

# Plan Fiduciaries: You Have No Right to Vote

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On December 11, 2020, the United States Department of Labor (DOL) issued a pre-publication version of its final regulations with respect to proxy voting in plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA). The purpose of the rule is to clarify the DOL's longstanding position regarding fiduciary responsibilities to vote proxies, to coordinate with recent changes implemented by the United States Securities and Exchange Commission (SEC) for investment advisers, and to dovetail on recent changes in DOL guidance regarding ERISA plan investments that promote environmental, social, and governance (ESG) principles. These final regulations generally apply following the expiration of the 30-day period following publication in the Federal Register (although certain provisions are not effective until January 31, 2022 for plan fiduciaries other than investment advisers).

Not at all surprising, the final regulations set out the basic premise that a plan fiduciary charged with the responsibility to manage plan assets that include shares of stock also has the responsibility to manage shareholder rights appurtenant to those shares, such as the right to vote proxies. The applicable fiduciary must exercise such authority in accordance with the loyalty and prudence standards prescribed under ERISA. Note, however, this responsibility will not apply to an individual account plan, such as a 401(k) plan, that provides for pass-through voting to participants and beneficiaries. Importantly, the final regulations specify a plan fiduciary is not required to (and, should not) vote every proxy. Rather, when deciding whether to vote proxies and when actually exercising such rights, the plan fiduciary must act solely in accordance with the economic interest of the plan and consider any costs involved (including costs of research). The plan fiduciary may not subordinate the interests of the plan to any non-pecuniary objective (e.g., ESG issues), or promote nonpecuniary benefits or goals unrelated to those financial interests of the plan. Furthermore, the plan fiduciary must evaluate material facts underlying each proxy vote and maintain records on proxy voting activities (this obligation has a delayed effective date of January 31, 2022 for fiduciaries other than investment advisers).

The final regulations do not preclude the engagement of another party to assist or advise on the exercise of such proxy rights, provided that the fiduciary exercises prudence and diligence in selecting and monitoring such person. This obligation extends to investments in pooled investment vehicles. Effective January 31, 2022, the plan fiduciary make a formal determination that such provider's proxy voting guidelines are consistent with the fiduciary's obligations under the final regulations. Importantly, the plan fiduciary cannot absolve itself of all fiduciary responsibility related to proxy voting merely by delegating such authority to a third party.

The final regulations also contemplate the use of proxy voting policies to set forth specific parameters for when to exercise its authority to vote shares. Of course, the plan fiduciary must design the policy in a prudent manner to serve the plan's economic interest and must review the policy on a periodic basis. Although not addressed in the final regulation, we recommend that such proxy voting policy be formally adopted by the plan fiduciary (and reflected in written minutes), and reviewed at least annually.

In summary, plan fiduciaries need to prepare for a change in their proxy voting practices. While some of the changes are not effective for many plan fiduciaries (other than investment advisers) until January 31, 2022, plan fiduciaries, investment advisers and other service providers will need to coordinate early in this process to address these changes and, if desirable, to adopt or review applicable voting proxy policies and to engage appropriate advisers.

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