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DOL PROPOSED REGULATIONS ON PROXY VOTING

The ERISA Industry Committee
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AGENDA

- Existing Guidance
- Current Requirements
- Proposed Regulations
- Requirements for Plan Fiduciaries
- Permitted Policies
- Delegation
- Comments
- Questions

EXISTING GUIDANCE

- Avon Products, Inc. Opinion Letter (1988)
- DOL Interpretive Bulletin 94-2
- DOL Interpretive Bulletin 2008-02
- DOL Interpretive Bulletin 2016-01

CURRENT REQUIREMENTS

- The DOL has long-held that proxy voting is a fiduciary act. A plan fiduciary has a fiduciary obligation to vote proxies on issues that may affect the value of a plan's investments.
- DOL Interpretive Bulletin 2016-01
 - A plan fiduciary should consider whether a plan's vote, either alone or with the votes of other shareholders, will affect the value of the plan's investments compared to the time and costs the plan will incur in voting the shares.
 - A plan fiduciary has a duty to monitor proxy voting decisions or actions and to incur reasonable expenses in fulfilling its fiduciary obligations.
 - In most cases, proxy voting should not require significant costs because proxies are frequently voted by investment managers who often engage consultants to reduce the costs of researching proxy matters and exercising shareholder rights.
 - Some proxies may involve out-of-the-ordinary voting costs or unusual requirements (e.g., voting proxies on shares of foreign corporations). A plan fiduciary should take these costs and requirements into consideration when deciding whether a plan should purchase the shares.

PROPOSED REGULATIONS

- The DOL published proposed regulations on September 4, 2020 related to proxy voting and the exercise of shareholder rights by ERISA plan fiduciaries.
- The DOL is accepting comments on the proposed regulations for 30 days. Comments are due by October 5, 2020.
- The Department has requested comments on “all facets” of the proposed regulations, as well as on approximately 30 specific issues.
- If the regulations are finalized without changes, the final regulations will take effect within 30 days of the regulations being finalized.

PROPOSED REGULATIONS

- Interpretive Bulletin 2016-01 no longer reflects the view of the DOL with respect to an ERISA plan fiduciary's exercise of proxy voting and other shareholder rights.
- The proposed regulations would amend the “investment duties” regulations under ERISA Section 404(a) to address the application of the duties of prudence and exclusive purpose to the exercise of shareholder rights, including proxy voting, the use of written proxy voting policies and guidelines, and the selection and monitoring of proxy advisory firms.

REQUIREMENTS FOR PLAN FIDUCIARIES

- A plan fiduciary must vote any proxy if the fiduciary prudently determines that the matter being voted upon would have an economic impact on the plan after considering research and taking into account the costs involved (including the cost of research, if necessary, to determine how to vote).
- The plan fiduciary must refrain from voting any proxy if it concludes that the matter being voted upon would not have an economic impact on the plan.
- “[T]he expenditure of plan resources is generally warranted only when proposals have a meaningful bearing on share value or when plan fiduciaries have determined that the interests of the plan are unlikely to be aligned with the positions of a company’s management.”

REQUIREMENTS FOR PLAN FIDUCIARIES

- A plan fiduciary must:
 - Consider factors that will affect the economic value of the plan's investment based on a determination of risk and return over an appropriate investment horizon consistent with the plan's investment objectives and the funding policy of the plan.
 - Consider the likely impact on the plan's investment performance based on such factors as the size of the plan's holdings in the issuer relative to the total investment assets of the plan, the plan's percentage ownership of the issuer, and the costs involved.
 - Not subordinate the interests of participants and beneficiaries in their retirement income or financial benefits under the plan to any nonpecuniary objective, or sacrifice investment return or take on additional investment risk to promote goals unrelated to those financial interests of the plan's participants and beneficiaries or the purposes of the plan.

REQUIREMENTS FOR PLAN FIDUCIARIES

- A plan fiduciary must:
 - Investigate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights. The fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without appropriate supervision and a determination that the service provider's proxy voting guidelines are consistent with the economic interests of the plan and its participants and beneficiaries.
 - Maintain records on proxy voting activities and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights.
 - Exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise 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.

PERMITTED POLICIES

- To minimize increased time and expense, plans may adopt proxy voting policies that align with one of three approaches identified by the DOL as being reasonably designed to serve the plan's economic interest:
 - Follow the voting recommendations of the issuer's management on proposals that are unlikely to have a significant impact on the value of the plan's investment, subject to any conditions determined by the fiduciary as requiring additional analysis.
 - Vote only on particular types of proposals that the fiduciary has prudently determined are substantially related to the corporation's business activities or likely to have a significant impact on the value of the plan's investment.
 - Refrain from voting on proposals when the plan's holding in a single issuer relative to the plan's total assets is below a quantitative threshold that is sufficiently small that the outcome of the vote is unlikely to have a material impact on the investment performance of the plan's portfolio.
- A plan fiduciary must review its proxy voting policies at least once every two years.

DELEGATION

- If a plan fiduciary has delegated authority to vote proxies or exercise shareholder rights to an investment manager or a proxy voting firm, the plan fiduciary must require the investment manager or proxy advisory firm to document the rationale for its 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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