

FIDUCIARY DUTIES REGARDING PROXY VOTING AND SHAREHOLDER RIGHTS

OMB CONTROL NUMBER 1210-0165

This ICR seeks for an approval of a new collection of information under OMB Control Number 1210-0165.

A. JUSTIFICATION

- 1. Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.**

Title I of the Employee Retirement Income Security Act of 1974 (ERISA) establishes minimum standards for the operation of private-sector employee benefit plans and includes fiduciary responsibility rules governing the conduct of plan fiduciaries. In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock, and that fiduciaries must carry out their duties relating to the voting of proxies prudently and solely for the economic benefit of plan participants and beneficiaries.¹

The Department is concerned that regulatory guidance in this area is appropriate, in part because the Department's existing sub-regulatory guidance may have created a perception that ERISA fiduciaries must vote proxies on every proposal. In the Department's view, a regulation in this area will address the misunderstanding that exists on the part of some stakeholders that ERISA fiduciaries are required to vote all proxies and, to the extent that proxies are voted, direct fiduciaries to act in a manner consistent with the economic interests of plans and plan participants that does not subordinate their interests to any non-pecuniary objectives or promote goals unrelated to the financial interests of participants and beneficiaries. Moreover, the Department has reason to believe that plan fiduciaries may sometimes rely on proxy voting advice from service providers without taking sufficient steps to ensure that the advice is impartial and rigorous. Both of these concerns point to the risk that a plan's proxy voting activity may impair, rather than advance, participants' economic interest in their benefits. The Department published a Notice of Proposed Rulemaking in the Federal Register on September 4, 2020 (85 FR 55219), and is adopting a final rule that includes an Information Collection (IC).

Specifically, it has long been the Department's view that the duty to monitor necessitates proper documentation of the activities that are subject to monitoring.² Accordingly, the IC in the Department's final rule requires responsible plan fiduciaries to maintain records

¹ Throughout this supporting statement, the Department's discussion of plan fiduciaries includes named fiduciaries under the plan, along with any persons that named fiduciaries have designated to carry out fiduciary responsibilities as permitted under ERISA § 405(c)(1).

² See 29 CFR 2509.2008-2 (73 FR 61731 (Oct. 17, 2008)).

on proxy voting activities and other exercises of shareholder rights. Where the authority to vote proxies or exercise shareholder rights has been delegated to an investment manager pursuant to ERISA section 403(a)(2), or a proxy voting firm or another person performs advisory services as to the voting of proxies, plan fiduciaries must prudently monitor the proxy voting activities of such investment manager or proxy advisory firm and determine whether such activities are consistent with applicable provisions of the final rule. This IC applies to all employee benefit plans with stock investments that have shareholder rights that may need to be exercised, and the Department's objective in including the IC in the final rule is to ensure that the costs plans incur to vote proxies and exercise other shareholder rights are economically justified.

2. Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.

As stated above, this IC requires responsible plan fiduciaries to maintain records on proxy voting activities and other exercises of shareholder rights. The final rule will help fiduciaries who manage retirement plans fulfill their duties of prudence and loyalty to American workers and retirees when voting proxies and exercising other shareholder rights. It has long been the view of the Department that compliance with these duties necessitates proper documentation. The final rule includes such a general recordkeeping requirement on proxy voting activities and other exercises of shareholder rights. In general, the extent of the documentation needed to satisfy the monitoring obligation will depend on the plan's individual circumstances, including the subject of the proxy voting and its potential economic impact on the plan's investment. For fiduciaries that are SEC-registered investment advisers, the Department intends that the recordkeeping obligations under paragraph (e)(2)(ii)(E) of the final rule be applied in a manner that aligns to similar proxy voting recordkeeping obligations under the Advisers Act

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.

Use of electronic methods of compliance is neither required nor precluded by the terms of this IC. The Department has assumed that the tasks involved with meeting the requirements of the IC generally will be performed by regulated financial services entities acting on behalf of employee benefit plans in connection with the proper management and voting of securities, and that the plans and financial services entities involved will establish and maintain recordkeeping systems, and comply with the IC requirements, by electronic means. The Department's estimates, therefore, take account of the use of electronic recordkeeping in establishing the burden associated with this IC.

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.

The Department notes that the ongoing proxy reform initiative being pursued by the Securities and Exchange Commission (SEC) may result in changes in practices among investment advisers and proxy advisory firms that will help address some of the Department's concerns about ERISA fiduciaries properly discharging their duties with respect to proxy voting activities and appropriately selecting and overseeing proxy advisory firms.

Pursuant to the 2019 SEC Guidance, where an investment adviser has the authority to vote on behalf of its client, the investment adviser, among other things, must have a reasonable understanding of the client's objectives and must make voting determinations that are in the best interest of the client. Under this guidance, for an investment adviser to form a reasonable belief that its voting determinations are in the best interest of the client, the investment adviser should conduct an investigation reasonably designed to ensure that the voting determination is not based on materially inaccurate or incomplete information. The 2019 SEC Guidance also provides that investment advisers that retain proxy advisory firms to provide voting recommendations or voting execution services should consider additional steps to evaluate whether the voting determinations are consistent with the investment adviser's voting policies and procedures, and in the client's best interest before the votes are cast. The 2019 SEC Guidance provides that investment advisers should consider whether the proxy advisory firm has the capacity and competency to adequately analyze the matters for which the investment adviser is responsible for voting. The 2019 SEC Guidance also explains that an investment adviser's decision regarding whether to retain a proxy advisory firm should also include a reasonable review of the proxy advisory firm's policies and procedures regarding how it identifies and addresses conflicts of interest. Further, as part of the investment adviser's ongoing compliance program, the investment adviser must, no less frequently than annually, review and document the adequacy of its voting policies and procedures. The SEC also adopted regulatory amendments that, among other things, require proxy advisory firms that are engaged in a solicitation to provide specified disclosures, adopt written policies and procedures reasonably designed to ensure that proxy voting advice is made available to securities issuers, and provide proxy advisory firm clients with a mechanism by which the clients can reasonably be expected to become aware of a securities issuer's views about the proxy voting advice, so that the clients can take such views into account as they vote proxies.³ The SEC issued supplemental guidance to assist investment advisers in assessing how to consider the additional information that may become more readily available to them as a result of these amendments, including in circumstances when the investment adviser uses a proxy advisory firm's electronic vote management system that "pre-populates" the adviser's proxies with suggested voting recommendations and/or for voting execution services.⁴

³ See Exemptions from the Proxy Rules for Proxy Voting Advice, 85 FR 55082 (Sept. 3, 2020) (2020 SEC Proxy Voting Advice Amendments).

⁴ See Supplement to Commission Guidance Regarding Proxy Voting Responsibilities of Investment Advisers, 85 FR 55155 (Sept. 3, 2020) (2020 SEC Supplemental Guidance).

The Department believes that investment advisers' efforts to satisfy new SEC requirements will reduce burdens on responsible fiduciaries required to comply with the Department's IC contained in the final rule. The requirements of this IC and the SEC's initiatives are not duplicative. Title I of ERISA governing employee benefit plan fiduciaries and the federal securities laws and rules governing investment advisers may overlap in some respects. In developing the final rule, a goal of the Department was to avoid overlapping or duplicative requirements. To the extent the requirements overlap, compliance with recordkeeping requirements applicable to investment advisers under federal securities law and rules can be used to satisfy recordkeeping requirements in the final rule. This will lead to overall regulatory efficiency.

5. If the collection of information impacts small businesses or other small entities describe any methods used to minimize burden.

This IC will impact small employee benefit plans. Such plans may rely on third-party service providers, such as asset managers, to act as responsible fiduciaries or otherwise assist with the exercise of plans' shareholder rights, including voting proxies. Burdens on plans, including small plans, associated with the IC were substantially minimized by a revision the Department made in the final rule, removing a requirement in the proposal that required responsible plan fiduciaries to maintain documents necessary to demonstrate the basis for each vote. The revision was made in response to comments that the requirement was unnecessary and would be costly. The final rule also includes optional safe harbors for proxy voting policies that the Department expects at least some plans will adopt, and burdens of the IC are likely to reduce by the adoption of such proxy voting policies.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

The final rule requires responsible plan fiduciaries to maintain records on proxy voting activities and other exercises of shareholder rights. This requirement is essential to ensure that plan assets are protected, and that named fiduciaries' compliance can be monitored by the Department in performing its oversight responsibilities under ERISA.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

- **requiring respondents to report information to the agency more often than quarterly;**
- **requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **requiring respondents to submit more than an original and two copies of any document;**
- **requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;**

- **in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
- **requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
- **requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

There are no special circumstances that require the collection to be conducted in a manner inconsistent with the guidelines in 5 CFR 1320.5.

- 8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 C.F.R. § 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.**

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

The Department published the required 60-day notice soliciting comments on the IC in the preamble to the Notice of Proposed Rulemaking published in the Federal Register on September 4, 2020 (85 FR 55219). In response, the Department received over 300 written comments during the open comment period from a variety of parties, including members of Congress, plan sponsors and fiduciaries, and plan service and investment providers. Responses to the public comments are included in the preamble of the final rule. The Department also received over 6,700 submissions as part of two separate petitions (i.e., form letters). The comments can be found at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91>.

The Department received comments that specifically addressed the paperwork burden analysis of the IC contained in the proposed rule. The Department carefully considered such public comments in developing the revised paperwork burden analysis for the final rule discussed below.

Commenters expressed concerns that the proposed rule would be onerous because it would not be feasible for plan fiduciaries to determine the economic impact of every proxy vote in a detailed way and document it. Thus, commenters suggested that the Department underestimated the amount of time that fiduciaries and clerical staff would spend documenting and maintaining documentation for votes. The Department believes that with this revision, the final rule's documentation and recordkeeping requirements should result in less burden than the proposal's requirements because the final rule requirements mirror previous guidance and align with the existing fiduciary duty of documentation.

Although the final rule did not carry forward the proposal's more burdensome documentation requirements, the Department is retaining the documentation time estimate from the proposal in light of the comments that argued the Department underestimated the recordkeeping burden and because of the uncertainty involved in determining which plans will need to change recordkeeping practices to comply with the final rule. Retaining the estimate is responsive to the comments and is intended to avoid underestimating the average time required for plan fiduciaries to comply with the final rule.

9. Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

No payments or gifts are provided to respondents.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

There is no assurance of confidentiality provided to respondents.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom *the information is requested*, and any steps to be taken to obtain their consent.

There are no questions of a sensitive nature.

12. Provide estimates of the hour burden of the collection of information. The statement should:

- **Indicate the number of respondents, frequency of response, annual hour**

burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

- **If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 12.**
- **Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 13.**

For this information collection, the hour burden reported in Question 12 is zero hours. The burden hours required for information collection activities required by the final rule are either: 1) employee benefit plan fiduciaries’ customary and usual business practices, or 2) costs associated with paying outside parties for the information collection activities discussed in the response to Question 13.

With regard to calculating the number of respondents, according to the most recent Form 5500 data there are 721,876 pension plans (92,480 large plans and 629,396 small plans) and 8,475 health or welfare plans (5,626 large plans filing a schedule H, and 2,849 small plans filing a schedule I).⁵ While the Schedule H collects information on a plan’s stock holdings, Schedule I lacks the specificity to determine if small plans hold stocks.

As shown in Table 1, the Department’s analysis estimates that 31,868 pension plans hold stocks and would have shareholder rights they may need to exercise.

Table 1. Number of Pension and Welfare Plans Holding Common Stocks or ESOP by Type of Plan, 2018 ^a

Common Stock (No Employer Securities)	Defined Benefit	Defined Contribution	Total Pension Plans	Welfare Plans	Total All Plans
Direct Holdings Only	1,272	2,286	3,558	569	4,127
Indirect Holdings Only	2,792	17,591	20,383	3	20,386
Both Direct and Indirect	941	586	1,527	1	1,528
Total	5,005	20,463	25,468	573	26,041
ESOP (No Common Stock)	-	5,809	5,809	-	5,809

⁵ EBSA estimates using 2018 Form 5500 filing data.

Common Stock and ESOP	-	591	591	-	591
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Total All Plans Holding Stocks	5,005	26,863	31,868	573	32,441
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³ DOL calculations from the 2018 Form 5500 Pension Research Files.

Additionally, 573 health and other welfare plans file the schedule H and report holding either common stocks or employer stocks. The Department lacks information on the number of small plans that hold stock. Small plans are significantly less likely than larger plans to hold stock in a way that would require the plan-level fiduciary to maintain records on proxy voting or other exercises of shareholder rights because we understand from interactions with plans, service providers, and other stakeholders that small plans tend to use SEC-registered funds, bank collective investment funds, and other pooled and collective funds as investment options. The Department did not receive any comments or additional data from commenters regarding the number of small plans that hold stock directly. Therefore, for purposes of estimating burden, five percent of small plans are presumed to hold stock, resulting in 31,470 small plans needing to comply with the information collection. Therefore, our estimate is that a total of 63,911 plans will need to comply with this information collection.

63,911 Respondents x 1 Response per Respondent = 63,911 Responses.

13. Provide an estimate of the total annual cost burden to respondents or recordkeepers resulting from the collection of information.

- **The cost estimate should be split into two components: (a) a total capital and start up cost component (annualized over its expected useful life); and (b) a total operation and maintenance and purchase of service component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.**
- **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collection services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory**

impact analysis associated with the rulemaking containing the information collection, as appropriate.

- **Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

The Department estimates that plan fiduciaries or service providers hired by employee benefit plan fiduciaries will require a half hour annually and a half hour of help from clerical staff to maintain or document the required information. The burden is estimated as follows: 63,911 plans * 0.5 hours = 31,955.4 hours for both a plan fiduciary and clerical staff. A labor rate of \$134.21 is used for a plan fiduciary and a labor rate of \$55.14 for clerical staff (31,955.4 * \$134.21 = \$4,288,739 and 31,955.4 * \$55.14 = \$1,762,023).⁶ This results in an annual cost burden estimate of \$6,050,762. These investment managers provide similar services for many plans resulting in economies of scale that limit the cost impact of the IC.

- 14. Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.**

There are no ongoing costs to the Federal government.

- 15. Explain the reasons for any program changes or adjustments reporting in Items 13 or 14.**

This is a new information collection.

- 16. For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.**

This is not a collection of information for statistical use, and there are no plans to publish the results of this collection.

⁶ Labor costs are based on statistics from Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation, Employee Benefits Security Administration (June 2019), www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

- 17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.**

Not applicable.

- 18. Explain each exception to the certification statement.**

There are no exceptions to the certification statement.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

Not applicable. The use of statistical methods is not relevant to this collection of information.