ACORE
AMERICAN COUNCIL ON
RENEWABLE ENERGY

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U.S. Department of Labor
Room N-5655
200 Constitution Avenue, NW
Washington, D.C. 20210

Submitted via regulations.gov

Re: RIN 1210-AB91 Proposed Rule, *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*

Dear Assistant Secretary Wilson,

The American Council on Renewable Energy ("ACORE") respectfully submits these comments concerning the September 4, 2020 proposed rule from the U.S. Department of Labor Employee Benefits Security Administration ("Department"), *Fiduciary Duties Regarding Proxy Voting and Shareholder Rights*, Regulatory Identifier Number 1210-AB91 ("proposed rule").[1] ACORE is a national nonprofit organization dedicated to advancing the renewable energy sector through market development, policy changes and financial innovation.

The proposed rule is redundant to the requirements of existing law and therefore unnecessary to protect the interests of investors. Rather than providing additional clarity around fiduciary compliance, the proposed rule is instead likely to sow confusion and increase regulatory burden on ERISA fiduciaries. According to the Department's own analysis, the proposed rule will impose added costs on plan participants and beneficiaries, unless fiduciaries abandon their voting rights or adopt the Department's voting preferences. Notably, the proposed rule offers no evidence of harm to ERISA plan participants or beneficiaries due to proxy voting and fails to quantify any benefit justifying its consideration. The proposed rule appears to be grounded in an erroneous assumption that Environmental, Social and Governance (ESG) considerations are unrelated to financial performance and inappropriately substitutes that erroneous assumption for the considered judgment of seasoned investment professionals exercising one of the most basic rights of stock ownership at the heart of fiduciary duty. There are too many other aspects of the proposed rule whose practical application would adversely impact ERISA fiduciaries, plan participants and beneficiaries.

For these reasons, the proposed rule should be withdrawn. If the proposed rule is not withdrawn, it should be expressly modified to clarify that ERISA's fiduciary duties require qualified

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[1] *See* 85 *Fed. Reg.* at 55,219.

investment professionals to vote in favor of proxies that better align holdings with ESG metrics when they prudently determine that doing so is in the economic interest of plan participants and beneficiaries. Finally, the unusually short 30-day comment period for this proposed rule should be extended to 120 days to allow for the full range of affected parties to express their concerns.

- **The proposed rule is redundant to the requirements of existing law and therefore unnecessary to protect the interests of investors.** As the preamble to the proposed rule and the proposed rule itself make clear, the fiduciary duty under Title 1 of the Employee Retirement Income Security Act of 1974 (ERISA) already requires that qualified investment advisors manage plan assets, including the casting of proxy votes, for the economic benefit of plan participants and beneficiaries.[2] This requirement exists today and applies to all proxy votes, ESG-related or otherwise. Accordingly, the proposed rule is not needed to create that requirement, or to have that requirement apply to ESG-related investments.

- **The proposed rule is likely to sow confusion and increase regulatory burden on ERISA fiduciaries.** After declaring that the fiduciary duty does not always require proxy voting,[3] the proposed rule uses highly selective and often contradictory criteria for fashioning its guidance as to when proxy votes should be cast. For example, after expressing concern that blanket voting policies may cause unnecessary expenditure of plan assets,[4] the proposed rule goes on to propose its very own set of preferred blanket voting policies (i.e. permitted practices), selectively relying on the same "prudently determined" economic benefit assumptions used by fiduciaries in other contexts less favored by today's Department.[5] Furthermore, while warning that "the expenditure of plan resources to decide whether and how to vote on … proposals that are unlikely to have an impact on a plan's uneconomic value … could constitute a fiduciary breach,"[6] the proposed rule at the same time "confirm[s] that when making their voting decisions, fiduciaries must perform reasonable investigations, understanding that certain proposals may require a more detailed or particularized voting analysis."[7] Setting forth requirements whose adherence invites charges of fiduciary breach is untenable for ERISA fiduciaries, as well as the proposed rule.

- **According to the Department's own analysis, the proposed rule will impose added costs on plan participants and beneficiaries, unless fiduciaries abandon their voting rights or adopt the Department's voting preferences.** The proposed rule requires fiduciaries to vote all proxies prudently determined to have an economic impact on their plans after consideration of costs[8]—and then creates an additional and highly prescriptive set of analytical and documentation requirements applied only to proxies that do not conform to the Department's preferences.[9] These onerous new requirements almost

[2] *See* 85 *Fed. Reg.* at 55,220.
[3] *See* 85 *Fed. Reg.* at 55,223.
[4] *See* 85 *Fed. Reg.* at 55,221.
[5] *See* 85 *Fed. Reg.* at 55,242.
[6] *See* 85 *Fed. Reg.* at 55,232.
[7] *See* 85 *Fed. Reg.* at 55,224.
[8] *See* 85 *Fed. Reg.* at 55,221.
[9] *See* 85 *Fed. Reg.* at 55,224.

certainly increase cost, a likelihood the Department's own analysis of the proposed rule readily concedes. Unless fiduciaries abandon their voting rights, or adopt the Department's voting preferences (i.e. permitted practices), "the costs of the proposed rule, including determining whether each proxy vote will have an economic impact, may be significantly greater."[10] Of course, the additional costs inherent in the proposed rule will ultimately be borne by plan participants and beneficiaries as an increasing amount of fiduciaries' time and money gets siphoned towards regulatory compliance.

- **The proposed rule offers no evidence of harm to ERISA plan participants or beneficiaries due to current proxy voting practices and fails to quantify any purported benefit for its consideration**. Across twenty-five pages of single-spaced text in the Federal Register, the Department cites no evidence of current proxy voting practices causing losses to plan participants or beneficiaries. The closest the Department comes to providing a rationale for the proposed rule's consideration is a brief bullet entitled "Mixed evidence on effectiveness of shareholder voting" selectively supported by a handful of sources that can hardly be considered independent or dispositive on the issue.[11] Additionally, the Department's own analysis provides no quantifiable benefit for the proposed rule.[12] Absent any credible finding that the proposed rule's asserted benefits will quantifiably outweigh its acknowledged costs, the Department should not move forward with this proposal.

- **The proposed rule appears to be grounded in an erroneous assumption that Environmental, Social and Governance (ESG) considerations are unrelated to financial performance and inappropriately substitutes that erroneous assumption for the considered judgment of seasoned investment professionals exercising one of the most basic rights of stock ownership at the heart of fiduciary duty.** In its analysis of the proposed rule, the Department states that "[its] concerns about plans' voting costs sometimes exceeding attendant benefits has been amplified by the recent increase in the number of environmental and social shareholder proposals introduced. It is likely that many of these proposals have little bearing on share value or other relation to plan interests."[13]

  In reality, ESG investing is a generally accepted investment theory with a proven track record of financial success. During the COVID-19 crisis, fund managers considered their focus on ESG-related risks a significant factor in the resiliency of their portfolios despite the economic downturn.[14] Furthermore, prominent investors like BlackRock, Goldman

[10] *See* 85 *Fed. Reg.* at 55,232.
[11] *See* 85 *Fed. Reg.* at 55,222.
[12] *See* 85 *Fed. Reg.* at 55,231.
[13] *See* 85 *Fed. Reg.* at 55,229.
[14] S&P Global, "Major ESG investment funds outperforming S&P 500 during COVID-19," April 13, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103

Sachs, J.P. Morgan, Bank of America, and many others, increasingly take ESG considerations into account when making investments decisions.[15] [16] [17] [18] [19]

By evaluating a broader spectrum of operating and financial risk, investments aligned with ESG principles are increasingly recognized as the best choice for realizing maximum long-term returns, generating better financial performance than non-ESG equivalents. In 2019, returns on ESG-aligned stocks outperformed the S&P by approximately 45%.[20] According to data from BloombergNEF, companies that perform well in Environmental, Social and Governance metrics saw stronger returns than other funds this past spring, despite the COVID-19 pandemic.[21] Specifically, the MSCI ESG World Leader Index, an index that includes companies like Microsoft, Alphabet, Johnson & Johnson and Roche Holdings, outperformed its non-ESG equivalent by 1.1 percentage points in April 2020.[22] According to S&P Global, ESG investment funds outperformed S&P Global 500 during the COVID-19 crisis.[23] As a result of this outperformance, a 2019 survey of senior executives revealed that a majority of North American executives viewed ESG considerations as part of their fiduciary duty,[24] and average support for ESG-related resolutions rose to 46% in 2019 from 27% in 2015, according to analysis of 40 fund families by Morningstar.[25] A record number of ESG-related resolutions have already passed in 2020.[26]

That fiduciaries are using more information to exercise better corporate oversight is a positive development for plan participants and beneficiaries. According to an MSCI research report, ESG factors tend to have financially material impacts on stock price

[15] BlackRock, "Committed to sustainability," https://www.blackrock.com/corporate/sustainability/committed-to-sustainability.
[16] Goldman Sachs, "ESG and Impact Investing," https://www.gsam.com/content/gsam/us/en/institutions/strategies/explore-by-solution/esg-and-impact-investing.html.
[17] J.P. Morgan, "Sustainable Investing," https://am.jpmorgan.com/ch/en/asset-management/adv/investment-themes/esg/.
[18] Bank of America, "Our commitment to environmental sustainability," https://about.bankofamerica.com/en-us/what-guides-us/environmental-sustainability-governance-and-policies.html#fbid=syC66Iffa39.
[19] Morningstar, "The Sustainable Funds Landscape in 6 Charts," March 18, 2020, https://www.morningstar.com/insights/2020/03/18/sustainable-funds-in-6-charts.
[20] Coffey, Brendan, "ESG Stocks Are Beating The S&P By 45% This Year," Forbes, November 12, 2019, https://www.forbes.com/sites/brendancoffey/2019/11/12/esg-stocks-are-having-a-fantastic-year/.
[21] BloombergNEF, "ESG Funds Outshining Competitors Even in Market Turmoil," https://www.bnef.com/shorts/7069.
[22] Ibid.
[23] S&P Global, "Major ESG investment funds outperforming S&P 500 during COVID-19," April 13, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/major-esg-investment-funds-outperforming-s-p-500-during-covid-19-57965103.
[24] State Street Global Advisors, "Into the Mainstream: ESG at the Tipping Point," November 2019, https://www.ssga.com/library-content/pdfs/insights/into-the-mainstream.pdf.
[25] Cook, Jackie, "How Fund Families Support ESG-Related Shareholder Proposals," February 13, 2020, Morningstar, https://www.morningstar.com/insights/2020/02/12/proxy-votes.
[26] Cook, Jackie, "Key ESG Issues Up for Shareholder Vote," June 4, 2020, Morningstar, https://www.morningstar.com/articles/987032/key-esg-issues-up-for-shareholder-vote.

performance and profitability for companies over multiple time periods.[27] Banks such as ING and BNP Paribas invest in sustainable finance projects due to the benefits of decreased loan prices and interest rates and increased access to financing, return on sales, sales growth, return on assets and return on equity.[28]

Investors naturally consider ESG factors when evaluating shareholder opportunities, including proxy votes. For example, when leading tractor-trailer truck manufacturer PACCAR Inc. announced its adoption of science-based emissions reduction targets, investors clearly understood that those targets would have a material impact on their sales volume and on which trucks they would sell in response to changes in public policy and consumer interest.[29] Similarly, Starbucks' commitment to reducing waste has a material impact on the products they need to purchase for their inventory, altering business costs.[30]

ESG considerations are a form of risk mitigation and consequently affect risk-related economic costs. According to Morningstar, reducing a company's ESG-related risks can confer a long-term competitive advantage.[31] Conversely, neglecting ESG-related risk can impact a company's competitive advantages and diminish long-term economic gains. For example, when a resource-intensive company does not invest in safety systems and infrastructure, it can increase its exposure to far costlier environmental liabilities.[32] Disregarding social and governance risks, such as a lack of transparency with customers or stakeholders, can lead to expensive litigation and a loss of sales.[33] Neglecting climate and environmental risks, such as those arising from oil and gas exploration and production, coal ash disposal or nuclear safety, can result in the creation of stranded assets, negatively affecting a company's balance sheet or reducing dividends.[34]

In its recently published *Managing Climate Risk in the U.S. Financial System*, the Commodity Futures Trading Commission (CFTC) plainly states that "U.S. financial regulators must recognize that climate change poses serious emerging risks to the U.S. financial system, and they should move urgently and decisively to measure, understand, and address these risks."[35] Rather than discouraging ERISA fiduciaries from voting on

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[27] MSCI, "Deconstructing ESG Ratings Performance," June 2020, https://www.msci.com/documents/10199/7b77de78-0c6e-0a45-f4dd-e65025552bae.
[28] Global Association of Risk Professionals, "ESG: Risks, Opportunities and Benefits," July 26, 2019, https://www.garp.org/#!/risk-intelligence/culture-governance/erm/a1Z1W000003lwfzUAA.
[29] Berridge, Rob, "How climate proposals fared during the 2020 proxy season," September 14, 2020, GreenBiz, https://www.greenbiz.com/article/how-climate-proposals-fared-during-2020-proxy-season.
[30] Ibid.
[31] Miller,Travis, Fulop, Tancrède, and Sherwood, Seth, "ESG Risk Comes Into Focus Companies focus on their ESG risks to build profitability for the long term," Morningstar, https://www.morningstar.com/features/esg-risk.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] U.S. Commodity Futures Trading Commission, *Managing Climate Risk in the U.S. Financial System*, https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf, p.ii.

climate-related proxies, the CFTC argues that ERISA fiduciaries have an affirmative responsibility to do so. "Fiduciary duty requires the assessment of material risks and the management of these risks on behalf of stakeholders in keeping with their stated long-term goals, and climate risk is increasingly being recognized as one such risk … Asset owners with a given mission, including the long-term support of an institution or beneficiary population, should consider the benefits climate-related investments could bring to their financial and mission-given goals. A fiduciary adviser or asset manager owes each of its clients a duty of loyalty and a duty of care and must act consistent with these obligations."[36]

Finally, ignoring ESG considerations can produce a kind of race-to-the-bottom "compliance mentality" that deprives corporate management of an important early warning system for emerging risks (e.g. climate change) that would be prudent to be aware of and start addressing sooner. According to a 2017 Ceres report entitled *The Business Case for the Current SEC Shareholder Proposal Process*, the list of today's widely adopted practices that were once considered emerging risks includes an independent Board Directors, majority voting for Directors, proxy access, sustainability reporting, adoption of international human rights principles as part of corporate codes of conduct and supply chain policies, and sexual orientation nondiscrimination policies.[37]

- **There are too many other aspects of the proposed rule whose practical application would adversely impact ERISA fiduciaries, plan participants and beneficiaries.** For example, the proposed rule's suggestion that fiduciaries consider adopting blanket policies of voting in favor of certain management-initiated resolutions[38] ignores the demonstrable reality that management may not always be advancing the soundest course of action or putting the investors' interests first in line. The proposed rule's suggestion that fiduciaries consider refraining from proxy voting based on issuer ownership thresholds[39] would functionally concentrate proxy voting in the hands of only the largest shareholders. Similarly, the proposed rule's suggestion that fiduciaries consider refraining from proxy voting based on plan ownership thresholds[40] is at odds with longstanding Department policy requiring fiduciaries to consider whether proxy voting, either individually or jointly with other shareholders, will produce plan benefits greater than voting costs.[41] As a practical matter, shareholders of all sizes routinely work together on shareholder resolutions, and on closely contested issues, every vote counts. Finally, the proposed rule fails to consider the growing number of investors who passively invest in index funds. For these investors, selling stock may not be an option, and proxy voting represents the only way they can protect and create long-term shareholder value.

- **For these reasons, the proposed rule should be withdrawn.**

[36] Ibid p.66.
[37] Ceres, *Case for the Current SEC Shareholder Proposal Process*, April 24, 2017, https://www.ceres.org/resources/reports/business-case-current-sec-shareholder-proposal-process.
[38] *See* 85 *Fed. Reg.* at 55,242.
[39] Ibid.
[40] Ibid.
[41] *See* 85 *Fed. Reg.* at 55,220.

- **If the proposed rule is not withdrawn, it should be expressly modified to clarify that ERISA's fiduciary duties require qualified investment professionals to vote in favor of proxies that better align holdings with Environmental, Social, and Governance (ESG) metrics when they prudently determine that doing so is in the economic interest of plan participants and beneficiaries.** To the extent ESG considerations enhance asset performance, ERISA compels fiduciaries to cast proxy votes in favor of ESG-related proposals. Failing to modify the proposed rule to include that requirement runs counter to the longstanding letter and spirit of fiduciary duty. As alignment with ESG metrics constitutes an ever-greater portion of corporate best practices, shareholder engagement conducted without reference to ESG considerations will result in an abdication of fiduciary responsibility, progressively limiting corporate oversight and raising the risk of larger losses and underperformance.

- **Finally, the unusually short 30-day comment period for this proposed rule should be extended to 120 days to allow for the full range of affected parties to express their concerns.** Any publicly traded firm may be subject to a shareholder initiative with economic impacts at stake, and any ERISA plan participant or beneficiary may not wish their fiduciary to sit out the debate. The Department has wide latitude to establish a lengthier comment period. A review of recent Department rulemakings reveals that 30 days is an unusually short comment window.[42] The Department should extend the comment period to at least 120 days due to the broad scope and potential impact of the proposed rule.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me at stoff@acore.org or 202-507-4634 with any additional questions you may have.

Sincerely,

Tyler Stoff
Director of Regulatory Affairs
American Council on Renewable Energy

cc: Honorable Eugene Scalia, Secretary of Labor

[42] U.S. Department of Labor, "Regulations," https://www.dol.gov/regulations.