



**ICGN**

International Corporate Governance Network  
*Inspiring good governance & stewardship*

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

Submitted electronically: [www.regulations.gov](http://www.regulations.gov)

5 October 2020

**Subject: ICGN Response to the Department of Labor Fiduciary Duties  
Regarding Proxy Voting and Shareholder Rights Proposed Rule: RIN 1210-  
AB95 Comment Letter**

Dear Secretary Scalia,

Thank you for the opportunity to provide comments to the proposed rule regarding proxy voting and shareholder rights. By way of background, the International Corporate Governance Network (ICGN) is led by investors responsible for assets under management in excess of US\$54 trillion. ICGN is a leading authority on global standards of corporate governance and investor stewardship. Our membership is based in more than 45 countries, including a large membership of US based investors, ERISA-covered funds, companies, advisors and stakeholders.

ICGN's mission is to promote high standards of professionalism in governance for investors and companies alike in their mutual pursuit of long-term value creation contributing to sustainable economies world-wide. ICGN offers an important investor perspective on corporate governance policies and guidance, to help inform public policy development and the encouragement of good practices by capital market participants. Our policy positions are guided by the ICGN Global Governance Principles<sup>1</sup> and the ICGN Global Stewardship Principles,<sup>2</sup> both of which have been developed in consultation with ICGN members and as part of a wider peer review. More information on ICGN may be reviewed on our website: [www.icgn.org](http://www.icgn.org)

ICGN's members are well versed in the fiduciary duty of proxy voting and shareholder rights. In the proposed rule, an explanation is offered by the Department

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<sup>1</sup> ICGN Global Governance Principles, 2017: [http://icgn.flpbks.com/icgn\\_global\\_governance\\_principles/](http://icgn.flpbks.com/icgn_global_governance_principles/)

<sup>2</sup> ICGN Global Stewardship Principles, 2016: <http://icgn.flpbks.com/icgn-global-stewardship-principles/#p=1>

of Labor/Employee Benefit Security Administration (DOL/EBSA) why the proposed rule has been filed:

A fiduciary's duty is only to vote those proxies that are prudently determined to have an economic impact on the plan after the costs of research and voting are taken into account. Nevertheless, a misunderstanding that fiduciaries must research and vote all proxies continues to persist, causing some plans to expend their assets unnecessarily on matters not economically relevant to the plan.

ICGN offers two responses to the proposed rule as follows.

### 1. Fiduciary Duty and Proxy Voting as a Plan Asset

Voting is a core ownership right, and a fundamental investor fiduciary duty. The responsible exercising of voting rights is a fundamental feature of investor stewardship and is built into stewardship codes in over twenty markets globally, including the United States.

Investor stewardship is grounded in the fiduciary duty that investors owe to their beneficiaries. Fundamental fiduciary duties include two central principles: 1) Duty of Care/Prudence and 2) Duty of Loyalty, which require investor fiduciaries to protect beneficiaries and serve their interests first and foremost.<sup>3</sup>

In this context we would say that there is no “misunderstanding” as mentioned in the proposed rule regarding the responsibility of fiduciaries to vote proxies associated with fund assets.

In the narrative for the proposed rule, the DOL/EBSA said:

[S]ince 1988 the amount and types of shareholder proposals have increased substantially. Therefore, the Department has decided to propose rule amendments that expressly state that *fiduciaries must not vote in circumstances where plan assets would be expended on shareholder engagement activities that do not have an economic impact on the plan, whether by themselves or after the costs of engagement are taken into account.* (Emphasis added).

We believe that a fiduciary's duty includes voting proxies, which provide economic value to the fund. In general, proxy voting will include voting on governance essentials such as individual director nominees, the ratification of auditor, advisory vote on “Say on Pay” or executive remuneration, and any management and/or shareholder proposals on the ballot.

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<sup>3</sup> International Corporate Governance Network (ICGN) Guidance on Investor Fiduciary Duties 2018, page 7: [http://icgn.flpbks.com/icgn-fiduciary\\_duties/](http://icgn.flpbks.com/icgn-fiduciary_duties/)

The most important votes on a company proxy cast by investors are the votes “for”, “against” or to “withhold” from the directors who are nominated by the company. The directors of investee companies are themselves fiduciaries who serve in positions of ultimate responsibility to support the long-term success of the company and, in turn, the interests of shareholder value. The board, through the leadership of the chairperson of the board and the relevant committees, should ensure that a slate of directors is provided to allow shareholders to vote in an informed way. According to the ICGN Global Governance Principles, Principle 3.3, Director Nomination Disclosure:

The board should disclose the process for director nomination and election/re-election along with information about board candidates which includes: a) board member identities and rationale for appointment; b) core competencies, qualifications, and professional background; c) recent and current board and management mandates at other companies, as well as significant roles on non-profit / charitable organisations; d) factors affecting independence, including relationship/s with controlling shareholders; e) length of tenure; f) board and committee meeting attendance; and g) any shareholdings in the company.<sup>4</sup>

The Principles, under 3.5 Elections, also require that, “Shareholders should have a separate vote on the election of each director, with each candidate approved by a simple majority of shares voted.”<sup>5</sup>

Therefore, the election of directors is paramount to an investor’s fulfilment of its fiduciary duty, for with these votes, an investor elects the very people that will decide the future direction of the company and its capital allocation strategy. Surely, the DOL/EBSA is not suggesting that it would be acceptable for investors to routinely pass on voting when this is one of the best ways to determine the viability of their investments. Moreover, many asset owners have specifically stated in their investment mandates that the asset manager is to vote on its shares in alignment with its proxy voting guidelines – in such cases it would be a breach of contract, and an abrogation of fiduciary duty for the asset manager to wilfully ignore its client’s wishes.

## 2. Shareholder Proposals and Costs for Exercising Shareholder Rights

In the proposed rule, DOL/EBSA said:

The Department invites comments on the degree to which plans are incurring costs to vote on proposals or exercise other shareholder rights and how they have balanced those costs against any perceived duty or requirement to vote proxies.

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<sup>4</sup> ICGN Global Governance Principles 3.3, p. 16.

<sup>5</sup> Ibid, p. 17.

The rise in shareholder proposals that is referenced in the proposed rule may directly relate to the actions or inactions taken by the company board of directors and management. Some of the early shareholder proposals requested that a board adopt best practices for corporate governance, which included the annual election of the board of directors, the appointment of a lead independent director, the adoption of majority vote standards and the separation of Chairman and CEO roles. Over time, many US companies adopted these practices after engagement with their shareholders. Currently, the overwhelming majority of shareholder proposals are related to corporate governance and executive compensation matters. Achieving the alignment of executive pay and incentives is fundamental to good corporate governance and it behooves investors to take the time to properly examine and respond to shareholder proposals relating to executive remuneration.

Examples of more recent shareholder proposals for which ICGN members have engaged companies to discuss relate to environmental and social proposals, including reporting on climate change, global concerns with child labor and slavery, the destruction of land and use of water resources. The proposals can be directly related to the necessary assessment by investors on the risks associated by investing in these companies. If a company refuses to report on items that could be material to investors, a last resort is the filing of a shareholder proposal. These types of shareholder engagement activities can certainly lead to a positive economic impact on the plan, not only for the investor filing the proposal- other investors will gain as well.

Finally, the concerns expressed by DOL/EBSA on the potential “cost” of shareholder engagement must be addressed. Moreover, any costs incurred by investors may in some cases be related to the inability of boards and management to provide greater transparency and reporting with respect to risks associated with company operations.

To propose that fiduciaries must weigh the cost of these engagements against their fiduciary duty (i.e., to ensure that plan assets are spent wisely for their beneficiaries) betrays an apparent misunderstanding by DOL/EBSA as to what engagement is and seeks to achieve. It also suggests some ignorance of an increasing body of research establishing the economic value of environmental, social and governance (ESG) investing and reporting. Through focused and targeted engagement by shareholders, more companies are providing information on ESG factors, which, in turn, provide investors with data to make investment decisions. Recent studies have shown positive returns (as noted in our earlier letter on the DOL’s proposed rule on ESG investing) whether in particular indices or through a company’s incorporation of ESG factors.<sup>6</sup> The positive returns relating to stewardship, including voting, will make

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<sup>6</sup> There is a growing base of academic research literature relating to ESG, but a representative study published in 2020 presented evidence concluding that ESG engagement can benefit shareholders by reducing firms’ downside risk: Andreas G.F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura Starks, Xiao Y. Zhou ESG Shareholder Engagement and Downside Risk (16 Apr 2020) Available at

more investors turn to intensifying stewardship activities, which ICGN strongly supports. This is a tremendous and important development that should be supported worldwide.

We hope these comments are useful in your deliberations. If you would like to follow up with us with questions or comments, please contact our Policy Director George Dallas: [george.dallas@icgn.org](mailto:george.dallas@icgn.org)

Yours sincerely,



Kerrie Waring  
**Chief Executive Officer**  
**International Corporate Governance Network**

cc.

Carol Nolan Drake, ICGN Shareholder Responsibilities Committee  
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ECGI: <https://ecgi.global/working-paper/esg-shareholder-engagement-and-downside-risk>. This is cited as an indicative example of recent research. We also cite two key meta studies relating to sustainability in the mid 2010s which provided an encouraging foundation to stimulate further research:

- Gordon Clark, Andrea Feiner and Michael Viehs, "From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance", March 5, 2015.
- Good Governance driving Corporate Performance? A meta-analysis of academic research & invitation to engage in the dialogue, Deloitte and Nyenrode Business University, December 2016.