

## **Fiduciary Duty Guidance for Proxy Voting Reform**

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### Summary

Investor proxy voting practices have entered the public spotlight in 2018 as Congress and the Securities and Exchange Commission (“SEC”) consider changes to the rules which govern proxy voting.<sup>2</sup> However, an accurate recognition of the investor fiduciary duties which provide the legal context for exercise of proxy voting rights has been largely missing from the debate.

We believe that any reform discussions should be anchored on an up-to-date understanding of how fiduciary principles fit the 21<sup>st</sup> century. This includes a balanced application of the fiduciary duties of (a) prudence (including the obligation to investigate and verify material facts), (b) loyalty to beneficiaries (with its obligation to treat different beneficiary groups impartially), and (c) reasonable management of costs.<sup>3</sup> These are legal duties which establish expectations for proxy voting processes at asset owners, investment managers and proxy advisors.

We also believe that improved alignment of proxy voting policies and procedures with these fiduciary duty fundamentals could improve company and investor performance over time and reduce exposure of fund beneficiaries to systemic risks. This realignment could be driven by greater investor and proxy service provider focus on (a) the evolving research and knowledge base that leads proxy voting trends, (b) oversight of how proxy voting conflicts of interest at investment managers are managed, (c) explicit attention to balancing short- and long-term effects of aggregated proxy votes, (d) consideration of systemic risks that can spread across portfolio companies and compound over time, and (e) recognition of the long-term benefits, as well as the costs, associated with opportunities to collaborate on these fiduciary process improvements.

### Proxy Voting as a Fiduciary Function

Investor fiduciaries have long known that proxy voting must be managed in accordance with fiduciary duties. Both the US Department of Labor (“DOL”) and SEC have issued guidance in the past few years reconfirming that proxy votes are rights which must be prudently exercised consistent with the interests of pension plan members and fund investors.

For example, in DOL Interpretive Bulletin 2016-01, the DOL noted, “The Department’s longstanding position is that the fiduciary act of managing plan assets which are shares of corporate stock includes decisions on the voting of proxies and other exercises of shareholder rights.”<sup>4</sup>

In Staff Legal Bulletin No. 20 (June 30, 2014), the SEC confirmed, “As a fiduciary, an investment adviser owes each of its clients a duty of care and loyalty with respect to services undertaken on the client’s behalf, including proxy voting.”<sup>5</sup>

Understanding how these fiduciary duties apply to proxy voting deserves a closer look.

## Duty of Prudence

Investor fiduciaries are required to exercise their management responsibilities prudently, in a fact-based and forward-looking manner, with reference to the care, skill, diligence and prudence used by similar investors.<sup>6</sup> This contemplates the use of processes which recognize practices at similar peers as a reference point. An understanding of peer practices is required, but the duty of prudence does not create a mindless lemming standard. Instead, it contemplates consideration of peer practices in the context of each fund's unique structure, risk appetite, strategy, governing documents and liabilities.

The duty of prudence also requires that fiduciaries have a reasonable process in place to investigate and verify facts relevant to investment decisions.<sup>7</sup> Personal preferences and beliefs (whether liberal or conservative) are insufficient to support fiduciary decisions, including those relating to proxy votes.

### *Evolution of Prudent Practices*

A current application of fiduciary principles includes understanding that prudent practices evolve over time. The Restatement of Trusts (Third), a leading authority on investor fiduciary law, confirms that fiduciary practices cannot remain static. "Trust investment law should reflect and accommodate current knowledge and concepts. It should avoid repeating the mistake of freezing its rules against future learning and developments."<sup>8</sup>

Investor fiduciaries must be especially attuned to changes in investment theories, knowledge base and industry practices. We are currently at such an industry inflection point. For instance, BlackRock's January 2018 letter to the world's largest companies highlighted fiduciary duty as requiring a new emphasis on company long-term strategic planning, sustainability and understanding of social purpose.<sup>9</sup> BlackRock announced it is doubling the size of its investment stewardship team to implement company engagement on this obligation. Similar letters to companies that emphasize materiality of long-term value creation and sustainability practices were also sent by industry giants State Street Global Advisors and Vanguard.<sup>10</sup>

Regulators have also acknowledged that understanding of the materiality of environmental, social and governance ("ESG") factors for long-term investors has been evolving. The DOL December 2016 Interpretive Bulletin confirmed that ESG factors can be material to proxy voting decisions and sustainable value creation.<sup>11</sup> The materiality of ESG was subsequently reaffirmed in a 2018 Field Assistance Bulletin, which restated that ESG factors can be significant drivers of company and investor success.

"[There] may be circumstances, for example involving significantly indexed portfolios and important corporate governance reform issues, or other environmental or social issues that present significant operational risks and costs to business, and that are clearly connected to long-term value creation for shareholders with respect to which reasonable expenditure of plan assets to more actively engage with company management may be a prudent approach to protecting the value of a plan's investment."<sup>12</sup>

In fact, levels of mainstream investor support for ESG shareholder resolutions have been increasing.

- BlackRock, Vanguard, Fidelity and American Funds, amongst the largest mutual fund investors in the world, began voting in favor of climate-related resolutions in 2017.<sup>13</sup>
- E&Y found that favorable votes of 30 percent or more (a level at which boards begin to pay serious attention) on environmental and social shareholder resolutions increased from 29 percent of those resolutions in 2017 to 41 percent in 2018, a significant upward trend.<sup>14</sup>
- The Climate 50/50 Project identified increasing large mutual fund support for shareholder proposals on key climate change and political influence disclosure resolutions at carbon-intensive companies but also identified a clear pattern of trend leaders and laggards. For example, during the last proxy season Legal and General and PIMCO voted in favor of 100% of the political influence disclosure resolutions while Vanguard, Prudential, BlackRock and JP Morgan supported none.<sup>15</sup>

A prudent proxy voting process requires an understanding of the drivers for such trends in peer voting practices. The duty to investigate and verify material facts also compels evaluation of current research findings (as well as company disclosures) to ensure voting decisions are based on an up-to-date factual investigation.<sup>16</sup> These responsibilities are shared by named asset owner fiduciaries and investment managers to whom proxy voting is delegated and require ongoing fiduciary oversight.<sup>17</sup>

### *Duty of Loyalty*

Investor fiduciaries must also exercise their responsibilities with absolute loyalty to the interests of fund participants and beneficiaries, managing assets to provide promised benefits and cover reasonable administrative expenses. Section 404 of the Employees Retirement Income Security Act (“ERISA”) explicitly provides “a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.”<sup>18</sup> This is intended to guard against harm to beneficiaries from self-dealing, fraud and personal biases of delegated fiduciary agents.

### *Conflicts of Interest*

When it established proxy voting rules in 2003, the SEC recognized potential for investment manager conflicts of interest in voting proxies and mandated, “To satisfy its duty of loyalty, the adviser must cast the proxy votes in a manner consistent with the best interest of its client and must not subrogate client interests to its own.”<sup>19</sup> For example, conflicts of interest can result from service fees received from companies on whose proxies votes are being cast, business interests in attracting new public company clients and manager compensation structures that are misaligned with the interests of fund participants.<sup>20</sup> Of particular note for current regulatory debates is that investment managers and proxy advisors owe fiduciary duties to their investor clients rather than to subject companies.<sup>21</sup>

Managers with delegated proxy voting authority typically disclose to clients their general conflicts arising from business interests and engage independent proxy advisors to apply established voting guidelines. Nevertheless, concern about the effect of conflicts on proxy voting persists.

In 2009, the SEC imposed fines on Intech Investment Management and its Chief Operating Officer for allegedly using a labor-friendly proxy voting policy at non-labor client funds to serve the manager's own business interests in attracting new labor fund clients. The SEC noted that "advisers may use a 'predetermined voting policy,' such as a third-party proxy voting service's platform, to vote proxies provided that the predetermined policy is 'designed to further the interests of clients rather than the adviser.'" (Emphasis added.)<sup>22</sup>

Although there is only one reported 2009 SEC enforcement action, a number of academic studies have identified apparent widespread links between mutual fund business interests and their proxy voting patterns.<sup>23</sup> This could be a significant fiduciary issue – and one that merits the attention of both regulators and the asset owners who delegate proxy voting to fund managers.<sup>24</sup> While we do not contend that investment manager conflict situations always involve Adviser Act or fiduciary duty violations, many readers might conclude there is more evidence that investment manager conflicts of interest are influencing some voting decisions than there is supporting other proxy voting conflict of interest allegations currently being debated.

#### *Public Statements and Vote Consistency*

Recent public statements from investment managers regarding material ESG factors and systemic risk exposures also present an opportunity for asset owner fiduciaries that have delegated proxy voting authority to conduct congruity analyses of proxy votes with those public statements.<sup>25</sup> The results could help fiduciaries identify situations where a delegated manager's proxy voting processes might not be adequate to ensure that votes are always being cast in the interests of fund participants and not being influenced by the manager's own business interests. Additional scrutiny and inquiries regarding compliance might be merited where inconsistencies are apparent.

As an example of how such potential inconsistencies might present, BlackRock states in its *Investment Stewardship 2018 Annual Report*, "During our direct engagements with companies, we address the issues covered by any **shareholder proposals that we believe to be material to the long-term value of that company. Where management demonstrates a willingness to address the material issues** raised, and we believe progress is being made, **we will generally support the company and vote against the shareholder proposal.**" (Emphasis added.)<sup>26</sup>

On the surface, this stated practice of voting against shareholder resolutions that have been determined to be in the best interests of the company suggests there is a preference for supporting management over the interests of clients in improving company performance as soon as practical. The resulting disconnect between value creation and proxy voting sends mixed signals to clients, the company and the marketplace. It could have the practical effect of giving companies more room to ignore or delay value enhancing actions.

Some clients might be concerned that a manager's interests in attracting or keeping business from companies could be causing such disconnects between voting practices and company value creation. Disconnects might result from misunderstanding that the fiduciary duty of loyalty in the exercise of proxy voting rights runs only to fund beneficiaries (who will benefit from improving company performance as soon as practical) rather than to the interests of company management or business goals of the fund manager. Or they might be a result of the tension between beliefs about advantages of relying only on continued engagement with a company over first sending a consistent proxy vote message and then offering to continue dialogue.

In any event, when proxy voting responsibilities are delegated, the named fiduciary still retains oversight duties.<sup>27</sup> Robust reporting and monitoring procedures are necessary to put teeth into compliance with the duty of loyalty when voting duties are delegated.<sup>28</sup>

### *Duty of Impartiality*

The duty of impartiality (often considered part of the duty of loyalty) requires that fiduciaries balance conflicting interests of different beneficiary groups. This requires consideration of cross-generational equity and other potentially conflicting interests among beneficiaries.<sup>29</sup> Like the duty of prudence, impartiality contemplates that fiduciaries diligently attend to identification and management of conflicting beneficiary interests.<sup>30</sup> Attention to alignment of time horizons with fiduciary decision processes is especially important for implementation of impartiality duties.

The potential for uncompensated transfer of risks and wealth creation between generations can be exacerbated by myopic investment practices that undermine sustainable long-term corporate wealth creation and favor older over younger fund participants. A growing body of research has found that companies which maintain the discipline to focus on long-term strategic planning and risk management can substantially outperform other companies over the long term.<sup>31</sup> Proxy votes on issues relating to executive compensation plan design, climate change exposure, mergers and acquisitions, election of directors, reporting on sustainability risks and similar matters can have long-term value creation implications which should be covered in proxy analyses.

### *Systemic Issues can Raise Duty of Impartiality Concerns*

In addition, systemic issues are often invisible to fiduciaries that focus exclusively on generation of short-term returns or are evaluated against only a market-relative performance benchmark. Nevertheless, systemic risks can spread across portfolio companies and compound over time, increasing risk exposures and degrading future returns of fund participants.<sup>32</sup> The potential for inequitable intergenerational treatment in the resulting transfer of risk and value is high.

Climate risk presents perhaps the most obvious systemic risk. However, other things like future value destruction from environmental damage and wealth creation limits imposed by ecosystem decline or the effects of excessive income inequality on consumer demand and political risk also raise impartiality concerns. The duty of impartiality requires analysis and a good faith effort to balance fund participant intergenerational and other beneficiary group conflicts as part of proxy voting processes. Use of decision processes that are aligned with efforts to balance short- and long-term value creation and consider systemic risks are critical to fulfilling impartiality

obligations – especially for younger plan participants who are more likely to be harmed over the long term by inattention to the duty of impartiality.

ESG and sustainability issues, in particular, often have systemic or long-term cost, risk and return implications. Proxy policies and analyses that do not take this into consideration are likely to raise duty of impartiality and prudence concerns, especially in regard to identification and balancing of inter-generational risk, cost and wealth creation transfers. Analysis of the inter-generational effects of climate change, natural capital restraints, excessive income inequality, health and safety risks, reports on long-term strategic planning, executive compensation plan design, board succession planning and similar matters would help investor fiduciaries implement impartiality obligations.

### *Duty to Manage Costs*

Put simply, wasting the money of participants and beneficiaries is imprudent. A fiduciary must be alert to balancing projected benefits against the likely costs when selecting, delegating duties to and compensating an agent, such as an investment advisor or manager.<sup>33</sup> This involves the exercise of discretion, under the circumstances, with the care, skill, diligence and prudence used by similar investors. However, it does not mandate selection of the lowest cost provider, as consideration of the net cost-benefit result over an appropriate time period with an acceptable level of risk is contemplated.

There are signs that industry standards are also evolving in regard to striking the balance for what costs are reasonable when engaging agents or advisors to assist in implementation of proxy voting responsibilities. For example, BlackRock recently announced it is doubling its staff allocated to corporate engagement and proxy voting.<sup>34</sup> Knowledge about the collective role that investors can play in creation and management of systemic risks that influence long-term investment outcomes is growing.<sup>35</sup> Availability of proxy advisors, new data sources and investor collaboration networks also allow for greater efficiency through cost and work sharing.<sup>36</sup> These cost management and service improvement opportunities must be considered by investor fiduciaries in order to fulfill their cost management obligations.

One practical implication of this is that most investor fiduciaries are essentially obligated to use proxy advisors and similar service providers in order to control costs and improve their ability to exercise informed proxy voting rights. It would be imprudent for them to ignore these cost and work sharing opportunities.

That does not mean that the quality of services provided by agents and other entities in the proxy voting service chain cannot be improved. However, improved alignment of proxy voting with fiduciary duty principles would undoubtedly involve additional costs. This would require that investor fiduciaries conduct a prudent balancing of the related costs and benefits over an appropriate time period and with an acceptable level of risk. Use of such an evaluative process is their legal obligation.

## Conclusion

Shareholder voting is an essential corporate governance right under state laws.<sup>37</sup> It is an important channel of communication between shareholders and companies that supports corporate governance balance between the board, shareholders and management. Accordingly, integrity and alignment of the proxy voting process are critical investor fiduciary concerns.

Decisions on management of the proxy processes, service standards and related costs for administration of proxy voting constitute investor fiduciary acts that should be linked with implementation of fiduciary obligations. Legal obligations of prudence, loyalty and cost management are rooted in the common law of trusts and transcend the debates currently occurring at the SEC and in Congress.<sup>38</sup> Application of a 21<sup>st</sup> century understanding of these fiduciary duties serves as a guide for proxy voting policies, analyses and reports.

The keys to improving alignment of proxy voting policies and practices with fiduciary duties include a greater focus by investor fiduciaries and their service providers on:

- Evolution in knowledge, research findings and related developments which lead trends in proxy voting;
- Oversight of how conflicts of interest in the proxy voting and investment management chain are managed;
- Balance between the short- and long-term effects of proxy decisions on different groups of fund beneficiaries over their varying investment time horizons;
- Aggregated influence of shareholder voting practices on systemic risks that can spread across portfolio companies and compound over time; and
- Cost-benefit considerations in management of proxy voting services.

We believe that greater attention to these fiduciary duty fundamentals could help drive an increase in company and investor performance over the long term, enhance sustainability and encourage more effective management of systemic risks. This has implications for the content of proxy analyses, staffing of proxy voting functions and structure of proxy policies. However, both companies and investment fund beneficiaries are likely to benefit from improved alignment of proxy voting management processes with an up-to-date application of fiduciary duty principles.

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<sup>1</sup> We submit this analysis in response to Roundtable discussion topics on how the proxy process could be improved, the role of proxy advisors and how relationships between proxy advisors, investors and issuers could be improved. Keith Johnson heads the Institutional Investor Services Group at Reinhart Boerner Van Deuren s.c. He formerly served as Chief Legal Officer of the State of Wisconsin Investment Board and President of the National Association of Public Pension Attorneys. Susan N. Gary is an Orlando J. and Marian H. Hollis Professor of Law at the University of Oregon. She served as the Reporter for the Uniform Prudent Management of Institutional Funds Act. Cynthia Williams holds the Osler Chair in Business Law at Osgoode Hall Law School, York University. She was previously a Professor of Law at the University of Illinois, College of Law. An earlier version of this analysis appeared as an Industry Voices Commentary in Pensions & Investments. The views expressed herein should not be attributed to the employers, clients or organizations with which the authors are associated.

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<sup>2</sup>The November 15, 2018 SEC Roundtable was convened to gather views on the proxy process and related SEC rules. The agenda includes “how has the role of proxy advisory firms evolved over time and are there ways in which their role and relationships with institutional investors and issuers can be improved?” A prior version of this analysis was submitted to the SEC as a Roundtable Comment. In the 115<sup>th</sup> Congress, legislation was introduced as H.R. 4015 which would impose new regulatory requirements on proxy advisors.

<sup>3</sup> For a detailed understanding of prudence and loyalty in the 21<sup>st</sup> century, see S. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, University of Colorado Law Review, Vol. 90 (2018); <http://dx.doi.org/10.2139/ssrn.3149856>.

<sup>4</sup> Available at <https://www.dol.gov/sites/default/files/ebsa/2016-31515.pdf>.

<sup>5</sup> Available at: <https://www.sec.gov/interps/legal/cfsfb20.htm>.

<sup>6</sup> S. Gary, *supra*, note 3.

<sup>7</sup> See the Uniform Prudent Management of Institutional Funds Act § 3 (c) (2), Comment. “The subsection requires persons who make investment and management decisions to investigate the accuracy of the information used in making decisions.”

<sup>8</sup> Restatement of Trusts (Third) 1992, §227, Introduction. For example, during much of the 20<sup>th</sup> century, investing in stock was seen as imprudent for an institutional fiduciary although it is now a staple investment asset class.

<sup>9</sup> The letter from Larry Fink, BlackRock’s CEO, is available at <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>. He says, “The statement of long-term strategy is essential to understanding a company’s actions and policies, its preparation for potential challenges, and the context of its shorter-term decisions. Your company’s strategy must articulate a path to achieve financial performance. To sustain that performance, however, you must also understand the societal impact of your business as well as the ways that broad, structural trends – from slow wage growth to rising automation to climate change – affect your potential for growth.”

<sup>10</sup> The Vanguard CEO’s letter to companies from is available at <https://about.vanguard.com/investment-stewardship/governance-letter-to-companies.pdf>. The letter from State Street Global Advisors’ President is at <https://www.ssga.com/investment-topics/environmental-social-governance/2017/Letter-and-ESG-Guidelines.pdf>.

<sup>11</sup> *Supra*, note 4.

<sup>12</sup> DOL Field Assistance Bulletin 2018-01 is available at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-01>.

<sup>13</sup> Ceres, *Four Mutual Fund Giants Begin to Address Climate Change Risks in Proxy Votes: How About Your Funds?*, at <https://www.ceres.org/news-center/blog/four-mutual-fund-giants-begin-address-climate-change-risks-proxy-votes-how-about>.

<sup>14</sup> EY Center for Board Matters, *2018 Proxy Season Review*, at <https://www.ey.com/us/en/issues/governance-and-reporting/ey-2018-proxy-season-review>.

<sup>15</sup> 50/50 Climate Project, *Asset Manager Climate Scorecard 2018*, at <https://5050climate.org/wp-content/uploads/2018/09/FINAL-2018-Climate-Scorecard-1.pdf>.

<sup>16</sup> The duty to make a reasonable effort to verify facts “incorporates the traditional duty of the fiduciary investor to examine information likely to bear importantly on the value or security of an investment.” Uniform Management of Public Employee Retirement Systems Act (1997) § 8 (a) (3), Comment, available at [http://www.uniformlaws.org/shared/docs/management\\_public\\_employee\\_retirement\\_systems/mpersa\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/management_public_employee_retirement_systems/mpersa_final_97.pdf).

The duty contemplates use of a reasonable process rather than absolute confirmation of every material fact. It must be balanced with peer practice standards and the duty to incur only reasonable expenses.

<sup>17</sup> Even when proxy voting duties are delegated to a third party manager, the primary fiduciary must have policies and procedures in place that are reasonably designed to provide sufficient ongoing oversight of the third party. SEC Staff Legal Bulletin No. 20 (June 30, 2014), *supra*, note 5, also requires that, when investment advisors engage proxy advisors, they must “ascertain that the proxy advisory firm has the capacity and competency to adequately analyze proxy issues, which includes the ability to make voting recommendations based on materially accurate information.”

<sup>18</sup> Available at <https://www.law.cornell.edu/uscode/text/29/1104>.

<sup>19</sup> SEC Release No. IA-2106; File No. S7-38-02 at <https://www.sec.gov/rules/final/ia-2106.htm>.

<sup>20</sup> *Id.*

<sup>21</sup> Of course, companies must succeed in order for investor fiduciaries to generate returns and meet current and future financial obligations. Investor fiduciaries have a keen interest in integrity of the proxy process.

<sup>22</sup> In the Matter of INTECH Investment Management LLC and David E. Hurley, File No. 3-13463, Adviser’s Act Release No. 2872 (May 7, 2009) at <https://www.sec.gov/litigation/admin/2009/ia-2872.pdf>.

<sup>23</sup> For example: Taub, Jennifer, *Able but Not Willing: The Failure of Mutual Fund Advisers to Advocate for Shareholders’ Rights*, The Journal of Corporation Law, Volume 34:3 (2009), page 843, at page 875. (“I found that

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the instances of support by a mutual fund family for shareholder-sponsored resolutions declined as the value of assets the Adviser had under management through DC plans increased. . . the probability that this occurred randomly is less than one percent.”); Ashraf, Rasha and Jayaraman, Narayanan and Ryan, Harley E., *Do Pension-Related Business Ties Influence Mutual Fund Proxy Voting? Evidence from Shareholder Proposals on Executive Compensation* (November 23, 2010), <http://dx.doi.org/10.2139/ssrn.1351966>, at page 2. (“Our analysis of nearly 18,000 votes cast by 143 fund families, 67 with pension-related business ties and 76 without ties, documents a strong relation between the likelihood that a fund family votes against shareholder proposals on compensation and pension-related business ties. . . fund families tend to vote with management at all firms, possibly to maintain reputation and to minimize the potential for lawsuits.”); Cvijanovic, Dragana and Dasgupta, Amil and Zachariadis, Konstantinos E., *Ties that Bind: How Business Connections Affect Mutual Fund Activism*, *Journal of Finance*, Volume 71, Issue 6, Pages 2933-2966 (December 2016; European Corporate Governance Institute (ECGI) - Finance Working Paper No. 438/2014; UNC Kenan-Flagler Research Paper No. 2317212, <https://doi.org/10.1111/jofi.12425>, at pages 1 and 32. (“We investigate whether business ties with portfolio firms influence mutual funds’ proxy voting using a comprehensive data set spanning 2003 to 2011. . . [We] find that business ties significantly influence pro-management voting at the level of individual pairs of fund families and firms after controlling for ISS recommendations and holdings. The association is significant only for shareholder-sponsored proposals and stronger for those that pass or fail by relatively narrow margins. . . . Further, we find that large and small fund families without business ties vote similarly, whereas large fund families with business ties vote in a more management-friendly manner than small families with business ties.”)

<sup>24</sup> 29 U.S. Code § 1134 provides the SEC with authority to investigate potential Adviser Act violations.

<sup>25</sup> *Supra*, notes 9 and 10.

<sup>26</sup> BlackRock Investment Stewardship 2018 Annual Report, page 10, at <https://www.blackrock.com/corporate/literature/publication/blk-annual-stewardship-report-2018.pdf>.

<sup>27</sup> 29 CFR § 2509.94–2, *Interpretive bulletin relating to written statements of investment policy, including proxy voting policy or guidelines*, at <https://www.gpo.gov/fdsys/pkg/CFR-2007-title29-vol9/pdf/CFR-2007-title29-vol9-sec2509-94-2.pdf>. “The fiduciary duties described at ERISA §404(a)(1)(A) and (B) . . . also require that the named fiduciary appointing an investment manager periodically monitor the activities of the investment manager with respect to the management of plan assets, including decisions made and actions taken by the investment manager with regard to proxy voting decisions.”

<sup>28</sup> It is worth noting that Morningstar recently acquired Fund Votes, which provides mutual fund and ETF proxy voting data on company resolutions and shareholder proposals, including environmental, social, and governance topics. This could provide asset owners with greater access to data for analyses of mutual fund voting practices. See <https://medium.com/the-esg-advisor/morningstar-acquires-fund-votes-and-company-responses-to-the-main-st-investors-coalition-letter-33f5aa3c7571>.

<sup>29</sup> The United States Supreme Court, in *Varity v. Howe* (1996), stated that “the common law of trusts [made applicable to ERISA §§404, 409] recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interest of all beneficiaries.”

<sup>30</sup> Fiduciaries cannot “ignore the interests of some beneficiaries merely as a result of oversight or neglect.” Restatement of Trusts, Third, 1992, §79, Comment (b).

<sup>31</sup> For example, see Barton, Manyika, & Keohane Williamson, *Finally, Evidence That Managing for the Long Term Pays Off*, *Harvard Business Review* (February 7, 2017), <https://hbr.org/2017/02/finally-proof-that-managing-for-the-long-term-pays-off>. (“New research . . . found that companies that operate with a true long-term mindset have consistently outperformed their industry peers since 2001 across almost every financial measure that matters.”); Alex Edmans, Vivian Fang & Allen Huang, *The Long-Term Consequences of Short-Term Incentives 2* (Oct. 4, 2017) (unpublished working paper), <https://irrcinstitute.org/wp-content/uploads/2017/12/13-Huang-Edmans-Fang-The-Long-Term-Consequences-of-Short-Term-Incentives.pdf>. (“The concern with short-term incentives is that they lead to the CEO taking myopic actions that boost the short-term stock price at the expense of long-run value.”).

<sup>32</sup> Hawley and Lukomnik, *The Long and Short of It: Are We Asking the Right Questions? Modern Portfolio Theory and Time Horizons*, *Seattle University Law Review*, Volume 41, Issue 2, 449 (2018), at page 450. (“[Modern Portfolio Theory (MPT)] accepts that some risks are systemic and non-diversifiable: Those are the risks that contribute to beta. Those risks can be financial (e.g., global financial crisis), environmental (e.g., climate change), or social (e.g., income inequality or political stability), but the focus of MPT is to create an efficient mean variance portfolio within that systematic risk framework by diversifying idiosyncratic risk (or as alpha seekers do, by seeking some idiosyncratic risks and avoiding others). The remaining systemic risk constitutes beta, and the investor is exposed to it. There is no consideration that investment decisions themselves—whether intentionally or accidentally—can affect systemic risk. It is a central point of our argument that while some risks are systemic and

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non-diversifiable, that does not suggest that they are immune from mitigation.”) Available at <https://digitalcommons.law.seattleu.edu/sulr/vol41/iss2/44/>.

<sup>33</sup> Uniform Management of Public Employee Retirement Systems Act § 6 (1997) at [http://www.uniformlaws.org/shared/docs/management\\_public\\_employee\\_retirement\\_systems/mpersa\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/management_public_employee_retirement_systems/mpersa_final_97.pdf); Restatement (Second) of Trusts § 188 (1959); Uniform Trust Code § 805 (2010).

<sup>34</sup> *Supra*, note 9.

<sup>35</sup> *Supra*, note 32.

<sup>36</sup> For example, efficiencies can be generated by proxy advisors and other entities or collaborations like the Principles for Responsible Investment (“PRI”), Council of Institutional Investors (“CII”), International Corporate Governance Network (“ICGN”), Focusing Capital on the Long Term (“FCLTGlobal”), Institutional Investor Group on Climate Change (“IIGCC”) and numerous other entities. See also *supra*, note 28.

<sup>37</sup> For example, see Delaware Code, Title 8, Chapter 1. General Corporation Law, Subchapter VII. Meetings, Elections, Voting and Notice. Reduction of proxy rights on the Federal level would restrict independent information flow to public company boards and could result in shareholders using election of directors as the remaining option for communicating on governance issues.

<sup>38</sup> Hawley, Johnson and Waitzer, *Reclaiming Fiduciary Duty Balance*, Rotman International Journal of Pension Management, Volume 4, Issue 2 (Fall 2011) at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1935068##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1935068##).