

DOL Clarifies Fiduciary Standards on Proxy Voting and Investment Policies

In response to concerns that prior guidance has unduly discouraged fiduciaries from exercising shareholder rights, the DOL issued guidance clarifying fiduciary duties on proxy voting and investment policy statements. The guidance also reiterates DOL's acceptance of applying environmental, social and governance policies to investment strategies. Plan fiduciaries wishing to increase shareholder engagement have room under this guidance to do so.

Background

The management of plan assets that include company stock, including the decisions on the voting of proxies and other exercises of shareholder rights, is a fiduciary action subject to the ERISA rules governing fiduciaries.

The DOL issued guidance in 1994 ([Interpretive Bulletin 94-2](#)) to assist fiduciaries in understanding their obligations under ERISA, including:

- The plan trustee has the duty to vote proxies unless authority to manage plan assets has been delegated to investment managers (or unless the named fiduciary retained the right to direct the trustee on the voting of proxies)
- The investment manager has, and may not delegate, exclusive authority to vote proxies unless expressly excluded under the plan or investment management agreement
- Compliance with an investment policy, including proxy voting guidelines, must be followed, to the extent consistent with ERISA
- Fiduciaries must put the interests of the participants and beneficiaries first, which may involve shareholder activities intended to influence corporate activities, to enhance the value of the participants' investments

In 2008, the DOL issued [Interpretive Bulletin 2008-2](#) to clarify and update IB 94-2, and to reflect its positions on shareholder activism and socially directed shareholder proxy voting initiatives. The DOL also issued [Interpretive Bulletin 2008-1](#) to address fiduciary



considerations on environmental, social and governance (ESG) investment strategies – but, believing this guidance “unduly discouraged” fiduciaries from considering ESG factors, later replaced it with Interpretive Bulletin 2015-1. (See our [November 12, 2015 For Your Information](#) for more on IB 2015-1.)

DOL Reinstates IB 94-2

The DOL believes there is an unquantifiable benefit to shareholder engagement and that IB 2008-2 has unduly discouraged fiduciaries from voting proxies and engaging in other prudent exercises of shareholder rights. In particular, according to the DOL, some stakeholders have misread IB 2008-2 to prohibit plans from voting proxies absent a conclusion that doing so is more likely than not to result in a quantifiable increase in the investment’s value. DOL is also concerned that, despite IB 2015-1, confusion remains about the consideration of ESG issues when voting proxies and in formulating investment strategies. To clarify its position, the DOL issued [Interpretive Bulletin 2016-1](#), which reinstates the principles originally articulated in IB 94-2 with minor updates to reflect trends on shareholder engagement, as discussed below.

Proxy Voting

A fiduciary’s obligation to prudently manage plan assets extends to proxy voting and proxies should generally be voted. In some situations, a fiduciary may consider whether the cost of voting is warranted. Regardless, a fiduciary’s duty includes periodic monitoring of investment managers – including actions taken in voting proxies – through a review of proxy voting records.

Investment Policy Statements

Investment policy statements, if established, are considered part of the documents governing the plan. They should include a proxy voting policy (for plans that include company stock) and may include policies concerning economically targeted investments and incorporate ESG factors. Only an express requirement to comply with an investment policy will control an investment manager’s authority to manage the plan assets, and then only to the extent consistent with ERISA. Even where an investment policy statement is in place, a named fiduciary remains obligated to monitor the investment manager’s management of plan assets.

Typical examples of permissible shareholder engagement include “say on pay,” monitoring the board composition for diversity, independence and experience, and the corporation’s policies and practices on environmental or social issues.

Shareholder Engagement

An investment policy may permit active monitoring of corporate management and communication if determined to be a prudent exercise of shareholder rights, taking into account the costs involved.

In Closing

This guidance reiterates the fiduciary requirements for proxy management and voting, emphasizing the DOL’s position that stock proxies have economic value and that trustees have the same fiduciary responsibilities for proxies as they do for investing plan assets. The DOL also acknowledges the positive effect of shareholder activism, perhaps even encouraging it. A fiduciary who fails to vote on a management proposal that could affect shareholder value or casts a vote without properly considering the impact of the proposal would appear to violate the duty to prudently manage plan assets.

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