Harvard Management Company, "The Proxy War Against Proxy Advisors," at 7-8 (Nov. 16, 2019) ("Importantly, [proxy advisors] economize the proxy research and voting functions by spreading the costs of tracking, analyzing, and processing many thousands of proxy votes over a larger pool of shareholders."), available at https://corpgov.law.harvard.edu/2019/11/27/the-proxy-war-against-proxy-advisors/; see also comments of former SEC Chair Jay Clayton at the U.S. Chamber of Commerce event on "Corporate Governance: Making the Case for Reform" (July 16, 2019) ("Outsourcing . . . in itself is not a bad thing. All the time in America we create value through outsourcing, outsourcing ministerial tasks, in this case, of going through filings and crunching the data, providing data reports, that's good. It probably saves shareholders, saves investors money."), available at https://www.centerforcapitalmarkets.com/event/corporate-governance-making-the-case-for-reform/.

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selection and monitoring of stewardship service providers. Section (d)(2)(ii)(E) of the rule requires plan fiduciaries to:

> Exercise prudence and diligence in the selection and monitoring of persons, if any, selected to exercise shareholder rights or otherwise advise on or assist with exercises of shareholder rights, such as providing research and analysis, recommendations regarding proxy votes, administrative services with voting proxies, and recordkeeping and reporting services.

In our experience, ERISA fiduciaries take their existing selection and monitoring responsibilities, as long articulated in DOL guidance, seriously and codifying those responsibilities in (d)(2)(ii)(E) of the rule is appropriate and sufficient for this practice to continue.

The preamble to DOL's final 2020 rules does not explain why this provision applies to "proxy voting firm[s]."[16] To the extent it was meant to address some concern or risk to plan participants when an ERISA fiduciary uses the services of a proxy advisor, the existence of any such risk was never substantiated in any way as part of DOL's 2020 rulemaking. The DOL's preambles in that rulemaking were laced with the unsupported allegations of proxy advisor critics and references to "concerns" expressed to the SEC as part of its 2020 proxy advice rulemaking. For example, the 2020 proposed rules' preamble recited issuer trade associations' claims that proxy advisors have made what the preamble called "factual and/or analytic errors."

This issue, however, was thoroughly explored and debunked as part of the 2020 SEC proxy advisor rulemaking. In that rulemaking, corporate management advocacy groups expressed "concerns" about errors in proxy advice and the SEC proposed an issuer pre-review regime to "promote accuracy" in proxy advice.[17] The comment process in that rulemaking, however, revealed that these "concerns" were anecdotes and generalized allegations based on surveys; there simply was no evidence of a significant error rate in proxy advice. The SEC's own Investor Advisory Committee demonstrated that a chart used by the SEC in its proposal reflected that issuers only claimed proxy advice errors 0.3% of the time and "none of those [were] shown to be material or to have affected the outcome of the related vote."[18] Even with respect to this small number of claimed errors, an analysis by the Council of Institutional Investors revealed that "most of the claimed 'errors' actually [were] disagreements on analysis and methodologies, and that some other alleged proxy advisory firm errors derive from errors in the company proxy statements."[19] Tellingly, the SEC disavowed its claim of proxy advisor inaccuracy as the

[16] In fact, in the preamble to the final rules, after reciting the concerns of commenters, including Glass Lewis, and questions about how and why the proposed rule applied to proxy advisors, DOL simply adopted a version of the rule without responding to those concerns and questions in any discernible way.

[17] U.S. Securities and Exchange Commission, Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-87457, at 110 (Nov. 5, 2019).

[18] See Recommendation of the SEC Investor Advisory Committee Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals (Jan. 24, 2020) (emphasis in original), available at https://www.sec.gov/comments/s7-22-19/s72219-6698769-206000.pdf.

[19] Letter of Ken Bertsch, Executive Director, Council of Institutional Investors to Chairman Jay Clayton, at 2 (Oct. 24, 2019), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20191024%20SEC%20comment%20letter%20proxy%20advisor%20accuracy.pdf.

basis for its final rules, saying accuracy was never the "sole basis" for its proposal and falling back to a vague goal of wanting to "improve the overall mix of information available to investors." In the words of an SEC Commissioner who dissented from the final rules, proxy advisor inaccuracy "failed as a justification for the proposal because there simply was not evidence of any significant error rate in proxy voting advice."[20] In any event, we note that the SEC has reopened its 2020 rulemaking to address investor concerns with the rules that resulted from that proceeding. In short, there is no evidentiary basis for heightened monitoring responsibilities when an ERISA fiduciary uses the services of a proxy advisor.

This change will also avoid potential confusion. In its 2020 rulemaking, DOL never adequately explained when this provision applied or what it required. As DOL explains in its current proposal, since the general prudence and loyalty duties of ERISA already impose a monitoring requirement, the 2020 rule's additional provision could have been misunderstood as requiring some special, undefined steps above and beyond these statutory obligations.[21]

iii. Eliminating the Safe Harbors.

We also support DOL's proposal to eliminate the two "safe harbor" examples in the 2020 rule –

> a. A policy of only voting on "particular types of proposals that . . . are substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment." (DOL's preamble had suggested such a policy might involve voting only on special situations, such as M&A transactions and contested elections of directors.); and
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> b. A policy of not voting unless the plan's holding of the company involved exceeds a threshold of the plan's total holdings. (DOL's preamble had suggested 5% as a possible threshold.).

As DOL notes, characterizing an aspect of the rule as a "safe harbor" invites it to be widely adopted, making it especially important that it adequately safeguard the interests of plan participants. DOL also notes the vagueness of the first safe harbor and that the second one has practical limitations, since

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[20] Statement of the Honorable Allison Herren Lee at SEC Open Meeting (July 22, 2020) ("Lee Open Meeting Statement"), available at https://www.sec.gov/news/public-statement/lee-open-meeting-2020-07-22; see also id. ("The final rules will still add significant complexity and cost into a system that just isn't broken, as we still have not produced any objective evidence of a problem with proxy advisory firms' voting recommendations. No lawsuits, no enforcement cases, no exam findings, and no objective evidence of material error—in nature or number. Nothing.").

[21] We note some inconsistency in how this rule has been described in different places in the 2020 preambles, as well as in the preamble to the current proposal. See 86 Fed. Reg. at 57,281 (describing this rule as applying "where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager or where a proxy voting firm performs advisory services as to voting proxies"). By its terms, the current rule applies "[w]here the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or other person who performs advisory services as to the voting of proxies." We understand the rule, by its terms, to apply to situations where voting or other authority to exercise shareholder rights has been delegated to an investment manager or proxy advisor; indeed, that is the only reading of the rule that gives meaning to the word "who" in it. In addition, significant aspects of the rule would not make sense in the context of a proxy advisor that is only providing advice, but has no authority to make voting decisions. In any event, this ambiguity is an additional reason this part of the rule should be deleted or, if that is not pursued for some reason, clarified and reproposed for comment.

many investment managers of sub-portfolios of ERISA investment vehicles would not necessarily have the information to calculate this threshold. At a more general level, DOL recognizes the two safe harbors, in conjunction with other provisions of the current rules, "may be construed as little more than regulatory permission for plans to broadly abstain from proxy voting." At the same time, the new rule would retain language specifically allowing "fiduciaries [to] adopt proxy voting policies providing that the authority to vote a proxy shall be exercised pursuant to specific parameters prudently designed to serve the plan's interest in providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan."

Glass Lewis supports these changes. DOL never explained in the 2020 rulemaking how these safe harbors were consistent with a fiduciary's general duties of prudence and loyalty to plan participants, let alone why ERISA should steer fiduciaries into them. The first safe harbor rests on an unexplained and unsupported premise that certain types of proxy votes -- in fact, the vast majority of proxy votes[22] -- are not "substantially related to the issuer's business activities or are expected to have a material effect on the value of the investment." As explained in Glass Lewis' prior comment letter, however, shareholders' voting rights, including the fundamental right to elect the company's directors, largely derive from state corporate law.[23] In fact, as the Delaware Chancery Court has explained, the shareholder franchise "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own."[24] As a matter of federalism, statutory authority, and common sense, DOL should not try to substitute its own judgment about the proper scope of the shareholder franchise for that of the states and other corporate governance authorities.

Moreover, many of the topics that corporate law permits shareholders to have a say on -- for example, the election of directors or ratification of auditors -- play an important risk mitigation role. These types of issues are often prophylactic; they do not readily lend themselves to an analysis of whether they will lead to a material effect on the value of a plan investment.[25] As DOL itself has previously recognized, however, they are nonetheless critical to avoid risks to plans' share capital over the long term.[26] Because this safe harbor encouraged fiduciaries to take a pass on these and most other proxy voting issues, it creates a genuine risk to plan participants' long-term interests and should be dropped from the rule.

The second safe harbor is problematic for similar reasons. This safe harbor appears to be premised on the notion that not voting at most, or perhaps even all, meetings a plan would be entitled to vote at would be in plan participants' best interests. DOL never explained or came close to substantiating this position, however. As noted in our previous comment letter, hypothetical (and counterfactual)

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[22] Elsewhere in its 2020 proposal, DOL acknowledged that the types of matters it saw as meeting this test -- M&A transactions, buy-backs, dilutive share issuances and contested elections of directors -- comprise 5.6% of all items state and other federal law entrusts to shareholder vote. DOL 2020 Proposing Release at 84.

[23] *Sante Fe Industries,* 430 U.S. at 479, 97 S.Ct. at 1304 (emphasis in original, quoting *Cort v. Ash,* 422 U.S. 66, 84, 95 S.Ct. 2080, 2090-91, 45 L.Ed.2d 26 (1975)).

[24] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (Allen, J.).

[25] The concept of "materiality" derives from the antifraud provisions of the federal securities laws. See Basic, Inc. v. Levinson, 485 U.S. 224, 240 (1988).

[26] See 2016 Interpretive Bulletin at 9.

"illustrations" in which proxy voting is costly and misleading discussion of the "mixed evidence" of the effectiveness of proxy voting are not a factual basis for such a rule.[27] There was simply no factual predicate established in the 2020 rulemaking to support seeking to steer ERISA fiduciaries into this practice. In addition, as DOL now notes, this safe harbor presents operational challenges that may make it practically unworkable.

Importantly, eliminating the safe harbors will not leave plan fiduciaries adrift with no guidance. As noted above, section (d)(3)(i) of the rule will continue to allow plan fiduciaries to "adopt proxy voting policies providing that the authority to vote a proxy shall be exercised pursuant to specific parameters prudently designed to serve the plan's interest in providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan." This sensible provision accords with current industry practice; many of our ERISA fiduciary clients, like our other clients, have adopted proxy voting policies to guide how they vote. Continuing to explicitly recognize the use of such policies in the rule gives fiduciaries the discretion they need to vote on behalf of their participants and beneficiaries in an effective and cost-efficient manner. Having such a policy, particularly one developed and implemented in an effective and cost-efficient manner with the assistance of an expert service provider, is evidence of a fiduciary's prudence.[28]

iv. Eliminating Special Documentation Requirements.

Finally, DOL proposes to eliminate the requirement added in 2020 that plan fiduciaries "[m]aintain records on proxy voting activities and other exercises of shareholder rights." DOL guidance has traditionally taken a more flexible, principles-based approach to documentation of fiduciary monitoring.[29]

Glass Lewis supports this change. As we noted in our 2020 comment letter, DOL never explained the need for adding new documentation requirements to the rule. In fact, DOL had previously explained that there is no basis to impose more onerous documentation requirements that would treat proxy voting differently than investment decisions or other activities of plan fiduciaries.[30] No evidence that DOL's prior practical approach to documentation had created any problems or harmed plan participants in any way was adduced in the 2020 rulemaking. Absent such evidence, there is no need for a

[27] See Glass Lewis Comment Letter at 5-10 and 24-26.

[28] See *Donovan v. Walton*, 609 F. Supp. 1221, at 1239-40 (S.D.Fla. 1985) (retaining and overseeing the work of expert consultants to help properly administer plan assets is evidence of a fiduciary's prudent behavior).

[29] See, for example, Letter from Phyllis C. Borzi, Assistant Secretary for Employee Benefits Security, EBSA Response to Performance Audit Draft Audit Report Number 09·11·001-12·121 (Mar. 29, 2011) ("DOL 2011 OIG Response") ("[A]s to fiduciary monitoring, various types of plan documentation of its ongoing operations may be sufficient to show appropriate monitoring of proxy voting decisions. Similarly, the rationale for a manager's vote may be to follow a uniform internal policy for recurring issues, and simply to document the reasons for any vote which goes against the policy."), available at https://www.oig.dol.gov/public/reports/oa/2011/09-11-001-12-121.pdf.

[30] DOL 2011 OIG Response ("In light of our enforcement and regulatory experience with proxy voting decisions, we do not believe we have a public record at this time that would justify the administrative burden and expenses that would be imposed on plans by a more expansive recordkeeping requirement than that described in the Interpretive Bulletin. Nor do we have a basis for uniquely singling out fiduciary proxy voting activities for a special documentation rule that does not apply to other fiduciary actions.").

prescriptive rule on the subject and we support DOL's proposal to revert to its traditional, more flexible approach to documentation of fiduciary monitoring.

Other Changes

In addition to the proposed changes, DOL should reconsider including sub-section (d)(2)(iii) in the final rule. This provision, which was newly added in 2020 and requires a specific determination when a fiduciary "adopt[s] a practice of following the recommendations of a proxy advisory firm or other service provider," is both unnecessary and unclear.

This provision was not proposed in its current form or as a standalone provision in 2020, meaning it has not benefited from the public comment process. While the provision is not well explained in the rushed and cursory preamble to the 2020 final rules, that preamble suggests that it responds to "the public comments that cited fiduciary practices that carry a high risk of noncompliance with ERISA." For the reasons discussed above and in our other comment letter, however, the record in that rulemaking, as well as the referenced SEC rulemaking, in no way, shape or form demonstrate that ERISA fiduciaries that seek the services of a proxy advisor are at "high risk of noncompliance with ERISA." To the contrary, by obtaining independent research and/or vote execution services, these fiduciaries will be more informed and better able to vote in an effective and cost-efficient manner.[31] For that reason, this provision is not only unnecessary, but potentially harmful to plan participants to the extent it suggests to ERISA fiduciaries that seeking expert advice and assistance with some aspects of proxy research and vote execution somehow risks noncompliance with ERISA.

It is also unclear what this provision means. As discussed above, the significant majority of our clients today receive recommendations based on their own custom voting policy or a "hybrid" policy that incorporates some elements of Glass Lewis "house policy," the client's custom policy, and/or issues that are "referred" for case-by-case analysis by the client. These clients have not "adopt[ed] a practice of following the recommendations of a proxy advisory firm" and we assume this part of the rule would not apply to them. Even for clients that elect to receive recommendations based on Glass Lewis house policy, however, those clients are in no way bound to follow those recommendations and they can and do depart from them based on their own determination of how to cast particular votes. While, in our experience, clients do not choose to receive recommendations based on a policy without first carefully reviewing it and deciding it reflects their chosen voting approach, that choice is not binding on them at any point. Unless DOL means for this part of the rule to only apply in the uncommon circumstance of a client that, for conflicts, regulatory prohibition, or some other reason, decides in advance that it will only vote in line with its proxy advisor or other service provider's recommendation, we are unclear when or how this provision would apply.

The Investment Duties regulation already provides -- in the immediately preceding sub-section -- that plan fiduciaries must exercise prudence and diligence in selecting and monitoring service providers, including proxy advisors. Because of this, including the additional vague and heightened burden of

[31] See *Donovan*, 609 F. Supp. at 1239-40.

(d)(2)(iii) is both unnecessary and a potential deterrent to informed, responsible shareholder engagement.

B. Investment Prudence and Loyalty Rules

Glass Lewis also supports the proposed changes to the investment prudence and loyalty duties section of the rule. Elements of the rules adopted in 2020 sought to discourage fiduciaries from considering environmental, social, and governance factors in their investment decisions. DOL had no legitimate basis to put such blinders on retirement plan fiduciaries and the resulting regulatory scheme exposes plan participants to some of the most significant risks to a long-term investor. The proposed changes are amply justified and should be adopted expeditiously.

The 2020 rulemaking was premised, in large part, on DOL's unsupported assumption that ERISA fiduciaries were considering ESG factors for "the purpose of achieving political or social objectives," rather than "maximizing return to beneficiaries." While this theory was pushed by self-interested corporate trade associations, it lacked any sound evidentiary basis and ignored the clear, emerging consensus view of some of the world's most sophisticated investors that ESG factors are important, material risk-return considerations. As State Street Global Advisors recently noted: "We believe that addressing material ESG issues is good business practice and essential to a company's long-term financial performance - **a matter of value, not values**."[32] Commenting on the proposed rules in 2020, BlackRock told DOL: "We believe that sustainability-related factors can contribute to both value creation and value destruction…. [T]here is a robust body of research that reinforces these views."[33] And Fidelity Investments, in that same rulemaking, noted that DOL's skepticism of ESG "fails to appropriately acknowledge the extent to which plan fiduciaries increasingly utilize environmental, social or corporate governance considerations specifically as critical pecuniary factors in any investment strategy. ESG factors can incorporate long-term financial considerations that investors may not take into account when solely considering an investment's quantitative earnings model."[34]

In short, the 2020 rulemaking was premised on the advocacy positions of corporate trade associations and the preconception that fiduciaries are pursuing (disfavored) "political or social objectives" and must be stopped from doing so. Self-serving advocacy positions and unfounded assumptions are not a sound basis for rulemaking, however. ERISA's duty of prudence should reflect the best and most current

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[32] Letter from Cyrus Taraporevala, State Street Global Advisors, to Corporate Board Members (Jan. 28, 2020) (emphasis in original); see also Bank of America Merrill Lynch, "Equity Strategy Focus Point ESG Part II: a deeper dive," (June 15, 2017) (ESG investing would help investors avoid bankruptcies and ESG attributes "have been a better signal of future earnings volatility than any other measure [it has] found.").

[33] Letter of BlackRock to the Department of Labor at 1 (July 30, 2020), available at https://www.blackrock.com/corporate/literature/publication/dol-financial-factors-in-selecting-plan-investments-073020.pdf.

[34] Letter of Fidelity Investments to the Department of Labor at 5 (July 30, 2020) (emphasis removed), available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00673.pdf.

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thinking on investment and stewardship practices.[35] Investment theory and practice has evolved to recognize the materiality of many ESG considerations. These considerations should therefore be treated no differently than any other material economic consideration for ERISA purposes.

We support the specific changes DOL has put forward to correct course. In particular, we strongly support the proposal to eliminate the concept of only considering "pecuniary factors" and instead clarify that a prudent fiduciary may consider any factor material to the risk-return analysis, including climate change and other ESG factors. As DOL explains in the regulatory preamble, "material climate change and other ESG factors are no different than other 'traditional' material risk-return factors."

While we recognize that the term "pecuniary" was drawn from ERISA case law, the term itself is antiquated, more used in legal than investment practice, and connotes something that can readily be monetized. For these reasons, the added need to determine that a consideration is a "pecuniary factor," coupled with the 2020 preamble's skepticism of ESG considerations, has created complexity and confusion, thereby potentially chilling ERISA fiduciaries from considering material risk-return factors. ESG factors -- such as the structure of a company's board of directors, its human capital management practices, or how its business may be affected over the long term by climate change -- may be less readily susceptible to quantification in monetary terms than, for example, a balance sheet line item. That in no way means, however, that these factors may not be just as, if not more, critical to the long-term financial returns of the company's investors, including retirement plan participants and beneficiaries. By eliminating the term "pecuniary" from the rule, DOL would free up fiduciaries to consider the full range of potential material risk-return factors without fear of regulatory second-guessing or litigation.

[35] See Lukomnik Letter, quoting §227 of the Restatement (Third) of Trusts ("Trust investment law should reflect and accommodate current knowledge and concepts. It should also avoid repeating the mistake of freezing its rules against future learning and developments.")

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Conclusion

For all the reasons stated above, Glass Lewis supports the proposed changes and encourages DOL to adopt them, as well as the other change discussed above. Thank you for your consideration of our comments.

Sincerely,

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