

Proxy Voting— Updated DOL Regulations

Michael T. Joliat
Shareholder
Reinhart Boerner
Van Deuren s.c.
Minneapolis, Minnesota

Maureen O'Brien
Senior Vice President,
Corporate Governance Director
Segal Marco Advisors
Chicago, Illinois



The opinions expressed in this presentation are those of the speaker. The International Foundation disclaims responsibility for views expressed and statements made by the program speakers.

International Foundation
OF EMPLOYEE BENEFIT PLANS 

Agenda

- **What is proxy voting?**
- What kinds of investments involve proxy voting?
- Updates to DOL regulations and action items for trustees.
- What is a trustee's fiduciary responsibilities for proxy votes?

What Is Proxy Voting?

- Publicly traded companies are run by management but owned by investors.
- Investors have voting rights over certain items such as electing their representatives to serve on a Company's board of directors.
- Most votes occur at the Company's annual shareholder meeting.

What Is Proxy Voting?

- Some companies welcome shareholders in person but the vast majority of votes are processed electronically (hence the term “proxy”).
- Qualified investors also have the right to add agenda items to the annual shareholder meeting by submitting a shareholder proposal that may become a proxy vote.
- Qualified is defined as owning corporate stock for:
 - Three years in an amount valued at \$2,000;
 - Two years in an amount valued at \$10,000; or
 - Three years in an amount valued at \$25,000.

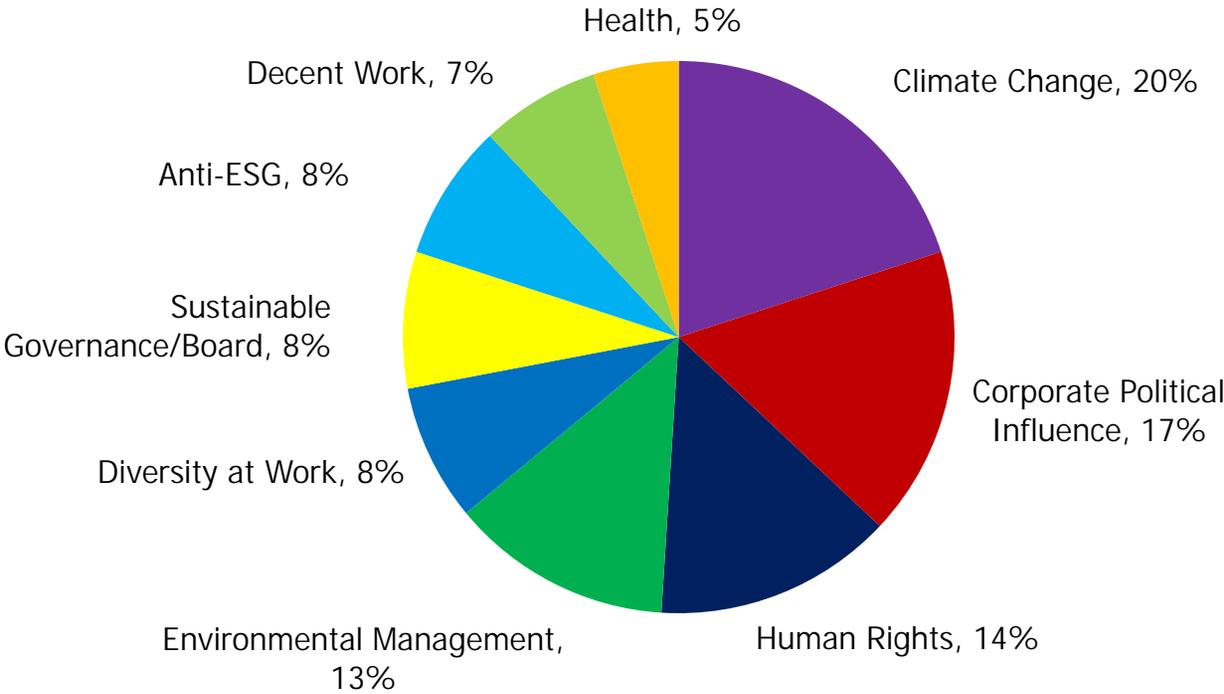
What Is Proxy Voting?

- Many investors, including many investment managers, delegate proxy voting to a proxy advisor.
- Two firms—Institutional Shareholder Services (ISS) and Glass Lewis—dominate the proxy voting market.
- Segal Marco Advisors, Egan Jones, Proxy Vote Plus also provide proxy voting services.
- Proxy advisors' recommendations may impact vote outcomes.

Proxy Votes Relate to a Variety of Important Business Decisions Brought Forth Both by Management and Shareholders, Including:

- Election of board directors
- Equity and other incentive compensation plans for senior executives
- Auditor ratification
- Mergers and acquisitions
- Oversight, management and disclosure of ESG risks

Environmental, Social and Governance Shareholder Proposals Filed in 2024



Source: Sustainable Investments Institute, as of February 16, 2024

Tesla—What Is Your Vote?

- Award CEO Elon Musk stock option award for potential max of \$56 billion
 - Achieved all performance hurdles
 - A Telsa share in 2010 was \$17, worth \$2,662 in 2024.
 - Median employee pay is \$45,811
 - Next top CEO earner is \$198,685,926 (TPG Inc.)

Tesla—What Is Your Vote?

How would you vote?

- A. For
- B. Against
- C. Abstain

Tesla—What Is Your Vote?

- Award CEO Elon Musk stock option award for potential max of \$56 billion

Result: **73% of independent voters in favor**

Disney—What Is Your Vote?

- 2 activist investors aiming for board seats
 - Nelson Peltz of Trian Management with former Disney CFO James A. Rasulo (1.8%)
 - Blackwells ran Craig Hatkoff, Jessica Schell, Leah Solivan (.01%)
 - One- and five-year weak relative performance, lack of succession planning, capital allocation, unsuccessful movie releases

Disney—What Is Your Vote?

Whose candidates would you back?

- A. Disney
- B. Pelz
- C. Blackwells

Disney—What Is Your Vote?

- 2 activist investors aiming for board seats
 - Nelson Peltz of Trian Management with former Disney CFO James A. Rasulo (1.8%)
 - Blackwells ran Craig Hatkoff, Jessica Schell, Leah Solivan (.01%)

Result: **Activists lose;**
all management nominees are elected.

Apple—What Is Your Vote?

- Report on the company's use of AI in its business operations and disclose any ethical guidelines that the company has adopted regarding the company's use of AI technology.

Apple—What Is Your Vote?

How would you vote?

- A. For
- B. Against
- C. Abstain

Apple—What Is Your Vote?

- Report on the company's use of AI in its business operations and disclose any ethical guidelines that the company has adopted regarding the company's use of AI technology.

Result: **37% voted in favor**

Thought Leaders on Proxy Voting

Policies on Corporate Governance

CII's corporate governance policies were last updated on September 11, 2023.

Preamble

CII believes effective corporate governance and disclosure serve the best long-term interests of companies, shareowners and other stakeholders. Effective corporate governance helps companies achieve strategic goals and manage risks by ensuring that shareowners can hold directors to account as their representatives, and in turn, directors can hold management to account, with each of these constituents contributing to balancing the interests of the company's varied stakeholders. We consider effective disclosure to be accurate, prompt and useful information on company policies, practices and results. CII advocates for investor protection and robust capital markets, accomplished through a combination of private ordering and market-wide rules and regulations.

- **Council of Institutional Investors**
 - Policies on corporate governance
 - Member database of proxy voting policies
 - <https://www.cii.org/policies>

Thought Leaders on Proxy Voting

2023 AFL-CIO Key Votes Survey

List of Votes Included in the 2023 AFL-CIO Key Votes Survey

Shareholder Proposals: "FOR" votes are consistent with the AFL-CIO Proxy Voting Guidelines

Company	Ticker	Proposal Subject	Item #	Meeting Date
Alphabet	GOOGL	Lobbying Disclosure	6	6/2/2023
Amazon.com	AMZN	Freedom of Association	16	5/24/2023
Bank of America	BAC	Racial Equity Audit	11	4/25/2023
Chevron	CVX	Climate Change Just Transition	9	5/31/2023
Chipotle	CMG	Freedom of Association	6	5/25/2023
Coca-Cola	KO	Racial Equity Audit	5	4/25/2023
Comcast	CMCSA	Racial Equity Audit	7	6/7/2023
ConocoPhillips	COP	Tax Payment Disclosure	9	5/16/2023
CVS Health	CVS	Freedom of Association	8	5/18/2023
Delta Air Lines	DAL	Freedom of Association	6	6/15/2023
Denny's	DENN	Paid Sick Leave	5	5/17/2023
Douglas Emmett	DEI	Lobbying Disclosure	6	5/24/2023
Exxon Mobil	XOM	Climate Change Just Transition	16	5/31/2023
GEO Group	GEO	Racial Equity Audit	5	4/28/2023
Goldman Sachs	GS	Racial Equity Audit	8	4/26/2023
HCA Healthcare	HCA	Patient Safety	6	4/19/2023
Marathon Petroleum	MPC	Executive Compensation Claw-backs	8	4/26/2023
McDonalds	MCD	Lobbying Disclosure	9	5/25/2023
Meta Platforms	META	Review Risk Oversight Committee	13	5/31/2023
Netflix	NFLX	Freedom of Association	8	6/1/2023
PPG Industries	PPG	Independent Board Chair	5	4/20/2023
Starbucks	SBUX	Freedom of Association	8	3/23/2023
Union Pacific	UP	Paid Sick Leave	7	5/18/2023
United Parcel Service	UPS	Climate Change Just Transition	8	5/4/2023
Wells Fargo	WFC	Freedom of Association	11	4/25/2023
Yum Brands	YUM	Paid Sick Leave	9	5/18/2023

- **AFL-CIO**

- Annual key vote survey
- Model proxy voting policy
- <https://aflcio.org/reports/afl-cio-key-votes-survey>

Thought Leaders on Proxy Voting



The Voice for Public Pensions

NCPERS VOTING GUIDELINES

I. Introduction

A. This document sets forth guidelines regarding the voting of proxies for the equity investments of the _____ ("Plan").

B. These guidelines reflect the Plan's determination of what positions are in the best economic interests of its beneficiaries on the most common and recurring proxy issues.

C. The Plan directs its proxy voting agent ("agent") to follow these guidelines unless the agent, using the care, skill, prudence and diligence that a prudent person would under the prevailing circumstances, believes that the agent should depart from these guidelines to protect the best economic interest of the Plan's beneficiaries. In such circumstances, the agent should advise the Plan, in advance of the proxy vote deadline, of the agent's intentions to depart from these guidelines and the agent's specific reasons for doing so. The Plan reserves the authority to direct the agent to vote the Plan's proxies in accordance with these guidelines.

D. If these guidelines do not apply, either directly or by reasonable interpretation, to a proxy issue, or if the guidelines acknowledge that the issue must be decided on a case-by-case basis, the agent is directed to use the care, skill, prudence and diligence that a prudent person would under the prevailing circumstances to cast a vote in the economic best interests of the Plan's beneficiaries.

II. Management Proposals

A. Routine Election of Board of Directors.

1. Two-thirds of the board of directors should be made up of independent outsiders. A director is not independent if he/she is a current or former employee or officer of the company, a relative of a current or former employee or officer, a person who has or had a business relationship with the company (e.g., lawyer, consultant, vendor, buyer), is part of an interlocking directorate (i.e., the director is employed by another corporation and an executive officer of the company serves on that other corporation's board), or owns such a substantial amount of company shares that he/she is viewed as controlling the company. If two-thirds of the board of directors is not represented by independent outsiders, a vote should be cast to withhold authority for all nominees who are insiders.

- **NCPERS**

- Annual key vote survey
- Model proxy voting policy
- <https://www.ncpers.org/corporate-governance>

What Is Proxy Voting?

- Shareholder votes communicate investor preferences and provide feedback to companies that helps prioritize focus.
- Votes further impact corporate decision-making in two ways:
 - Shareholder proponents and corporate representatives negotiate outcomes prior to a vote.
 - A vote supported by a majority of shareholders is likely to be implemented.

What Is Proxy Voting?

- 2021 Exxon Mobil
 - Shareholders unseat two management recommended directors to the board in favor of shareholder nominated directors with climate expertise.
- 2023 Coterra
 - Shareholder proposal on methane reporting at Coterra receives 73% and company issues requested report
- However, less than 3% of submitted proposals received majority support in 2023.¹

1. <https://corpgov.law.harvard.edu/2023/08/03/shareholder-proposal-developments-during-the-2023-proxy-season/>

Agenda

- What is proxy voting?
- **What kinds of investments involve proxy voting?**
- Updates to DOL regulations and action items for trustees
- What is a trustee's fiduciary responsibilities for proxy votes?

What Kinds of Investments Involve Proxy Voting?

- Proxy votes are a feature for every investment in which a plan has a direct or indirect ownership interest in a publicly traded company and sometimes in other asset classes.

What Kinds of Investments Involve Proxy Voting?

- Publicly traded companies
 - A plan directly owns shares of publicly-traded companies (e.g., Apple, or Microsoft)
 - Usually, this is in the context of a separately managed account
 - Proxy votes will always arise with respect to the plan's directly-held shares of publicly-traded companies
 - This kind of investment is where proxy voting will arise most often, and management of proxy voting will be most relevant

What Kinds of Investments Involve Proxy Voting?

- Publicly traded investment firm
 - A plan owns shares of an investment company that exclusively invests in corporate bonds
 - No proxy votes will arise with respect to the underlying bonds
 - However, the investment company is itself a company that may conduct shareholder votes—A proxy vote may arise with respect to the investment company
 - Although proxy voting will be minimal with respect to this investment, it can occur

What Kinds of Investments Involve Proxy Voting?

- Commingled equity fund (non-plan asset vehicle)
 - A plan owns shares of a non-plan-asset investment fund that invests exclusively in publicly traded companies (e.g., a domestic large-cap mutual fund)
 - Typically, no proxy votes will arise with respect to the underlying shares of publicly traded companies, it is the exclusive right and responsibility of the investment company, as owner of those shares, to vote them. However, some firms now offer proxy choice programs.
 - Also, the investment company is itself a company that may conduct shareholder votes—A proxy vote may arise with respect to the investment company

What Kinds of Investments Involve Proxy Voting?

- Commingled equity fund (plan asset vehicle)
 - A plan owns shares of a plan-asset investment fund that invests in publicly-traded companies (e.g., a domestic large cap collective trust)
 - Proxy votes will arise with respect to the underlying shares of publicly traded companies, and it is the right of the benefit plan investors to vote them. However, the benefit plan investors may agree to delegate that authority to the manager after determining that the manager's proxy voting policy complies with ERISA.
 - Also, the investment company is itself a company that may conduct shareholder votes—A proxy vote may arise with respect to the investment company

What Kinds of Investments Involve Proxy Voting?

- Fixed income
 - A plan directly owns a corporate bond (e.g., via a separately managed account)
 - A corporate bond is a promise by a company to repay money with interest—Owning a bond does not make a plan a part owner of the company
 - A plan's fiduciaries need not consider proxy voting when investing directly in corporate bonds, because proxy voting cannot arise in that context

Agenda

- What is proxy voting?
- What kinds of investments involve proxy voting?
- **Updates to DOL regulations and action items for trustees**
- What is a trustee's fiduciary responsibilities for proxy votes?

Why Is the DOL Regulating Proxy Voting?

- About one quarter of all the investable assets across the globe—more than \$37 Trillion—are in U.S. retirement plans
- Today's investments build tomorrow's society
- Should ERISA plan fiduciaries be allowed to wield their investment power to influence the future?
- This question has been hotly debated and highly politicized for more than 3 decades

Why Is the DOL Regulating Proxy Voting?

- 1994 (IB 94-2, Clinton administration): Pro-activism DOL guidance
- 2008 (IB 2008-02, Bush administration): Anti-activism DOL guidance, reversed 94-2
- 2015/2016 (IB 2015-1, IB 2016-1, Obama administration): Pro-activism guidance reinstated 94-2
- 2018 (FAB 2018-01, Trump administration): Anti-activism DOL guidance, reversed 2015/2016 guidance
- 2020 (85 FR 81658, Trump administration: Anti-activism regulation enhanced anti-activism elements of 2015/2016 guidance
- 2022 (87 FR 73822, Biden administration): Pro-activism regulation over-ruled 2020 regulation, reinstated and enhanced 94-2

Why Is the DOL Regulating Proxy Voting?

- The DOL first expressed an opinion about ERISA plans wielding their investment power to influence markets in 1994 (IB 94-2)(Clinton administration)
- IB 94-2 stated that proxy voting was a fiduciary duty, and that shareholder activism and economically targeted investing could be consistent with that duty so long as the economic interests of the plan are not subordinated to unrelated objectives

Why Is the DOL Regulating Proxy Voting?

- In 2008 the DOL revisited its prior guidance (IB 2008-02) (Bush administration)
- If the cost of proxy voting likely exceeds the expected economic benefits of voting, a fiduciary must refrain from voting
- Because there are certain costs for informed voting and the economic benefits are always uncertain, IB 2008-02 was generally viewed as discouraging ERISA plans from proxy voting

Why Is the DOL Regulating Proxy Voting?

- In 2015 and 2016 the DOL again revisited its prior guidance (IB 2015-01, IB 2016-01)(Obama administration)
- The 2015/2016 guidance effectively said to ignore the 2008 guidance, reverting the DOL's position to the pro-activism position of IB 94-2

Why Is the DOL Regulating Proxy Voting?

- In 2018 the DOL issued Field Assistance Bulletin 2018-01
- FAB 2018-01 stated that fiduciaries' duty was to "always put first the economic interests of the plan in providing retirement benefits" and take investment action based on "financial factors" alone
- FAB 2018-01 was interpreted as discouraging proxy voting and activist investing

Why Is the DOL Regulating Proxy Voting?

- In 2020, the DOL upped the ante, this time codifying its position in regulations (85 FR 81658) (Trump administration)
- The 2020 regulations were the DOL's most anti-activism position to date
- They provided safe harbors under which plans could systematically refrain from proxy voting, and imposed burdensome documentation requirements for justifying activist investment actions
- The 2020 guidance was perceived as strongly discouraging ERISA plans from proxy voting and activist investing

Why Is the DOL Regulating Proxy Voting?

- In 2022, the DOL again issued new regulations (87 FR 73822) (Biden administration)
- The 2022 regulations were yet another flip of position, now expressing and codifying the DOL's most pro-activism stance to date

Why Is the DOL Regulating Proxy Voting?

- The 2022 regulations effectively reversed the proxy voting safe harbors, from encouraging plans to systematically refrain from voting to prohibiting plans from systematically refraining from voting:
 - “No proxy voting policies...shall preclude submitting a proxy vote when the fiduciary prudently determines that the matter being voted upon is expected to have a significant effect on the value of the investment”

Why Is the DOL Regulating Proxy Voting?

- The 2022 regulations also took aim at the common practice of automatically ceding proxy voting power to ISS and Glass Lewis:
 - “A fiduciary may not adopt a practice of following the recommendations of a proxy advisory firm or other service provider without a determination that such firm or service provider’s proxy voting guidelines are consistent with the fiduciary’s obligations”

Why Is the DOL Regulating Proxy Voting?

- The 2022 regulations eliminated the burdensome documentation and justification requirements of the 2020 regulations with respect to activist investment actions, and expressly stated that, for purposes of considering an investment action:
 - “Risk and return factors may include the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action.”
- Added a requirement commingled funds must get buy in from clients on proxy voting decisions.

Why Is the DOL Regulating Proxy Voting?

- The 2022 regulations were challenged by 26 state attorneys general and private plaintiffs who alleged that the regulations were arbitrary and capricious under the Administrative Procedure Act and violated ERISA
- The U.S. District Court for the Northern District of Texas upheld the 2022 regulations in *Utah v. Walsh*, No. 2:23-CV-016-Z, (N.D. Tex. Mar. 28, 2023)
- The 5th Circuit remanded the case back to the District Court for reconsideration following the Supreme Court's *Loper Bright* decision (*Utah v. Su*, No. 23-11097, 2024 WL 3451820 (5th Cir. July 18, 2024))

Why Is the DOL Regulating Proxy Voting?

- A bill to overturn the 2022 regulations and revert to the 2020 regulations passed both houses of Congress in early 2023
- President Biden vetoed the bill on March 20, 2023

Why Is the DOL Regulating Proxy Voting?

- Should benefit plan fiduciaries be allowed to wield their investment power to influence the future?
- Those on opposite sides of the debate are moving farther apart, not closer
- For the foreseeable future, consensus is unlikely

Why Is the DOL Regulating Proxy Voting?

- Examples
 - Jan. 17, 2024
 - The South Carolina Senate unanimously passed the ESG Pension Protection Act, a bill to require the South Carolina Retirement System Investment Commission to consider only "pecuniary factors" when making investment decisions
 - February 15, 2024
 - NY Common Retirement Fund announced restrictions on investments in 8 oil and gas companies and doubled to \$40 Billion its investment commitment to "Sustainable and Climate Solutions"

Agenda

- What is proxy voting?
- What kinds of investments involve proxy voting?
- Updates to DOL regulations and action items for trustees
- **What is a trustee's fiduciary responsibilities for proxy votes?**

What Do the Current Regulations Require?

- With the DOL regularly flipping its position, what should fiduciaries do?
 1. Comply with mechanical requirements of currently applicable regulations.
 2. Ensure your fund has a proxy voting policy that is based on the best interests of your plan participants.
 3. Revisit the policy and the voting record annually and as needed when legal changes occur.

What Do the Current Regulations Require?

- What are the mechanical requirements of the currently applicable regulations with respect to proxy voting?
- The new regulations require you, with respect to every plan investment, to:
 1. Be informed as to the policy and procedure by which proxies will be voted in connection with the investment; and,
 2. Either dictate an ERISA-compliant policy for voting or verify that the policy that will be used complies with ERISA.

Key Takeaways

- Proxy votes communicate the preferences of your plan participants to the companies in which they have ownership rights.
- Each administration has its perspective on proxy voting.
- Know how your votes are being cast and ensure your policy puts your plan participants interests first.

Your Feedback
Is Important.
Please Scan
This QR Code.

Session Evaluation

