

Managers of Plan Asset Funds: Important December 1, 2023 Deadline for DOL's Proxy Voting Rule

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Background of Proxy Voting Requirements

On December 1, 2022, the U.S. Department of Labor ("DOL") released its final rule regarding investment duties of fiduciaries under ERISA (referred to as the "ESG Rule"). The ESG Rule includes a specific requirement on proxy voting that, in particular, impacts managers of pooled investment vehicles that are deemed to hold "plan assets" for purposes of ERISA (such managers, "Plan Asset Managers" and such vehicles, "Plan Asset Vehicles").

The ESG Rule requires that for each Plan Asset Vehicle, a Plan Asset Manager must reconcile the differences in the investment policy statements and proxy voting practices of each ERISA investor. In the case of proxy voting, if there are differences, the ESG Rule requires the Plan Asset Manager to reconcile the conflicting policies and to vote (or abstain from voting) the relevant proxies to reflect such differing policies in proportion to each ERISA investor's economic interest in the Plan Asset Vehicle.

To avoid the practical difficulties with such proportional voting, the ESG Rule provides an alternative approach whereby a Plan Asset Manager can satisfy its responsibility by:

- Developing its own investment policy statement consistent with Title I of ERISA; and
- Requiring each ERISA investor in a Plan Asset Vehicle to accept such policy, including any proxy voting policy, before the ERISA investor is permitted to invest in the Plan Asset Vehicle.

The compliance date of December 1, 2023 is fast approaching and we recommend Plan Asset Managers take the following steps to come into compliance with the ESG Rule and its proxy voting requirements, for both new and existing ERISA investors.

Existing ERISA Investors in Plan Asset Vehicles

- Review, confirm and document that the Plan Asset Manager's investment policy statement and proxy voting policies are consistent with Title I of ERISA. To the extent the Plan Asset Manager retains a proxy voting service for the voting of proxies, it must undergo a similar review and document that such proxy voting service's voting policies are consistent with Title I of ERISA.
- Review and confirm whether the Plan Asset Vehicle's subscription documents include a provision whereby ERISA investors accept the Plan Asset Manager's investment policy statement and proxy voting policy.
 - If there is no such provision, analyze the Plan Asset Vehicle's fund documents to determine the applicable procedure for obtaining investor consent (i.e., written consent or "negative" consent) for the addition of an acknowledgement from ERISA investors regarding the Plan Asset Manager's investment policy statement and proxy voting policy.

New ERISA Investors in Plan Asset Vehicles

- Provide each prospective ERISA investor with the Plan Asset Manager's investment policy statement and proxy voting policies, that are consistent with Title I of ERISA.
- Update each Plan Asset Vehicle's subscription documents to include a provision stating that ERISA investors accept the Plan Asset Manager's investment policy statement and proxy voting policy.

- **Practice Point:** We recommend all managers of pooled investment vehicles include such provisions in the subscription documents for all pooled investment vehicles (not just Plan Asset Vehicles) in the event a vehicle later becomes a Plan Asset Vehicle.

Plan Asset Managers should also review any side letter with an ERISA investor in a Plan Asset Vehicle and the governing documents to any separately managed account with a client that is subject to ERISA for compliance with the ESG Rule.

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