

December, 2020

Final Rule on Proxy Voting and Shareholder Rights Released by Department of Labor

The Department of Labor (“DOL”) released a final rule on Friday, December 11, 2020 amending its “Investment Duties” regulation. This rule addresses the application of fiduciary duties under ERISA in regards to the exercise of shareholder rights, including proxy voting.

The final rule adopts a principles-based approach, requiring that fiduciaries have a process in place for exercising shareholder rights, including proxy voting, under which their duties are carried out prudently and in the sole interest of plan participants. This rule becomes effective 30 days after its date of publication in the *Federal Register* and includes delayed compliance dates to January 31, 2022, for certain recordkeeping and proxy voting policy requirements, subject to conditions set forth in the rule.

Key features of the final rule are as follows:

- The duty of the fiduciary in managing plan assets that are stock shares “includes the management of shareholder rights appurtenant to those shares, such as the right to vote proxies”; however, the fiduciary’s duty in managing shareholder rights “does not require the voting of every proxy or the exercise of every shareholder right.”
- In evaluating whether and when to exercise shareholder rights, the fiduciary must act prudently, solely in the interest of plan participants and beneficiaries, and for the exclusive benefit of plan participants and beneficiaries and defraying reasonable expenses.
- In order to fulfill their fiduciary obligations in deciding whether and how to exercise shareholder rights, fiduciaries must comply with six requirements:
 1. “act solely in accordance with the economic interest of the plan and its participants and beneficiaries”;
 2. “consider any costs involved”;
 3. “not subordinate the interest of plan participants and beneficiaries ... to any non-pecuniary objective”;
 4. “evaluate material facts that form the basis for any particular proxy vote or other exercise of shareholder rights”;
 5. “maintain records on proxy voting activities and other exercises of shareholder rights”;
and
 6. “exercise prudence and diligence in the selection and monitoring of persons, if any, selected to advise or otherwise assist with exercises of shareholder rights.”

- If authority is delegated to a third party to vote proxies and/or exercise other shareholder rights, or if a fiduciary follows the recommendations of a third party in exercising shareholder rights such as proxy voting, the fiduciary must prudently monitor that party's activities to ensure they meet the fiduciary obligations under the final rule.
- The rule provides two "safe harbor" policy types that fiduciaries may adopt to satisfy loyalty and prudence requirements in making a decision as to whether to vote a proxy (but not how to vote):
 - "A policy that voting resources will focus only on particular types of proposals that the fiduciary has prudently determined are substantially related to the corporation's business activities or are expected to have a material effect on the value of the plan's investment";
 - "A policy of refraining from voting on proposals or types of proposals when the size of the plan's holdings in the stock subject to the vote are below quantitative thresholds that the fiduciary prudently determines, considering its percentage ownership of the stock and other relevant factors, is sufficiently small that the matter being voted upon is not expected to have a material effect on the investment performance of the plan's portfolio (or assets under management in the case of an investment manager)".
- Under the final rule, plan fiduciaries are required to periodically review their proxy voting policy.
- A provision of the rule clarifies that it does not apply to rights on shares held in defined contribution plans "that are passed through to participants and beneficiaries that hold the shares in their individual accounts."
- The rule also provides guidance on certain other issues, including "the role of plan trustees and investment managers, practices of following proxy advisory firm recommendations (robo-voting practices), and the treatment of conflicting plan policies in pooled investment vehicles."

Voya continues to monitor regulatory developments impacting retirement plans.

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