

Proxy Advisors Are Maybe (i.e., Probably) Plan Fiduciaries According to the Department of Labor

In April 2026, the Department of Labor (“DOL”) issued [Technical Release 2026-01](#), and an accompanying [New Release](#), declaring proxy advisors who render their services pursuant to a mutual understanding on an ongoing basis for a fee will ordinarily be considered a plan fiduciary. This, of course, depends on the facts and circumstances of each case, but the bottom line is—if an advisor meets the functional fiduciary test, they are a plan fiduciary under current law. This article will examine why the DOL published the Technical Release 2026-01, who is considered an ERISA fiduciary, why the DOL believes proxy advisors are fiduciaries, and what this means for plan sponsors.

How did we get here?

On December 11, 2025, the President issued [Executive Order 14366 – Protecting American Investors From Foreign-Owned and Politically Motivated Proxy Advisors](#) (“EO 14366”). EO 14366 focused on two foreign-owned proxy advisors—Institutional Shareholder Services Inc. and Glass, Lewis & Co., LLC. These and other proxy advisory firms, according to EO 14366, “wield enormous influence over corporate governance matters . . . and the value of Americans’ investments more generally, including 401(k)s, IRAs, and other retirement investment vehicles.” (90 Fed. Reg. 58503 (Dec. 16, 2025)). Specifically, EO 14366 points to proxy advisors’ use of their influence to “prioritize radical politically-motivated agendas—like ‘diversity, equity, and inclusion’ and ‘environmental, social, and governance’—even though investor returns should be the only priority.” (*Id.*). The President directed Secretary of Labor revise **all** regulations and guidance relating the fiduciary status of individuals—like proxy advisors—who manage rights appurtenant to shares held by ERISA plans consistent with EO 14366’s policy. (90 Fed. Reg. 58504 (Dec. 16, 2025)).

When is a person considered a fiduciary?

This new guidance nicely dovetails with the DOL’s March 2026 [restoration](#) of the investment advice rule and the 1975 five-part investment advice fiduciary test. A person is a plan fiduciary to the extent they:

- (i) **exercise any discretionary authority or control** over the management of the plan or its assets and their disposition; or
- (ii) render **investment advice for a fee or compensation** with respect to the plan’s property or money, or has any authority or responsibility to do so. (ERISA Section 3(21)(A)(i) and (ii)).

A person will be considered an “investment advice fiduciary” under (ii) if, under the facts and circumstances, they meet the following requirements:

- (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property;
 - (2) on a regular basis;
 - (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that;
 - (4) the advice will serve as a primary basis for investment decisions with respect to plan assets; and
 - (5) the advice will be individualized based on the particular needs of the plan.
- (Technical Release 2026-01).

Why are proxy firms maybe (i.e., probably) fiduciaries?

If a proxy advisory firm meets the standards outlined above they are considered plan fiduciaries because shareholder rights—including voting proxies of shares held by ERISA plans—are plan assets. (Technical Release 2026-01; DOL Letter to Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc., 1988 WL 897696 (Feb. 23, 1988). Further, Technical Release 2026-01 “reminds and cautions plans and proxy advisory firms that to the extent a proxy advisory firm exercises any authority or control over the exercise of shareholder rights attributable to shares owned by an ERISA-covered plan, the proxy advisory firm will be a functional fiduciary under ERISA section 3(21)(A)(i).”

The DOL was careful to point out that a plan’s contract with a proxy advisor can be a relevant factor in assessing the agreement between the parties and whether the advice provided will primarily determine the plan’s investment decisions. Additionally, the DOL cautioned plans and plan proxy advisors that written disclaimers regarding fiduciary status in their agreements could be set aside if warranted by the facts and circumstances.

What does this mean for plan sponsors?

In sum, plan sponsors need to take inventory of their proxy advisors and carefully examine their relationships with each of these advisors. This is also a good time for plan sponsors to review their proxy voting policy—or adopt one. Plan sponsors need to determine if, based on ERISA’s definition of “fiduciary,” these advisors are also plan fiduciaries. Depending on the results of these inquiries, plan sponsors may need to revisit their [contractual agreements](#).

If you have any questions regarding Technical Release 2026-01, proxy voting, or what it means to be an ERISA fiduciary, please contact Boutwell Fay LLP.