DOL ISSUES PROXY VOTING REGULATIONS FOR PLAN FIDUCIARIES

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The Department of Labor ("DOL") issued final regulations in December dealing with the fiduciary duties related to proxy voting of investments held within ERISA plans. Under the regulations, the DOL has confirmed that the fiduciary duty to manage assets held within a plan includes voting of proxies and exercising other shareholders rights. These duties lay with the plan trustee unless the trustee has delegated such authority. Consistent with other regulations issued in November 2020, the DOL indicates that non-pecuniary and social interests should not play a part in the fiduciary decision making process. This new regulation makes it clear that ERISA fiduciaries should not consider environmental, social, and corporate governance or other similar considerations in a manner that would subordinate the pecuniary factors being considered.

Under the regulations a fiduciary must:

- Act solely in the economic interest of the plan and its participants.
- Consider the costs involved when deciding to vote a proxy or exercise a shareholder right.
- Not subordinate the financial interests of plan participants to non-pecuniary interests or promote non-pecuniary benefits or goals unrelated to plan participant financial interests.
- Evaluate the material facts that form the basis for any vote or exercise of shareholder rights.
- Maintain records on proxy votes and other exercise of rights.
- Exercise prudence and diligence in the selection and monitoring of any persons selected to advise or assist with proxy votes or exercise of rights.

The new regulation became effective on January 15, 2021. The January 15 effective date is important because it pre-dates President Biden's Executive Order advising agencies to consider delaying the effective date for new regulations for a period of 60 days from January 20. However, this regulation may be identified as an item to be further reviewed by the Biden Administration as a similar regulation directing fiduciaries to evaluate plan investments based solely on risk and return factors was identified as one that would be reviewed. DOL Regulation Section 2550.404a–1

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