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# DOL Guidance on Shareholder Rights (A Political Ritual)

**BARBARA PLETCHER**

On December 28, 2016 (at the end of the Obama administration), the U.S. Department of Labor (DOL) issued Interpretive Bulletin 2016-1 (IB 2016-1) to document DOL views regarding shareholder rights such as voting of proxies and shareholder activism/engagement. This Interpretive Bulletin also addresses maintenance of and compliance with investment policies in employee benefit plans.[1]

IB 2016-1 withdrew Interpretive Bulletin 2008-2, issued at the end of the Bush administration, and reinstated views expressed in Interpretive Bulletin 94-2, which was issued during the Clinton administration, but withdrawn by the Bush administration. Most views expressed in the Obama, Bush and Clinton era Interpretive Bulletins have remained consistent over the years. Views on economically targeted investments ("ETI"), environmental, social and governance ("ESG") investing, and associated shareholder activism have, however, been less consistent.

Outlined below are views expressed consistently by Obama, Bush and Clinton era Interpretive Bulletins. Inconsistent views are highlighted in comment boxes. The analysis below is footnoted in order to link discussions regarding investment selection and shareholder action in the above-referenced Interpretive Bulletins with companion Interpretive Bulletins devoted to "economically targeted investments." [2]

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A. **Voting is a Fiduciary Act.** The fiduciary act of managing plan assets that are shares of corporate stock includes the voting of proxies appurtenant to those shares of stock.

B. **Who Votes.** Voting of proxies lies exclusively with the plan trustee except to the extent (1) the trustee is subject to the direction of a named fiduciary, or (2) the power to manage, acquire or dispose of the relevant assets has been delegated to one or more investment managers pursuant to ERISA 403(a)(2).

C. **Investment Policy Statements.** The maintenance by an employee benefit plan of an investment policy statement ("IPS") is consistent with the fiduciary obligations set forth in ERISA section 404(a)(1)(A) and (B).

D. **An Investment Policy Is Not a Shield.** Actions taken in compliance with an investment policy are not protected actions if they are imprudent under the circumstances.

E. **Components of an Investment Policy.** An investment policy includes guidelines or general instructions concerning types or categories of investment management decisions, which may include proxy voting decisions. A named fiduciary's determination of the terms of an IPS is an exercise of fiduciary responsibility and, as such, may need to take into account factors such as the plan's funding policy and its liquidity needs, as well as issues of prudence, diversification and other fiduciary requirements of ERISA.

> **IB 2016-1 (Obama era):** An investment policy may include policies concerning economically targeted investments, incorporate environmental, social or governance (ESG) factors, or integrate ESG-related tools, metrics and analysis to evaluate an investment's risk or return or to choose among equivalent investments.

F. **Monitoring of Investment Policy.** A named fiduciary must monitor investment managers' compliance with the governing investment policy. The governing investment policy can be the plan's investment policy or the investment manager's investment policy.

G. **Tie Breaker.** If two or more investments are economically indistinguishable and would fill a similar role with respect to diversification, liquidity, and risk/return, then factors outside the economic interest of the plan could be used to decide between these investments.

H. **No Subordination of Value of Retirement Benefits.** In voting proxies, the responsible fiduciary may not subordinate the interests of participants and beneficiaries in their retirement income to unrelated objectives.

> **IB 2016-1 (Obama era):** ESG factors can be consistent with the economic interests of participants and their beneficiaries in their retirement income, as suggested by the growing number of institutional investors now engaging companies on ESG issues.[3]

I. **Shareholder Activism/Engagement.** An investment policy that contemplates activities intended to monitor or influence the management of corporations in which the plan owns stock is consistent with a fiduciary's obligations under ERISA. Such activism may be especially appropriate where plan investments in corporate stock are held as long term investments or where a plan may not be able to easily dispose of such an investment.

> **IB 2008-2 (Bush era):** Shareholder activism is appropriate where the responsible fiduciary concludes there is a reasonable expectation that such monitoring or communication with management will enhance the economic value of the plan's investment in the corporation after taking into account the costs involved.

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**IB 94-2 (Clinton era) and IB 2016-1 (Obama era):** Shareholder activism is appropriate where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management *is likely* to enhance the value of the plan's investment in the corporation after taking into account the costs involved.

**J. Topics for Shareholder Activism/Engagement.** Appropriate topics include (i) independence and expertise of candidates for the corporation's board of directors, (ii) assuring that the board has sufficient information to carry out its responsibility to monitor management, (iii) appropriateness of executive compensation, (iv) corporate policy regarding mergers and acquisitions, (v) extent of debt financing and capitalization, (vi) nature of long-term business plans, (vii) corporate investment in training to develop its work force, and (viii) other workplace practices.

**IB 2016-1 (Obama era):** Adds the following potential topics for shareholder activism/engagement:

(i) Governance structures and practices, particularly those involving board compensation.

(ii) Transparency and accountability in corporate decision-making.

(iii) Responsiveness to shareholders.

(iv) Climate change preparedness and sustainability.

(v) Governance and compliance policies, and practices for avoiding criminal liability and ensuring employees comply with applicable laws and regulations.

(vi) Diversity and equal employment opportunity for the work force.

(vii) Policies and practices to address environmental or social factors that have an impact on shareholder value.

**K. DOL Enforcement.**

**IB 2008-2 (Bush era):** Contains the following warnings:

(i) Plan fiduciaries risk violating the exclusive purpose rule when they exercise their fiduciary authority in an attempt to further legislative, regulatory or public policy issues through the proxy process. In such cases the Department would expect fiduciaries to be able to demonstrate in enforcement actions their compliance with the requirements of ERISA sections 404(a)(1)(A) (exclusive purpose) and (B) (prudent man standard).[4]

(ii) Fiduciaries must be prepared to articulate a clear basis for concluding that the proxy vote, the investment policy, or the activity is *more likely than not* to enhance the economic value of the plan's investment before expending plan assets.

**IB 2016-1 (Obama era):** Concern that IB 2008-2 (Bush era) is out of step with important domestic and international trends in investment management and has the potential to dissuade ERISA fiduciaries from exercising shareholder rights.[5, 6]

In summary, Obama era guidance is consistent with Clinton era guidance and can be viewed as consistent with Bush era guidance, except as follows: (i) Obama era guidance is based on the concept that ETI and ESG factors can positively impact the economic interests of the plan and its participants, and (ii) Obama era guidance supports shareholder activism/engagement if it is "likely to enhance" shareholder value, while Bush era guidance required that such activism/engagement be "more likely than not" to enhance shareholder value.

Obama era guidance supports employee benefit plan investment fiduciaries who incorporate ETI and ESG factors

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into their investment-related activities. History tells us, however, that Obama era guidance, like predecessor guidance, remains subject to change. In any event, for investment fiduciaries, recently issued Interpretive Bulletin 2016-1 is a reminder to monitor implementation of shareholder rights and statements of investment policy.

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[1] IB 2016-1 documents legal standards imposed by Sections 402, 403 and 404 of Part 4 of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). It does not address prohibited transaction issues.

[2] See, IB 94-1 (companion to Clinton era IB 94-2), IB 2008-1 (companion to Bush era IB 2008-2), and IB 2015-1 (companion to Obama era IB 2016-1).

[3] IB 2015-1 (issued during Obama era in conjunction with IB 2016-1) states that environmental, social and governance issues may have a direct relationship to the economic value of the plan's investment.

[4] Consistent with item G, above, IB 2008-1 (issued during Bush era in conjunction with IB 2008-2) permits a fiduciary to take into account factors outside the economic interest of the plan to decide between two or more investments that are economically indistinguishable. This Interpretive Bulletin provides, however, that under these circumstances, fiduciaries will "rarely be able to demonstrate compliance with ERISA absent a written record demonstrating that a contemporaneous economic analysis showed that the investment alternatives were of equal value."

[5] IB 94-1 (issued during Clinton era in conjunction with IB 94-2) provided that "fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally."

[6] IB 2015-1 (issued during Obama era in conjunction with IB 2016-1) states that fiduciaries need not treat commercially reasonable investments as inherently suspect or in need of special scrutiny merely because they take into consideration environmental, social or other such factors, and that the DOL does not construe consideration of ETIs or ESG criteria as presumptively requiring additional documentation or evaluation beyond that required by fiduciary standards applicable to plan investment generally.

FEBRUARY 2017

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# The State of Wellness Programs

**JENNIFER A. MATTHEWS**

When the Equal Employment Opportunity Commission ("EEOC") issued its recent final wellness plan rules under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), it was attempting to clarify previous rules and interpretive guidance. And clarification was needed. Even the best-intentioned employers were sometimes unsure whether their wellness programs were compliant. Given the popularity of wellness as a component of benefit offerings, this was becoming increasingly problematic. However, in attempting to settle some of the controversy, the EEOC left certain questions open. While some of the uncertainly may dissipate as case law begins to address current rather than past wellness programs, the state of the law remains unsettled.

In particular, recent case law has revealed two potential issues regarding the new EEOC rules. First, though the EEOC specifically stated that the insurance safe harbor did not apply to wellness programs, there is disagreement between courts (currently, the Seventh Circuit Court of Appeals in *EEOC v. Flambeau Inc.* and the U.S. District Court for the Eastern District of Wisconsin in *EEOC v. Orion Energy Systems, Inc.*) regarding whether it might be possible to structure a wellness program to which the insurance safe harbor applies. Second, while the EEOC provided guidance that wellness program incentives in certain limited amounts do not undermine a program's

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voluntariness, the EEOC's authority to make such a rule is now being challenged.

## EEOC Guidance

In May, 2016, the EEOC issued final rules regarding wellness programs, in particular regarding the relationship between wellness programs, the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"). The date by which employers have to comply with the rules (the applicability date) is "the first day of the first plan year that begins on or after January 1, 2017, for the health plan used to determine the level of inducement permitted under this rule." To the extent the rules describe limits on incentives, or articulate the requirement that employers provide a notice explaining what medical information will be taken and how the medical information will be used, the rules are intended to only apply prospectively. However, the EEOC considers the remainder of the rules to be just a clarification of existing regulatory framework and, as such, has stated it will also apply them retroactively to employer plans in existence prior to January 1, 2017. Please see http://www.truckerhuss.com/2016/05/eeoc-issues-final-wellness-rules-under-the-ada-and-gina/.

The general ADA rule is that an employer may not require employees to submit to physical exams or respond to inquiries regarding a disability absent a job-related reason or business necessity. However, an employer can ask for information as to its employees' health and require medical exams as part of a voluntary health program. Voluntary health programs includes wellness programs. To be voluntary, a plan must neither require employee participation nor deny coverage for non-participation. In addition, employers may not take or threaten any adverse employment action against employees for non-participation, and must provide appropriate notice regarding the medical information that will be obtained and the purpose for which it will be use. The new EEOC guidance ties the limit on inducements to the type of wellness plan. For example, incentives of no more than 30% of the cost of self-only coverage under the group health plan in which an employee enrolls, where an employer offers the wellness program only to employees enrolled in a group health plan, will not make a wellness program involuntary. It does not matter if the inducement is structured in the form of a penalty or an incentive. The new guidance also says that the insurance safe harbor is not available for wellness programs (see 29 C.F.R. 1630.14(d)(6)). The safe harbor allows collection of medical information by "organizations sponsoring, observing or administering the terms of a bona fide benefit plan that isn't subject to State laws that regulate insurance" 42 U.S.C. 12201(c).

## Litigation Backdrop

While the EEOC was finalizing guidance on the application of the ADA and GINA to wellness programs, several lawsuits were brought regarding specific employer wellness programs.

### A. *EEOC v. Flambeau, Inc.*

Flambeau required that employees participate in its wellness program as a condition of enrollment in its medical plan. Part of Flambeau's wellness program involved completing a health risk assessment and a biometric screening. When one employee failed to complete the assessment and biometric screening on time, he was denied coverage. The company retroactively reinstated his coverage when he subsequently completed these steps. The employee complained and the EEOC brought suit.

Flambeau moved for summary judgment, both on the ground that its wellness program was covered by the ADA's insurance safe harbor for bona fide benefit plans, and also on the ground that the provisions of its wellness program were voluntary because they were not a condition of employment. The EEOC filed a cross-motion for partial summary judgment on the basis that the insurance safe harbor did not apply. In 2015, the district court granted summary judgment for Flambeau, on the basis that the insurance safe harbor could apply to some wellness programs, including the one in question. The case was appealed.

In January, 2017, the Seventh Circuit Court of Appeals held that Flambeau was properly granted summary judgment, but did so based on the mootness of the case. In the interim, Flambeau had discontinued its wellness program, though this was not due to the ongoing litigation. Instead, the decision had been taken due to an analysis

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## DOL Proposes a 60-Day Delay in Implementation of the Fiduciary Rule

Just a few hours before our webinar on March 1st, entitled *What Comes Next? — Lessons Learned & Practical Implications of the Fiduciary Rule Under Review*, the Department of Labor (DOL) released a **proposed** rule extending the April 10th applicability date of the Fiduciary Rule (the "Rule") by 60 days. (The Rule is also commonly referred to as the "Conflict of Interest Rule.")

The proposed rule follows President Trump's February 3rd Executive Memorandum, in which he directed the DOL to reconsider the Rule and determine whether its impact "may adversely affect the ability of Americans to gain access to retirement information and financial advice." If, after reconsideration, the DOL determines that such adverse impacts *may* occur, then the DOL is directed to propose rescinding or revising the Rule as it sees fit. The DOL could also propose further delaying the implementation date to provide for more time to analyze the Rule. According to the DOL, the purpose of the proposed 60-day extension is to "guard against the risk" that it will not have sufficient time to complete its analysis before April 10th, when the Rule is set to become applicable. (Note: the Rule became **effective** on June 7th of last year, however, the **applicability** date — the date of enforcement — is April 10th.) The proposed rule provides for only a 15-day public comment period on the rule itself, and only 45 days in which to provide information relevant to the analysis requested in the President's February 3rd memorandum.

We were able to review and analyze the proposed rule in time to incorporate it into our presentation. If you would like to view the presentation, please access our webinar recording at http://www.truckerhuss.com/events/.

We will continue to monitor the status of the Rule and advise you of any significant developments.

that led the company to believe the wellness program was not cost effective. In addition, the employee in question had left the company, and the Court found that he would not be entitled to recover damages. The Court of Appeals therefore declined to address the merits of the case. The Court did, however, note the fact that the EEOC regulations had been issued after the events in the case took place. The Court also left open the possibility that the case might succeed on the theory that the safe harbor exception would apply, stating that "the EEOC's theory of discrimination assumes that the ADA's insurance safe harbor does not cover at least some wellness plans. Whether that is true, and for what kinds of wellness plans it might be true, were open questions at relevant times in 2012 and 2013. They remain open even today."

### B. *EEOC v. Orion Energy Systems, Inc.*

Orion created a wellness program that, among other things, asked employees to complete a health risk assessment. The health risk assessment included a biometric screening. Those who chose not to complete the health risk assessment could still enroll in the employer-

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sponsored health insurance plan, but had to pay the entire monthly premium amount. Employees who did complete the health risk assessment still had to pay deductibles, co-pays, and certain out-of-pocket expenses for their medical coverage. Once Orion received the data (in anonymous, aggregated form), it used it to identify common health issues and provide employees with education or assistance in making health improvements. The company's stated reason for the program was to improve overall productivity and lower the company's health care costs. In this case, the employee in question decided not to participate in the health risk assessment and stated that she understood that she would be responsible for the entire monthly premium. Her employment was subsequently terminated, and she contacted the EEOC.

The EEOC brought suit against Orion, alleging violations of the ADA on the basis of an improper wellness program as well as a violation of anti-retaliation provisions. Orion made a motion for summary judgment on the grounds that its wellness program fell into the insurance safe harbor, and also on the grounds that it was a voluntary program. The EEOC made a cross-motion for summary judgment, saying that Orion's program violated the ADA as a matter of law, arguing that it was involuntary and also that the safe harbor rule should not apply.

In September 2016, the District Court for the Eastern District of Wisconsin agreed with the EEOC that the safe harbor rule, as a clarification of existing law, could be applied retroactively. It explicitly declined to follow the holding in *Flambeau*, found that the EEOC had the authority to interpret the ADA to exclude wellness programs from the insurance safe harbor, and held that this interpretation was reasonable. Finally, because Orion's program was not used to underwrite, classify, or administer risk, and the company did not use the information that it obtained to assess the appropriateness of the level of its insurance premiums or to determine what coverage would be offered under its health plan, the court ruled that the safe harbor provision would not apply to Orion's wellness program. However, the court did grant summary judgment for Orion on the basis that its program was voluntary. In doing so the court found that the new standard would not apply retroactively, and so did not analyze the level of incentives in the company wellness program.

### C. *AARP v. EEOC*

In October 2016, the American Association of Retired Persons ("AARP") brought suit against the EEOC, alleging that the new rules represented a significant and impermissible departure from the old standard. The basis was that the new rules went too far in curtailing existing medical privacy rights, particularly for older workers. Specifically, the AARP's case alleged that wellness programs that require the provision of health information can only really be voluntary if employers can neither require participation nor penalize employees who opt not to disclose their private information. It argues that the EEOC rule regarding incentives is too permissive, that incentives that fall within the limits may still represent double or triple an individual's existing health costs. Thus, when applied in the real world, an incentive of this sort may undercut Congressional intent to protect worker privacy and, hence, to limit employment discrimination.

In December 2016, the AARP attempted to have the District Court in the District of Columbia issue a preliminary injunction to stop the implementation of the EEOC rules that was planned for January 1, 2017. The preliminary injunction was denied and the EEOC's rules are now in effect; however, the case is still ongoing.

### D. H.R. 1313

On March 2, 2017, Congresswoman Virginia Foxx introduced a bill to clarify rules relating to nondiscriminatory wellness programs. The language in the bill states that the insurance safe harbor will apply to workplace wellness programs and leaves in place the current incentive caps.

## Takeaways

The limits of the EEOC guidance continue to be tested. Whether the insurance safe harbor can still exist for wellness programs (for example, those that are explicitly structured to underwrite company risks and otherwise meet the language of the statute) remains to be seen. Presuming the AARP case continues, the appropriateness of the EEOC's rule on incentives will be formally reviewed. Or, Congress may intervene and help resolve some of the controversy. Employers should continue to monitor these developments and consider how the objectives and operation of their respective wellness programs may be seen in the light of the developing law.

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## FIRM NEWS

On February 24, **Robert Gower** was selected as an "Outstanding Volunteer" for his work in 2016 for the Justice & Diversity Center of the Bar Association of San Francisco. JDC's volunteers assist low-income clients and non-profits through legal representation and related social services.

On April 5, **Marc Fosse** will be a panelist for a webinar entitled *Mastering New IRC 457(f) Plan Guidance for ERISA Counsel: Structuring Deferred Comp Plans for Nonprofit Entities,* sponsored by Strafford Publications.

10 – 11:30 am PDT
1 – 2:30 pm EDT

On May 3, **Marc Fosse** will be co-presenting a live web-cast sponsored by the Knowlege Group entitled *The New Section 409A and 457(f) Deferred Compensation Rules Demystified.* Marc will present an overview of the Rules and will discuss modifications in existing guidance and their practical implications, reporting requirements and best compliance practices.

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