

April 25, 2018

U.S. Department of Labor Issues Caution Regarding Recent ESG Focus of Certain Institutional Investors

On April 23, 2018, the U.S. Department of Labor (DOL) released a Field Assistance Bulletin stating that ERISA fiduciaries must always put first the economic interests of the plan and, accordingly, ERISA fiduciaries:

1. must avoid too readily treating environmental, social and corporate governance (ESG) issues as being economically relevant to any particular investment choice; and
2. may not incur significant plan expenses to (i) pay for the costs of shareholder resolutions or special shareholder meetings, or (ii) initiate or actively sponsor proxy fights on environmental or social issues.

The Field Bulletin clarifies a 2015 DOL interpretation issued under the Obama administration that suggested that ERISA fiduciaries may consider ESG factors in making investment decisions without violating their fiduciary duties when the ESG factors have a direct relationship to the economic and financial value of an investment.

The Field Bulletin can be viewed as a reaction to the growing prominence of ESG issues (which include matters like climate change, political contributions, workplace diversity and the Opioid Accountability Project) in the 2018 proxy season and the increased focus on ESG issues in the voting policies of institutional investors and proxy advisory firms like Institutional Shareholder Services and Glass Lewis. The Field Bulletin's focus on the economic relevance of ESG proposals appears to be in conceptual alignment with Staff Legal Bulletin 14I (SLB 14I) issued by the Securities and Exchange Commission (SEC) in November 2017. SLB 14I indicates that the SEC will focus on a shareholder proposal's significance to the company's business in considering whether the proposal can be excluded from the issuer's proxy statement under Rule 14a-8(i)(5). The SEC stated that, under this framework, shareholder proposals that raise issues of social or ethical significance may be excluded, notwithstanding their

SULLIVAN & CROMWELL LLP

general or abstract importance, based on the application of quantitative analytics of the proposal's economic relevance to the issuer's business.

* * *

Copyright © Sullivan & Cromwell LLP 2018

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Whitney A. Chatterjee	+1-212-558-4883	chatterjee@sullcrom.com
Catherine M. Clarkin	+1-212-558-4175	clarkinc@sullcrom.com
H. Rodgin Cohen	+1-212-558-3534	cohenhr@sullcrom.com
Heather L. Coleman	+1-212-558-4600	colemanh@sullcrom.com
Robert W. Reeder III	+1-212-558-3755	reederr@sullcrom.com
Melissa Sawyer	+1-212-558-4243	sawyer@sullcrom.com
Marc Trevino	+1-212-558-4239	trevinom@sullcrom.com

Los Angeles

Alison S. Ressler	+1-310-712-6630	resslera@sullcrom.com
-------------------	-----------------	--

Palo Alto

Sarah P. Payne	+1-650-461-5669	paynesa@sullcrom.com
----------------	-----------------	--
