

August 9, 2010

Department of Labor Commences Proxy Voting Inquiry

The Office of the Inspector General (OIG) of the Department of Labor (DOL) recently mailed a letter to certain retirement plans requesting information regarding proxy voting activities. The letter states that it was sent to a “stratified, random sample of employee benefit plans,” and that the information will be used by the Employee Benefits Security Administration (EBSA) to assess the level of compliance with ERISA in the area of proxy voting. It appears that this inquiry is related, at least in part, to the DOL’s concern in recent years that certain plan sponsors may be using the proxy voting process to influence business, social, and political goals while not providing clear benefits to plan participants.

Background

The DOL has a long-standing position that proxy voting is integral to the fiduciary act of managing plan assets. Most recently, in 2008, the DOL issued [Interpretive Bulletin §2509.08-2 \(IB 08-2\)](#), which superseded prior guidance on proxy voting and expanded on DOL’s views on the topic.

IB 08-2 reiterates much of the DOL’s prior guidance in Interpretive Bulletin 94-2, which IB 08-2 supersedes. IB 08-2 states that proxy voting must be exercised by the plan trustee, a named fiduciary acting through the trustee’s instructions, or the investment manager to which investment authority of the relevant asset has been delegated. IB 08-2 also reiterates DOL’s view that proxy voting must be based solely on factors relating to the economic value of the investment and that plan fiduciaries must monitor proxy voting. IB 08-2 reaffirms DOL’s opinion that a proxy voting policy is an important part of an investment policy statement.

IB 08-2 goes further than IB 94-2 by indicating that a plan fiduciary’s use of the proxy process to further legislative, regulatory or public policy issues, unrelated to the enhancement of the economic value of the plan’s investment, would be an ERISA violation. This guidance on socially directed voting is similar to the views expressed by the DOL in a 2007 advisory opinion issued to the U.S. Chamber of Commerce. That advisory opinion, though not explicitly addressed to unions and multiemployer pension plans, was intended to address concerns that had been raised by the Chamber as to whether unions could use the proxy voting process of large multiemployer pension plans to influence issues in which the unions had an interest.

OIG Audit

The OIG published its fiscal year [2010 audit workplan](#) in October 2009. The workplan lists an audit of pension plan proxy voting activities as a new item. The workplan states that “estimates indicate that some pension plans spend up to \$1 million per plan per year on proxy activities. These activities encompass plan efforts to influence business, social, and political goals through proxy voting.” The workplan further states that in 2008, “DOL reiterated its view if proxy activities do not provide a clear benefit to plan participants, the expenditure of the funds is an Employee Retirement Income Security Act (ERISA) violation.” According to the workplan, the OIG audit will address the following question: “Is EBSA adequately enforcing ERISA requirements on plan proxy activities?”

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The audit letter asks the plan sponsor to provide the following information regarding proxy voting activities:

- Any proxy voting guidelines effective during calendar year 2009.
- A list of the plan's investments by dollar amount and number of shares as of December 31, 2009.
- Any fiduciary services agreements with an investment manager/proxy voter.
- Any monitoring reports for an investment manager/proxy voter.
- Any disclosures of conflicts of interest of an investment manager/proxy voter.

The letter also asks for contact information, in anticipation of possible further audit activity. The letter explains that the results of the inquiry will be collected and provided to the EBSA to assist with compliance efforts.

Next Steps

Even if a plan sponsor has not received a letter from the OIG, the attention given to this issue suggests that this would be an appropriate time to revisit retirement plan proxy voting procedures. In particular, plan sponsors should confirm that the relevant plan fiduciaries understand how proxies are voted, that guidelines regarding proxy voting have been established under the plan and investment policy, that the fiduciaries are monitoring the results of proxy voting, and that the other requirements of ERISA are satisfied.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com