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Jeanne Klinefelter Wilson
Acting Assistant Secretary
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: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights; RIN 1210-AB91

Dear Acting Assistant Secretary Wilson:

Thank you for the opportunity to comment on "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," the proposed rules recently issued by the Employee Benefits Security Administration of the Department of Labor ("DOL").[1]

Glass, Lewis & Co., LLC ("Glass Lewis") supports DOL's stated objective of making sure that retirement plan fiduciaries are managing plan assets, such as voting and other shareholder rights, in the best interest of their plan participants. 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 in the best interest of their client

The proposed rules, however, seem intended to deter retirement plan fiduciaries from doing just that. Stemming from unsupported and incorrect assumptions that proxy voting and other shareholder engagement is ineffective and costly to plan participants, the proposed rules would create unworkable standards and mandate the use of unduly burdensome and risky analyses to justify voting proxies. The proposal would then except policies of not voting or

[1] Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, RIN 1210-AB91, 85 Fed. Reg. 55,219 (Sept. 4, 2020) (the "Release"). Page references throughout are to the pdf version of the release made available by DOL.

voting with management from these burdens, incentivizing plans to either forgo exercising their shareholder rights or just adopt a policy of "robovoting" with management.

We are deeply concerned that the proposed rules would harm plan participants and the public interest. We are also concerned that DOL's lack of prior consultation with market participants and rushed rulemaking process are not sufficient to adequately consider the issues involved and to fully understand the economic and practical consequences of its untested approach. For these and all the other reasons detailed below, we respectfully request that DOL not adopt the proposed rules and instead reaffirm the balanced approach in its current proxy voting guidance.

I. Background.

A. Glass Lewis.

Founded in 2003, Glass Lewis is a leading independent proxy advisor.[2] 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 2019, Glass Lewis published over 26,000 proxy research reports on companies headquartered around the globe.

In addition to providing proxy research, Glass Lewis executes votes on behalf of its investor clients, in accordance with their specific instructions. A significant majority of Glass Lewis' clients today have their own custom voting policies. 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." Since Glass Lewis engages

[2] Glass Lewis is a portfolio company of the Ontario Teachers' Pension Plan Board ("OTPP") and Alberta Investment Management Corp. ("AIMCo"). Neither OTPP nor AIMCo is involved in the day-to-day management of Glass Lewis' business.

extensively with institutional investors and aims to have policies that reflect the views of its clients, it is not uncommon for an investor client to elect the same policy as Glass Lewis for some or all of the issues up for vote.

Once finalized, 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. Glass Lewis does so through its vote management system, in which 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.

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."[3]

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:

[3] 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").

> 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.
>
> 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.
>
> 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.[4]

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 clients."[5] 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."[6]

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[4] Letter of Ken Bertsch, Executive Director, Council of Institutional Investors and 60 institutional investors to 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.

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

[6] Id.

II. There is no need for the rules.

DOL has not shown any need for the proposed rules. None of the reasons DOL cites for its action provide any compelling reason to replace its current guidance or promulgate a new rule, and certainly not one with the effect of deterring plan fiduciaries from voting shares in the best interest of plan participants.

A. Changes in the investment landscape make shareholder engagement more important, not less.

To demonstrate a need for these rules, DOL first points to "changes in the investment landscape" since the Avon Letter was issued in 1988. DOL notes that the share of individual company stock held in private pension funds has decreased, while an increasing percentage of plan investments are in mutual funds, many of which pursue passive investing strategies. DOL further notes the increasing role of institutional investors in the capital markets and that these shareholders' proxy voting policies have become more complex over time.

What DOL does not explain is why these changes would warrant a new rule that seeks to discourage ERISA fiduciaries from exercising shareholder rights. If, as DOL's current proxy voting guidance states and most fiduciaries believe, the costs of proxy voting are low and voting provides overall benefits to the plan, the portion of plan assets held in individual company stocks is irrelevant. In fact, if the percentage of plan assets in stocks is decreasing, that would suggest that proxy voting is less costly and less difficult for plans than in the past.[7] Further, 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. The growth of institutional investors and their increasingly sophisticated custom voting policies have made shareholder engagement all the more important and cost-effective. It is certainly not a reason to seek to prevent ERISA fiduciaries from engaging in it.

DOL also asserts that asset managers have mistakenly believed that shareholder voting and engagement contribute to shareholder value. According to DOL, however, emerging research "regarding whether proxy voting has reliable positive effects on shareholder value and a plan's investment has yielded mixed results."[8] And DOL takes particular issue with some investors' focus on environmental, social and governance ("ESG") risks, asserting that "[i]t is

[7] DOL offers no evidence that plans' positions in individual portfolio companies are smaller than in the past.

[8] Release at 13.

likely that many of these [recent environmental and social shareholder] proposals have little bearing on share value or other relation to plan interests."[9]

But DOL offers scant evidence to second-guess market practices, experience, and the expert judgments of asset managers on this issue. DOL simply ignores strong evidence of the benefits of shareholder voting and engagement on companies' financial performance, as well as the benefits, on an individual company and plan-wide basis, of considering systematic risks that fall under the ESG umbrella. In fact, DOL itself acknowledges the increasing sophistication and resources dedicated to shareholder voting and engagement, but offers no explanation for why this would be the case other than unsupported insinuations that plan fiduciaries must be pursuing their personal, political preferences or the illogical suggestion that asset managers spend significant resources to vote out of a mistaken belief it is required.

The simple reality is that fiduciaries have increasingly focused on proxy voting and shareholder engagement because it adds value, both for their individual investments 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.[10] A group of experienced practitioners and academics recently offered a concrete, monetized example of the financial benefits of engagement to a retirement plan's beneficiaries:

> As an example, consider the Boardroom Accountability Project undertaken by the New York City Comptroller, on behalf of the New York City retirement systems, in 2014. Comptroller Scott Stringer announced that he would seek to create a "proxy access" rule at 75 companies through private ordering . . . . The mere announcement caused a 53 basis point excess return, according to three academics, including one from the SEC. At the time of Comptroller Stringer's announcement, the City's funds held $5.023 billion in those 75 companies' stock. Based on the 53 basis points of excess return, that means

[9] Release at 40.

[10] See for example Yaron Nili & Kobi Kastiel, Competing for Votes, 10 Harv. Bus. L. Rev. 287 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3681541 ("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.").

the BAP created some $266 million in excess return for the City's pension funds. As the City's funds generally hold 1% or less of a company's stock, that means the total market impact was more than $25 billion. The actual impact on total market value over time, as 600 companies have adopted proxy access is likely even greater. While the academic study noted that the results likely would have been greater had a proxy access standard been market-wide and set by regulation, even just using the 53 basis point as the basis, extending the attempt to install proxy access across every listed company at the time of Stringer's announcement would have resulted in an increased market value of some $132.5 billion.[11]

DOL also frames the issue narrowly - as whether "such activities [are] likely to enhance the value of a plan's investment *in a particular security*" - rather than focusing on the impact on the plan. But, as illustrated by this example, shareholder engagement at one company can have spillover effects on other plan holdings. Participants in a plan with a diversified portfolio of individual stocks would want to maximize the value of the portfolio as a whole, rather than each individual company, and a prudent fiduciary would therefore engage in activities that have a net positive effect for the plan as a whole.[12]

[11] 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/.

[12] This is why the quote from David Yermack that DOL uses to justify discouraging shareholder engagement actually demonstrates one of the reasons that DOL's approach is misguidedly narrow. See Ann Lipton, I Just Read the Department of Labor's New ERISA Voting Proposals and Boy Are My Fingers Tired (from typing) (Sept. 4, 2020) ("Lipton Blog"), https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html. In fact, as Professor Lipton points out, DOL dropped the italicized part of Yermack's observation to obscure this very point: "Activist institutions frequently state that their goal is not to improve the value of individual investment positions, but rather to create positive externalities by signaling optimal governance practices market-wide, *potentially improving the value of the institutions' other diversified investments.*" (emphasis added).

DOL's other support for its claim of "mixed results" on the effectiveness of shareholder engagement, which are mostly studies of hedge fund activism, is also thin and selective. For example, the first article cited by DOL concluded that "shareholder activism has become more value increasing over time. Research based on shareholder activism from the 1980s and 1990s generally finds few consequential effects, while activism in more recent years is more

As to ESG considerations, DOL seeks to substitute its judgment for the emerging consensus view of some of the world's most sophisticated investors. 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**."[13] BlackRock recently told DOL in a related rulemaking: "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."[14] 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."[15] ERISA's duty of

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frequently associated with increased share values and operating performance." Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, Thirty Years of Shareholder Activism: A Survey of Empirical Research, 44 J. Corp. Fin. 405, 407 (2017). Obviously, the current value of shareholder engagement - not what happened in the 1980s and 1990s - is what is relevant to this rulemaking. Likewise, the point of the Lund article is not that shareholder voting or engagement is not effective, but that, due to what the author believes is a free rider problem, "passive fund managers are not doing enough to push management to maximize shareholder welfare." Dorothy S. Lund, The Case Against Passive Shareholder Voting, 43 J. Corp. Law 101, 104-105 (2018); see also id. at 113-14 ("In sum, although institutional investors' incentives are imperfect, there is evidence that the presence of large, sophisticated investors with a financial interest in the long-term health of portfolio companies has become an important corporate governance safeguard.").

[13] 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 that ESG attributes "have been a better signal of future earnings volatility than any other measure [it has] found.").

[14] 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.

[15] 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.

prudence should reflect the best and most current thinking on investment and stewardship practices, not the advocacy positions of corporate trade associations.[16]

Moreover, DOL ignores the important role of shareholder engagement in risk mitigation. DOL's own current proxy voting guidance notes 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."[17] The release offers no reason to believe this is not still the case. Emerging academic research shows that shareholder attention to ESG issues can significantly reduce investment risk.[18] Professor John C. Coffee, Jr. has recently explained asset managers' need for ESG disclosure as part of their approach to investment risk mitigation:

> Economic logic explains why diversified institutional investors want more ESG disclosures . . . . Put simply, the Capital Asset Pricing Model ("CAPM") posits that diversified investors are primarily interested in "systematic risk," because diversification protects (and even immunizes) them from unsystematic risk. Systematic risks are essentially risks that diversification does not protect against: for example, a national banking crisis, a pandemic, or sudden and irreversible climate change. [And] much ESG disclosure overlaps heavily with systematic risk."[19]

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[16] See Lukomnik Letter ("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.") (quoting §227 of the Restatement (Third) of Trusts).

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

[18] 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.

[19] John C. Coffee, Jr., ESG, Common Ownership, and Systematic Risk: How They Intersect (Sept. 14, 2020) (footnote omitted), available at https://clsbluesky.law.columbia.edu/2020/09/14/esg-common-ownership-and-systematic-risk-how-they-intersect/.

Notably, DOL apparently seeks to deter ERISA fiduciaries from voting on issues that are widely understood to be basic aspects of corporate transparency and accountability. In its Citizens United decision, the Supreme Court assumed shareholders could vote on such issues. *Citizens*

DOL also ignores fiduciaries' duty to consider the needs of all their plan participants, including those with investment time horizons significantly longer than management's expected tenure at the company. As a group of academics and investment professionals explained in response to DOL's proposed ESG investing rule:

> [Y]ounger and older participants are likely to have differing investment risk tolerances, income generation needs and long-term capital growth expectations. By defaulting to a short-term bias, the proposal downplays materiality of ESG/sustainability risks and opportunities (e.g., those associated with climate change, misaligned executive compensation plans, workforce mismanagement, human rights violations, corporate culture, etc.) to which long horizon ERISA investors are exposed, even though they might not be evident in short-term financial metrics.[20]

In sum, DOL's skepticism about the benefits of shareholder voting and engagement is based on a thin and selective reading of a few studies and ignores market practices, experience, the views of the world's most sophisticated investors and other, more compelling academic research. However, even if DOL had established that the evidence on the effectiveness of shareholder engagement was "mixed," it would in no way be a rational basis for this rule proposal. Given that DOL itself has previously acknowledged the costs of proxy voting are low, there would need to be clear and compelling evidence of some harm from shareholder voting - rather than "mixed" evidence of its effectiveness - to rationally justify a rule that skews voting in this manner. Other than the completely speculative costs hypothesized in its illustration, however, DOL has identified no such harm.

B. Fiduciaries do not vote out of a misunderstanding that it is always required.

DOL also claims that there has been "a persistent misunderstanding among some stakeholders that ERISA fiduciaries are required to vote all proxies." Its support for this,

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United v. FEC, 540 U. S. 93 (2003) (relying in part on "the procedures of corporate democracy . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits . . . .")

[20] Lukomnik Letter. This is one of the reasons that DOL's reliance on a few event studies of the filing of shareholder proposals is misguided. A prudent fiduciary would likely have a longer-term horizon than immediate stock price reaction.

however, mainly consists of a few assertions to that effect by management trade associations and corporate counsel. DOL itself has clearly told fiduciaries they do not need to vote all proxies in its prior guidance and DOL provides 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 doing so exceed the expected benefits, such as is the case in a variety of recurring circumstances involving both U.S. and foreign companies.

In fact, DOL's own statements contradict its contention here. DOL has previously noted that, based on its reviews of plans' proxy voting practices, "we believe the guidance EBSA has provided over the years has become well understood."[21] In this very release, DOL explains that asset managers see voting and shareholder engagement as a key part of a responsible, prudent investment strategy. Specifically, DOL cites approvingly a report that "investor voting behavior among owners of U.S. companies has changed significantly - perhaps almost revolutionarily - over the past two decades," and that, "for the overwhelming majority of share capital represented in the U.S., ***voting is certainly no longer a compliance exercise***."[22] DOL also attributes the rise in shareholder engagement to ERISA fiduciaries' "belief that participating in such activities was likely to enhance the value of a plan's investment in a particular security."[23] Likewise, in 2016, DOL expressed concern that its 2008 guidance "may have worked to discourage ERISA plan fiduciaries . . . from voting proxies and engaging in other prudent exercises of shareholder rights."[24] DOL makes no effort to reconcile any of these recent statements with its current contention that ERISA fiduciaries are voting all proxies based on a "persistent misunderstanding" of what it takes to comply with ERISA.[25]

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[21] 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"), available at https://www.oig.dol.gov/public/reports/oa/2011/09-11-001-12-121.pdf.

[22] Release at 12 (emphasis added).

[23] Release at 13.

[24] 2016 Interpretive Bulletin at 4-5.

[25] The statement in a speech by a former, senior BlackRock official that under the Avon Letter, asset managers "should generally vote shares as part of their fiduciary duty" plainly does not reflect a misunderstanding that asset managers "must always vote proxies." In fact, it suggests a correct understanding of DOL's currently effective guidance. See 2016 Interpretive Bulletin at 5 (DOL guidance properly understood to mean that "proxies should be voted as part of the

C. Recent SEC actions are not a reason for DOL rulemaking.

Finally, the DOL points to the SEC's recent issuance of guidance for investment advisers and adoption of rules governing proxy advisors. DOL acknowledges that "[m]any investment managers are registered as investment advisers with the SEC" and therefore are subject to the SEC guidance. DOL does not point to any significant regulatory gap left by the SEC's actions, however, nor does it explain why the SEC's adoption of one set of requirements related to proxy voting advice would necessitate DOL adopting a different set of requirements for ERISA fiduciaries. (We note that DOL has abandoned the claim in its rulemaking agenda that the goal of this rulemaking was to "harmonize" its requirements with those of the SEC.) In short, the SEC's actions do not provide any rational reason for DOL to impose further, different obligations on asset managers that are ERISA fiduciaries.

III. The proposed rules add onerous and unworkable burdens with no explanation or even acknowledgment of the change from its past guidance.

The principal feature of the proposed rules is a new requirement that each decision to vote a proxy proposal be justified by what the DOL characterizes as "individual cost/benefit analyses."[26] Specifically, the new rules would add six factors that must be considered both in "deciding whether to exercise shareholder rights and when exercising shareholder rights." Among the mandatory considerations, the fiduciary must:

- Consider "only factors that they prudently determine will affect the economic value of the plan's investment;"
- "Investigate material facts that form the basis for any particular proxy vote;" and
- "Maintain records . . . that demonstrate the basis for particular proxy votes."

The requirement to consider these six factors would be reinforced by a new rule that a plan fiduciary "must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering those factors described [above] and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote)."

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process of managing the plan's investment in company stock unless a responsible plan fiduciary determined that the time and costs associated with voting proxies with respect to certain types of proposals or issuers may not be in the plan's best interest").

[26] Release at 27.

This is a significant change in the law. DOL's current guidance on proxy voting was specifically issued to reassure fiduciaries that, absent unusual circumstances, they do not need to engage in a "cost-benefit analysis" before voting proxies. Now, however, the DOL would mandate that each proxy vote be justified through an individual cost-benefit analysis, including, among other things, a "determination" that the matter being voted on "would have an economic impact on the plan." In fact, DOL's proposal would make a series of changes that each would serve to make fiduciaries' decision to exercise shareholder rights more difficult and costly. Among the changes (all emphasis added):

- The proposed rules would mandate that ERISA fiduciaries "must not vote any proxy unless the fiduciary prudently determines that the matter being voted upon *would have* an *economic impact* on the plan after considering those factors described [above] and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote)."
  - DOL's current guidance provides that "[t]he fiduciary obligations of prudence and loyalty to plan participants and beneficiaries require the responsible fiduciary to vote proxies on issues that *may affect* the *value* of the plan's investment. *This principle applies broadly*."
- The proposed rules would mandate that ERISA fiduciaries "*[i]nvestigate* material facts that form the basis for any particular proxy vote . . . ."
  - DOL's current guidance does not use the word "investigate" or contain any equivalent requirement.
- The proposed rules would mandate that ERISA fiduciaries "consider[] *only* factors that they prudently *determine will affect* the *economic value* of the plan's investment."
  - DOL's current guidance states that fiduciaries are required to "consider those factors that *may affect* the value of the plan's investment."
- The proposed rules suggest that only ballot items related to M&A, share issuances and contested elections of directors are "likely to have a significant impact on the value of the plan's investment."
  - DOL's current guidance suggests that shareholder engagement would be appropriate in "various circumstances," including --
    - "the independence and expertise of candidates for the corporation's board of directors,"
    - "governance structures and practices,"
    - "executive compensation,"
    - "the nature of long-term business plans including plans on climate change preparedness and sustainability,"
    - "governance and compliance policies and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations,"

        - "the corporation's workforce practices (e.g., investment in training to develop its work force, diversity, equal employment opportunity),"
        - "policies and practices to address environmental or social factors that have an impact on shareholder value," and
        - "other financial and non-financial measures of corporate performance."
- The proposed rules would mandate that ERISA fiduciaries maintain "records on proxy voting activities . . ., including records that demonstrate *the basis for* particular proxy votes."
    - DOL's current guidance requires "records as to proxy voting."
- The proposed rules say nothing about the importance of considering the potential value and cost-effectiveness of shareholder engagement in concert with other shareholders or the relevance of being a long-term, passive holder.
    - DOL's current guidance specifically notes that shareholder engagement is consistent with ERISA when the fiduciary has "a *reasonable expectation* that such monitoring or communication with management, *by the plan alone or together with other shareholders,* is likely to enhance the value of the plan's investment in the corporation, after taking into account the costs involved," and that "[s]uch a reasonable expectation may exist in various circumstances, for example, where plan *investments in corporate stock are held as long-term investments*, *where a plan may not be able to easily dispose of such an investment, or where the same shareholder engagement issue is likely to exist in the case of available alternative investments*."

Each of these changes is significant on its own and would increase compliance costs and/or detract from ERISA fiduciaries' ability to manage assets and mitigate risk in the best interest of plan participants. For example, the new standard of "determin[ing]" that a specific proxy vote "would have an economic impact" on the plan is completely ill-suited to the purpose and role of proxy voting. Many of the items corporate law permits shareholders to have a say on - for example, the election of directors or ratification of auditors - are to mitigate risk and assure prophylactic measures are in place to avoid threats to their share capital over the long term. Even if the company were to propose a director for election to the board who was clearly unqualified and incompetent, how would a fiduciary "determine" that voting against that person "would have an economic impact on the plan"? Requiring a definitive determination of economic impact for each proxy vote is unworkable and would effectively prevent fiduciaries from engaging in activities that would mitigate risk and enhance value for their plan participants.[27]

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[27] See also Brian Croce, DOL proposes rule to narrow scope of ERISA fiduciaries' proxy voting, Pensions & Investments (Aug. 31, 2020), available at https://www.pionline.com/regulation/dol-proposes-rule-narrow-scope-erisa-fiduciaries-proxy-voting (quoting ERISA counsel: the

Other critical elements of the rules are equally problematic, as well as unexplained. No information is provided about what it means to "[i]nvestigate material facts that form the basis for any particular proxy vote," although a fiduciary that votes without having done so would now risk violating ERISA. What is DOL's basis for no longer considering issues long and widely understood to be financially material like "governance structures and practices" to be "likely to have a significant impact on the value of the plan's investment"? Why would DOL no longer reference the relevance of being a long-term, passive holder?

While each of these unexplained changes is significant in its own right, in the aggregate, they amount to a complete shift from the generalized determination contemplated by the 2016 Interpretive Bulletin. Indeed, the sea change in approach is starkly reflected by the way DOL described the costs of the analysis it expected under its prior guidance versus the costs anticipated under the proposed rules. In 2016, DOL noted that:

> **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 . . . . **Thus, . . . many proxy votes involve very little, if any, additional expense to the individual plan shareholders to arrive at a prudent result.**[28]

Now, however, DOL estimates that researching and documenting these analyses would take asset managers from 40 minutes (for routine items) to 2 hours and 20 minutes (for special situations) for each proxy vote, resulting in an aggregate compliance burden to ERISA plan asset managers of well over $10 billion dollars a year.

Notwithstanding that this is the central feature of the proposal, the release devotes all of two sentences to summarizing the 2016 Interpretive Bulletin and does not discuss or even mention the significant differences detailed above. DOL does, however, propose rescinding that Interpretive Bulletin, which, of course, would be unnecessary if DOL were not changing its requirements through the proposed rules.[29]

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proposed rule "could present real practical challenges in that benefits from shareholder engagement are often long term in nature. So we'll have to look at the rule carefully in order to see if this is remotely workable in the real world.").

[28] 2016 Interpretive Bulletin at 5-6 (emphases added; footnote omitted).

[29] See Lipton Blog.

“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency's action arbitrary and capricious.”[30] As the Supreme Court explained in a recent case, an agency “must at least display awareness that it is changing position and show that there are good reasons for the new policy.”[31]

DOL has not met that basic standard here. Each of the changes should be explained and justified with “good reasons for the new policy.” DOL - perhaps recognizing that there are no such good reasons[32] - has completely failed to do so and elected to ignore the fact that it is changing the law. This fails to meet its standards under the APA and the proposal should be withdrawn or reissued for comment with some reasoned explanation for the changes.

IV. The documentation requirements are unnecessary and unworkable.

The proposal’s documentation requirements are both unnecessary and unnecessarily specific. First, DOL would impose a new requirement for fiduciaries to maintain records “that demonstrate the basis for particular proxy votes.” Then, DOL would add an additional requirement that, in monitoring an asset manager or proxy advisor, the fiduciary “require such investment manager or proxy advisory firm to document the rationale for proxy voting decisions or recommendations sufficient to demonstrate that the decision or recommendation was based on the expected economic benefit to the plan, and that the decision or recommendation was based solely on the interests of participants and beneficiaries in obtaining financial benefits under the plan.”

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[30] *Lone Mtn. Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (internal quotations and citations omitted).

[31] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) (internal quotations omitted). Moreover, the agency must “be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Id.* (internal quotations and citations omitted).

[32] DOL later acknowledges these analyses would be so burdensome that engaging in them would be “a likely inefficient use of plan resources.” Release at 27.

But DOL does not explain the need for either of these new requirements. In fact, DOL has previously explained that there is no basis to impose more onerous documentation requirements that would treat proxy voting differently than other fiduciary activities:

> [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.[33]

DOL does not provide evidence that the practical documentation requirements in its current guidance have created any problems or harmed plan participants' interest in any way.

Likewise, the proposed documentation requirement for each decision or recommendation by an asset manager or proxy advisor is also problematic. While it is unclear exactly what DOL expects here, if the suggestion is that proxy advisors would tailor their rationale for every recommendation to each specific plan (and its participants) whose asset manager uses its research, that would be unnecessarily plan-specific and unworkable given the scale of proxy advisors' work. As described above, proxy advisors support their clients, such as asset managers for retirement plans, by providing vote recommendations based on their chosen proxy voting policy, which is usually a custom policy the client has selected to serve the interests of its clients (e.g., a retirement plan and its participants). The proxy advisor does not, in any way, make the determination of what a client's policy should be and how a client should vote. These decisions are at the sole discretion of the asset manager.

This new documentation requirement is also unnecessary. Under the proposed rules, an ERISA fiduciary may only follow the recommendations of a proxy advisor if, among other things, it has determined that the proxy advisor's guidelines "are consistent with the economic interests of the plan and its participants and beneficiaries." In addition to making this determination, the rules would require ERISA fiduciaries to supervise their proxy advisor on an ongoing basis.[34] Adding to these requirements a mandate that each rationale somehow make a

[33] DOL 2011 OIG Response; see also id. ("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.").

[34] Proposed Rule 29 C.F.R. 2550.404a-1(e)(2)(ii)(D) and Release 22 n.56.

plan-specific demonstration would achieve little other than adding potentially significant additional cost.

V. Designating voting with management or not voting as "permitted practices" is arbitrary and capricious.

Having saddled ERISA fiduciaries with these arbitrarily burdensome analyses, the proposal would then offer them a way to avoid them – the "permitted practices" of voting with management or not voting. The proposal makes clear that DOL believes its proposal would effectively compel use of the permitted practices: DOL "anticipates that most, if not all plans, will adopt policies that utilize the permitted practices."[35] And, in fact, this is the purported benefit of the proposal: "The Department anticipates that plans would derive savings from the proposal's 'permitted practices,'" by which it apparently means they would not then incur the unreasonable costs of the arbitrarily burdensome analyses its rules would otherwise mandate.[36] DOL, however, does not explain how these permitted practices are even consistent with a fiduciary's general duties of prudence and loyalty under ERISA Section 404, let alone provide a rational basis for steering fiduciaries into these practices.

Shareholders' voting rights are granted by state corporate law and, to a lesser extent, exchange listing standards (and, in the case of say-on-pay, federal legislation). As the Delaware Supreme Court has explained:

> The most fundamental principles of corporate governance are a function of the allocation of power within a corporation between its stockholders and its board of directors. The stockholders' power is the right to vote on specific matters, in particular, in an election of directors . . . Accordingly, while these "fundamental tenets of Delaware corporate law provide for a separation of control and ownership," the stockholder franchise has been characterized as the "ideological underpinning" upon which the legitimacy of the directors managerial power rests."[37]

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[35] Release at 51; see also id. at 59 ("The Department intends that the permitted practices will impact a large share of all proxy votes . . . .").

[36] Release at 50; see also id. at 59 ("the burden associated with these votes when using the permitted practices will likely be very low").

[37] *MM Cos., Inc. v. Liquid Audio, Inc.,* 813 A.2d 1118, 1126 (Del. 2003) (citations omitted); see also *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (shareholder vote "is

State corporate law therefore grants shareholders the right to vote on certain matters that are essential to safeguarding the capital they have provided the corporation, such as the election of directors, ratification of auditors, and changes to the articles of incorporation or bylaws. State corporate law, as well as exchange listing standards, also mandate that shareholder approval be obtained before management engages in self-interested transactions, such as the adoption of a stock option plan for the company's officers and directors.

Through its permitted practices, however, DOL seeks to second-guess the expert judgments of these recognized corporate governance authorities. Thus, DOL's second permitted practice encourages fiduciaries to only vote on matters "substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment," which DOL suggests are M&A transactions, buy-backs, dilutive share issuances and contested elections of directors. As DOL elsewhere notes, these types of votes comprise 5.6% of all items entrusted to shareholder vote by state and federal law.[38] While votes on these matters are certainly important, the DOL does not explain its conclusion that the other 94% of situations in which shareholders have a right to vote are routine and somehow not "substantially related to the corporation's business activities" or otherwise are inappropriate issues for shareholders to weigh in on.

For example, under the Dodd-Frank Act, shareholders of public companies are entitled to an advisory vote on the company's executive compensation program. By doing so, shareholders can evaluate executive compensation relative to company performance and express their disapproval for pay without performance. The DOL proposal, however, would inexplicably treat these votes as not "substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment."[39] In contrast, however, the proposal would permit an ERISA fiduciary to depart from its usual practice of not voting if the company's management needed them to vote to achieve quorum for a shareholders' meeting. According to the proposal, "The direct and indirect costs incurred by the corporation related to delaying the shareholders' meeting, such as additional proxy

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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.").

[38] Release at 84.

[39] This directly contradicts prior DOL positions. See, for example, DOL 2011 OIG response ("plan fiduciaries should independently evaluate proposals regarding executive compensation and "golden parachute" arrangements because of the reasonable expectation that such proposals will economically impact the value of the company.")

solicitation, legal, and administrative costs, ***would be an economic detriment to the plan's holding***."[40] DOL should explain why plan participants would be harmed by the administrative costs of delaying an annual meeting, but not by excessive pay without performance.

As to voting with management, DOL's primary argument is that ERISA fiduciaries can rely on the recommendations of officers and directors because they have fiduciary duties to the company under state corporate law. But the law imposes these duties because management's interests can and do differ from those of the company's shareholders,[41] and state corporate law requires shareholder votes precisely because managers' fiduciary duties alone are not adequate to align management's and shareholders' interests.

In fact, courts often lightly enforce these duties on the basis that shareholders have other means to oversee management, such as proxy voting. For example, in *In re Walt Disney Co. Derivative Litigation*,[42] the Delaware Chancery court held that a company's board of directors did not breach its fiduciary duty by allowing the company to pay an executive who was quickly hired and fired $140 million for 14 months' work. The court explained that "Delaware law does not - indeed, the common law cannot - hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices," and that "[t]he redress for failures that arise from faithful management must come from the markets, ***through the action of shareholders*** and the free flow of capital, and not from this Court."[43]

Moreover, fiduciary duties do not mandate good business performance. As the Delaware courts have explained, "Generally, shareholders have only two protections against perceived inadequate business performance. They may sell their stock . . . or ***they may vote to***

[40] Release at 28 n.63 (emphasis added).

[41] Adolf A. Berle, Jr. & Gardiner C. Means, The Modern Corporation and Private Property (1932) ("The separation of ownership from control produces a condition where the interests of owner and of ultimate manager may, and often do, diverge, and where many of the checks which formerly operated to limit the use of power disappear.")

[42] 907 A.2d 693 (2005).

[43] Id. at 698 (emphasis added); see also Lipton Blog (shareholder "rights [to sue for breach of a fiduciary duty] are *extremely limited* because *state corporate law relies on the shareholder franchise*; it's why the courts can take a hands-off approach to management matters, because they assume *shareholders* will do the monitoring, not the judiciary.)

replace incumbent board members."[44] And, as DOL itself recognizes in its current guidance, "selling the stock and finding a replacement investment may not be a prudent solution for a plan fiduciary."[45] In fact, that guidance quotes Vanguard founder John Bogle's explanation that index funds' "only weapon" if management is not performing is to "get a new management or to force the management to reform."[46] Making it difficult for fiduciaries to use the shareholder franchise to incentivize good business performance would affirmatively harm plan participants' interests.

The DOL also defends robovoting with management because "nearly all management proposals are approved with little opposition."[47] But this is akin to arguing that a bank doesn't need a security guard because most days no one tries to rob it. The value of the shareholder franchise comes from the ability to exercise it when needed (even if in a small percentage of cases) and management's knowledge that any of their proposals could be met with similar disapproval. After all, management may no longer feel constrained to offer proposals that are usually acceptable to their shareholders if federal regulations prevent shareholders from voting on them.

The DOL offers no rational explanation of why routinely voting for the proposals of someone with divergent interests than plan participants, including on matters like executive pay,[48] would be consistent with a fiduciary's duties of loyalty and prudence, let alone why ERISA should favor it.

The arbitrariness of designating voting with management or not voting (unless management needs it to achieve a quorum) as permitted practices is exacerbated by DOL's

[44] *Blasius*, 564 A.2d at 659 (emphasis added).

[45] 2016 Interpretive Bulletin at 6.

[46] Id. at 6-7.

[47] Release at 26.

[48] George W. Dent, Toward Unifying Ownership and Control in the Public Corporation, 1989 Wis. L. Rev. 881, 891 ("Managerial and shareholder interests also diverge over executive compensation. Managers want high pay for little work; shareholders favor the opposite."), available at https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1513&context=faculty_publications.

decision to encourage these practices, rather than the market practices that have developed for institutional shareholders to effectively and efficiently safeguard their clients' interests through proxy voting. As the 2016 Interpretive Bulletin recognized:

> The maintenance by an employee benefit plan of a statement of investment policy designed to further the purposes of the plan and its funding policy is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B). Since the fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock, a statement of proxy voting policy would be an important part of any comprehensive statement of investment policy.[49]

As noted above, the super-majority of Glass Lewis' clients have developed their own custom voting policy to ensure votes are cast consistently and in their clients' best interests. Moreover, DOL's current guidance recognizes that investment managers may, after appropriate due diligence, select and use a proxy advisor both to achieve cost-savings and to help implement its chosen voting policy in an informed and consistent manner. The proposal, however, would arbitrarily make voting in line with management recommendations a permitted practice, rather than an asset managers' use of a customized proxy voting policy developed to serve its clients' best interests. DOL should preserve the recognition in its 2016 guidance that an expert, appropriately-designed "statement of investment policy designed to further the purposes of the plan" is consistent with ERISA's fiduciary duties.

Indeed, the release is laced throughout with the unsupported allegations of proxy advisor critics, without DOL either substantiating those criticisms or noting their makers' self-interest.[50] For example, the release refers to issuer trade associations' claims that proxy advisors have made what the release calls "factual and/or analytic errors." But this issue was thoroughly explored as part of the recent SEC proxy advisor rulemaking. There, as here, issuers and their advocacy groups expressed "concerns" about errors in proxy advice and the SEC proposed an issuer prereview regime to "promote accuracy" in proxy advice.[51] The comment

[49] 2016 Interpretive Bulletin at 14.

[50] See Release at 42, 43, 44 (alleged problems of proxy advisors are prefaced with "some commenters have asserted," "A number of stakeholders have questioned," "Some question," "the SEC described concerns," "Some stakeholders also question," and "Critics additionally complain").

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

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 Advisor 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."[52] 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."[53] Tellingly, the SEC disavowed its claim of proxy advisor inaccuracy as the 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."[54]

Here, though, DOL would resuscitate this disproved "concern," along with other unsubstantiated allegations, as part of the basis for its proposal. DOL should rely on evidence, not unsubstantiated concerns or the claims of self-interested parties. More generally, the proposal is arbitrary in expressing concern about asset manager and proxy advisor conflicts, while encouraging ERISA fiduciaries to rely on management recommendations or simply

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[52] See Recommendation of the SEC Investor Advisory Committee Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals at 5 (Jan. 24, 2020) (emphasis in original), available at https://www.sec.gov/comments/s7-22-19/s72219-6698769-206000.pdf.

[53] Letter of Ken Bertsch, Executive Director, Council of Institutional Investors to SEC 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.

[54] Statement of the Honorable Allison Herren Lee at SEC Open Meeting (July 22, 2020), 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.").

automatically vote with management without addressing or even acknowledging management's conflicting interests.[55]

Finally, the DOL should clarify the operation of the permitted practices. In the proposal, the DOL claims that adopting the permitted practices will save plans' money by eliminating the need to analyze each proposal. However, the DOL also claims that the permitted practices will allow for individualized exceptions, such as where there is a "heightened management conflict[] of interest" or the company needs the plan to vote to achieve quorum for its annual meeting. These two goals are inconsistent. If an ERISA fiduciary avoids the costs of analyzing each proposal, they would have no apparent way of knowing if the proposal presents a heightened management conflict or otherwise poses special risks to the plan.[56]

VI. The economic analysis is flawed.

DOL's regulatory impact analysis consists of qualitative discussion of the expected costs and benefits of the rules, as well as an "illustration" that quantifies the proposed rules' costs and benefits. The impact analysis and accompanying illustration have at least four fundamental flaws.

[55] For example, the release notes that some proxy advisors "may issue proxy voting recommendations while the company that is the subject of such recommendations is a client of the firm's consulting business," and warns ERISA fiduciaries that "[p]articular attention" must be paid to such firms. Release at 22. It is not rational, however, to simultaneously warn ERISA fiduciaries about the proxy advice of someone who has consulted for a company, while encouraging them to unquestioningly accept the proxy advice of someone actually employed by the company (i.e., management). Compare also Release at 20-21 ("Information that will better enable fiduciaries to determine whether or how to vote proxies on particular matters includes . . . voting recommendations of management") with Release at 22 ("fiduciaries must be aware that conflicts of interest can arise at proxy advisory firms that could affect vote recommendations").

[56] As discussed further below, DOL's assumed cost savings also ignore the realities that most asset managers for ERISA plans will continue to vote proxies, and assume the related costs, for their non-ERISA clients. Moreover, even consistently voting with management would require the overhead costs of having a proxy voting platform and related systems and processes. Finally, DOL does not suggest that adopting a permitted practice will relieve ERISA fiduciaries from their broader obligation to monitor the corporate governance of portfolio companies.

First, DOL presents no actual evidence of a problem warranting this new regulation. While DOL expresses concern about the costs of proxy voting on plan participants, it provides no evidence of plan assets being wasted or spent imprudently on proxy voting. In fact, DOL is forced to admit that, based on the evidence it has, plans' costs for proxy voting "might generally seem small."[57] Assuming high costs as part of a hypothetical illustration is not evidence of a problem warranting regulatory intervention.

Second, and critically, the release fails to understand the baseline against which the proposed changes should be measured. Benefits and costs must be measured against a "baseline" and that "baseline should be the best assessment of the way the world would look absent the proposed action."[58] Here, however, DOL's assumed "baseline" has no grounding in current law or evidence of actual market practice. As noted above, DOL's current guidance makes clear that individual cost-benefit analyses are not required and that "many proxy votes involve very little, if any, additional expense to the individual plan shareholders to arrive at a prudent result." DOL nonetheless blithely asserts that "the activities described in the proposal already are reflected in common practice and are best practices."[59] No basis is given for this assertion,[60] however, and DOL admits it "lack[s] data" on the issue. In reality, it defies all logic to assume that asset managers as a "best practice[]" are spending what, by DOL's calculation, comes to some $13 billion annually on compliance measures that DOL has specifically told them that they do not need to do.[61] Essentially, DOL has assumed away any obligation to justify the

[57] Release at 40. DOL follows this admission with speculation that plans' actual costs might be higher and then weakly offers that "even small costs may not be justified."

[58] OMB Circular A-4, Regulatory Analysis (Sept. 17, 2003).

[59] Release at 51; see also Release at 58 ("the Department believes that the common practices of most plans related to proxy voting are generally consistent with the standards in the proposal").

[60] The only reference to actual facts about market practices is an admission that those facts do not support the assumed baseline. See Release at 52 (as to documentation, "such practices are not universal. In the course of its enforcement activity, the Department sometimes encounters instances where documentation is absent or does not meet the requirements of this proposal.")

[61] Table 2 indicates that a 5% increase in research costs and 1% increase in documentation costs would together would result in $535,217,964 in additional, annual compliance costs for ERISA asset managers. Extrapolating from these figures, DOL's estimate of the total, annual compliance cost for ERISA asset managers to vote proxies is $13,008,824,800.

costs of the burdensome analyses its rules would impose by assuming, with no basis, those analyses are being conducted today. This is an improper end-run around a cost-benefit analysis.[62]

Third, DOL's economic analysis and the accompanying illustration, in particular, ignore the role of proxy advisors in achieving economies of scale. The front part of the release acknowledges the "resource-intensive" tasks that an ERISA plan or its asset manager would need to take on to vote proxies, including "organizing proxy materials, diligently analyzing portfolio companies and the matters to be voted on, determining how the votes should be cast, and submitting proxy votes to be counted."[63] And it also notes that the cost "to collect and analyze the information necessary to reach an appropriate conclusion" "may be lower if the fiduciary can rely on an impartial, expert third-party adviser who specializes in such matters and provides similar services to many shareholders."[64] In fact, the economies of scale achieved through the use of asset managers and proxy advisors are part of the reason "voting proxies involves *very little, if any, additional expense* to the individual plan shareholders to arrive at a prudent result," as DOL's current guidance notes.

These facts are ignored in the illustration, however. The illustration assumes that some 2,000 asset managers will individually and independently perform a cost-benefit analysis, research and document their rationale for each proxy vote, without using a proxy advisor. As other parts of the release seem to recognize, however, this would not make economic sense and is not, in fact, how the proxy voting market works. The illustration thus assumes unrealistic costs that would be "saved" through use of the permitted practices. If DOL is going to rely on a theoretical illustration, that exercise should be reperformed with a more accurate model of how proxy voting works and then re-exposed for comment.

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[62] DOL's related assumptions that research costs will increase by 5% and documentation costs by 1% to account for asset managers who are not already complying with the proposed rule is equally unsupported, illogical and self-serving. Absent evidence, which we do not believe exists, that asset managers are already conducting individual cost-benefit analyses and complying with the other elements of the rule, DOL's economic analysis should acknowledge and quantify the full costs of all affected ERISA fiduciaries' complying with the new requirements.

[63] Release at 24.

[64] Release at 37; see also id. at 42 (noting SEC statement that "proxy advisory firms can capture economies of scale for several of the services they provide, including voting advice.")

Fourth and finally, the proposed rules' approach of focusing on economic impact to each individual portfolio company imposes the opportunity cost of causing ERISA fiduciaries to disregard systematic risks that cut across their portfolio. As discussed above, a variety of issues the rules would deter voting on, such as board declassification, may have positive, spillover effects beyond the company that is the subject of the engagement. The prescriptive requirement in the proposed rules that plan fiduciaries "must . . . consider[] only factors that they prudently determine will affect the economic value ***of the plan's investment***" would effectively put blinders on fiduciaries, causing them to have to disregard these broader effects and their benefits to the plan as a whole.[65] This opportunity cost is not mentioned in the release's economic analysis, let alone considered and quantified. Regulations, especially "economically significant" ones, are supposed to be based on evidence and have their costs and benefits quantified to the extent possible.[66] DOL has not met that standard here.

VII. Legal issues.

A. The rules exceed DOL's authority under ERISA by passing over into corporate governance.

By displacing state corporate law with its own judgment about the proper scope of the shareholder franchise and by creating vastly differential compliance burdens based on how a shareholder votes, DOL has exceeded its authority to implement the general duties of prudence and loyalty under ERISA Section 404. "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."[67]

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[65] In fact, in some circumstances, the excessively narrow approach mandated by the proposed rules would lead to the irrational result of ERISA plans actually voting against themselves. See Lipton Blog (citing Leo E. Strine, Jr., *Securing Our Nation's Economic Future: A Sensible, Nonpartisan Agenda to Increase Long-Term Investment and Job Creation in the United States*, 71 Bus. L. 1081, 1093 (2016).).

[66] Executive Order No. 13,563, 76 FR 3821, (Jan. 21, 2011) ("each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.")

[67] *Santa Fe Industries v. Green,* 430 U.S. 462, 479 (1977) (emphasis in original) (quoting *Cort v. Ash,* 422 U.S. 66, 84 (1975)).

Here, however, the permitted practices would substitute DOL's opinion of what is "substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment" for the determinations made under state corporate law of what shareholders must approve or vote on. But the general provisions of ERISA Section 404 do not grant DOL authority to rewrite state corporate law; in fact, they should be read in a manner not to do so.[68]

Likewise, states' decisions in their corporate law to grant shareholders a say on certain corporate matters can obviously be subverted if DOL can attach any degree of onerous conditions and liability risk to how shareholders vote on those matters (i.e., against management). Could DOL pass a rule saying all ERISA fiduciaries must vote against board declassification proposals because, in DOL's opinion, those are bad corporate governance and would harm plans' interests? Could DOL put in place an interim final rule during a contested merger saying only a vote for the merger would be a permitted practice, with massive compliance burdens and unworkable determinations required to justify an against vote?[69] The proposed rules would set a precedent for federal regulation that dictates the vote in internal corporate decisions governed by state corporate law. This is bad policy and beyond DOL's general authority to make sure retirement plan fiduciaries are prudent and loyal.

For this reason also, we question the assertion in DOL's "Federalism Statement" that the proposed rules would not have any direct effect on "the distribution of power and responsibilities among various levels of government." The proposed rule taxes shareholders' exercise of their rights under state corporate law based on their choice to exercise that right or to vote a particular way. "Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights."[70] Here, however, DOL would

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[68] *Bond v. United States*, 572 U.S. 844 (2014) (statute "must be read consistent with principles of federalism inherent in our constitutional structure"); *Business Roundtable v SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990) (state corporate law "regulates the distribution of powers among the various players in the process of corporate governance, and the Commission's present leap beyond disclosure is just that sort of regulation"); cf. *Am. Equity v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010) (invalidating SEC rule for failure to adequately consider rule's interaction with state law).

[69] Cf. *Business Roundtable*, 905 F.2d at 411 n.6 (" If this part of the rule could allow the Commission to pass on the merits of a corporate merger, then the Commission was asserting a quite radical power.").

[70] *Blasius*, 564 A.2d at 659 n.2.

intentionally deter exercise of those rights. DOL should explain how this is consistent with a due regard for the principles of Federalism.

B. The proposed rules would violate the First Amendment

ERISA fiduciaries engage in speech and expression protected by the First Amendment when they vote and conduct other shareholder engagement activities that the proposed rules would apply to, such as "campaigning for shareholder proposals."[71] The proposed rules are unquestionably a content-based and viewpoint-based restriction on such speech. They impose unique and burdensome restrictions on shareholder activities that may be contrary to the interests of a favored group, while removing those restrictions when the expressive activity favors the preferred group. Such laws "'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[72] Here, that showing has not and cannot be made. In fact, far from demonstrating that the proposed rules are narrowly tailored to address a compelling state interest, the vague and unsupported speculation about plan assets being wasted on proxy voting underlying this proposal suggest the real motivation is to alter votes and suppress other expressive activity with which DOL does not agree.[73]

C. A 30-day effective period is not legal or appropriate.

DOL states that its proposed rule would be effective 30 days after the date of publication of the final rule.[74] The release, however, acknowledges that OMB has designated the proposed rule as a "major rule,"[75] and the Congressional Review Act provides that a major

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[71] Release at 41.

[72] *NIFLA v. Becerra*, 538 U.S. __ (2018) (quoting *Reed*, 135 S. Ct. at 2226).

[73] *First Nat'l Bank of Boston v. Bellotti***,** 435 U.S. 765 (1978) (claim of waste not sufficient to prevent company from exercising its First Amendment rights); see also Victor Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L.J. 235, 251 (1981) ("when the stricture seems to be aimed at only a very narrow kind of political speech, and only on a particular topic, a court may reasonably suspect that the concern of the legislature is not "waste" but silencing the expression of particular views").

[74] Proposed Rule 29 C.F.R. 2550.404a-1(g); Release at 32.

[75] Release at 35.

rule shall not be effective earlier than 60 days after publication of the final rule in the Federal Register.[76]

Moreover, given settled reliance interests and the importance of not disrupting the complex shareholder voting process, DOL should allow a significantly longer effective period for any final rule it adopts that, like the proposal, would force substantial changes to ERISA fiduciaries' voting practices. For example, the SEC recently included transition periods of well over a year for elements of its proxy advisor rules and shareholder proposal rules that would require market participants to adopt new policies and procedures and that would undo settled reliance interests. If DOL proceeds with a final rule, it should include an effective date that is consistent with the law and that is appropriate in the circumstances.

D. A 30-day comment period with no access to other comments is inappropriate.

DOL should also extend the comment period for at least two reasons. First, a 30-day comment period is too short for a rulemaking that: 1) would constitute the first rules under ERISA on proxy voting; 2) per DOL's own analysis, either imposes hundreds of millions in costs or results in hundreds of millions in savings based on how market participants respond to the rules; 3) OMB has designated a "major rule" under the Congressional Review Act; and 4) OMB has designated "economically significant." Especially considering the lack of data in the proposal, a 30-day comment period is too short for commenters to have a meaningful opportunity to react to what has been proposed and supply the agency with the information it should have to make informed decisions on this critical issue.[77]

Here, the harms of this short comment period have been exacerbated by DOL's failure to make comments it has received available to the public through its online portal. As of October 5, 2020, the last day of the comment period, none of the 208 comment letters that DOL has received have been made available on regulations.gov. This prevents commenters from being able to respond to other comments and deprives the agency of this critical input.[78]

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[76] 5 U.S.C. 801(a)(3)(A). DOL's own decision about when to conduct this rulemaking is not "good cause" for an exception to these requirements.

[77] Executive Order No. 12,866, 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.")

[78] See Administrative Conference of the United States, Recommendation 2011-2 (June 16, 2011); see also Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic

DOL should extend or reopen the comment period to allow adequate time for comment and to permit commenters to respond to other comments.

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Conclusion

For all the reasons stated above, Glass Lewis respectfully requests that the DOL not adopt the proposed rules and, instead, reaffirm the balanced approach in its current proxy voting guidance that affords plan participants the benefits of shareholder voting and engagement at low cost. Thank you for your consideration of our comments.

Sincerely,

Kevin Cameron
Executive Chair

Nichol Garzon-Mitchell
Senior Vice President, General Counsel

Dockets at 2 (May 28, 2010) ("OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov."); cf. *Portland Cement v. Ruckelshaus,* 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency.").