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Acting Assistant Secretary
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

*Submitted via regulations.gov*

**Re: Fiduciary Duties Regarding Proxy Voting and Shareholder Rights Proposed Regulation (RIN 1210-AB91)**

Dear Acting Assistant Secretary Wilson:

On behalf of the American Federation of State, County and Municipal Employees ("AFSCME"), I am writing in strong opposition to the U.S. Department of Labor's ("DOL") proposed rulemaking entitled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights Proposed Regulation" (RIN 1210-AB91) (the "Proposed Rule").

AFSCME's 1.4 million members provide the vital services that make America happen. With members in communities across the nation, serving in hundreds of different occupations — from nurses to corrections officers, child care providers to sanitation workers — AFSCME advocates for fairness in the workplace, excellence in public services and freedom and opportunity for all working families. AFSCME members in the private sector participate in both single and multiemployer retirement plans that will be negatively affected by the Proposed Rule if it is adopted. Further, while not directly covered by the Employee Retirement Income Security Act ("ERISA"), many of the more than 150 public pension funds in which AFSCME members participate look to ERISA for guidance on fiduciary standards.

**DOL Should Withdraw Current Proposed Rule**

The Proposed Rule was published in the Federal Register on September 4, 2020, and only permits a brief 30-day comment period. More than 30 days are needed for analysis of a rule that will create unnecessary and burdensome regulation that will disenfranchise pension and employee benefit plans from voting proxies in the interests of plan participants and beneficiaries. For over three decades, fiduciaries for

ERISA plans have been voting proxies subject to the duties of prudence and loyalty consistent with DOL's long-standing interpretive guidance.

We urge DOL to withdraw the Proposed Rule and allow the current guidance to remain in place. Alternatively, DOL should withdraw the Proposed Rule and issue a new proposed rule only after it has addressed the deficiencies described herein. DOL should then provide sufficient time for public comment, including through a public hearing and a post-hearing comment period. Overturning decades of established policy should not be rushed through with a 30-day comment period during an ongoing pandemic and economic crisis at the end of a Presidential term.[1]

**DOL's Rationale for the Proposed Rule Lacks Merit**

DOL has failed to provide a persuasive rationale for its Proposed Rule. DOL has given proxy voting guidance to ERISA plans for over 30 years with the consistent view that proxy voting is a fiduciary obligation. In 1988, DOL's "Avon letter" first recognized that proxy votes are assets and therefore must be managed according to the fiduciary duties of prudence and loyalty. This guidance was formalized in Interpretive Bulletin 1994-2, revised with the addition of cautionary language in Interpretive Bulletin 2008-2, and updated again in 2016 with Interpretive Bulletin 2016-01, where DOL reinstated its original 1994 guidance.

DOL does not provide a persuasive justification for replacing its longstanding guidance with a new burdensome regulation. The Proposed Rule is premised on fundamentally flawed assumptions about proxy voting and fiduciaries' understanding of their duties. DOL states one of its primary justifications for the Proposed Rule is a concern that there may be "a persistent misunderstanding among some stakeholders that ERISA fiduciaries are required to vote all proxies."

DOL offers no evidence that fiduciaries are voting proxies inappropriately. Given more than 30 years have passed since the Avon Letter was issued, DOL has had plenty of time to gather evidence of any problems. The only support DOL provides for its position, however, is advocacy documents from commenters representing organizations like the Business Roundtable and the Washington Legal Foundation asserting that ERISA fiduciaries believe they must vote all proxies.[2]

DOL's view that ERISA plans are incurring increased proxy voting costs due to "the recent increase in the number of environmental and social shareholder proposals" is misleading and incorrect. The SEC found that the total number of shareholder resolutions going to a vote has

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[1] We note that DOL has used its existing statutory authority to postpone deadlines for complying with various ERISA requirements throughout the COVID-19 National Emergency. See EBSA Disaster Relief Notice 2020-01. DOL clearly has the authority under the Administrative Procedure Act to provide for a substantially longer comment period and should do so given that the COVID-19 National Emergency also affects the ability of the regulated community to respond to this notice of proposed rulemaking.

[2] Ann Lipton, "I Just Read the Department of Labor's New ERISA Voting Proposals and Boy My Fingers Are Tired (from Typing)," Business Law Prof Blog, September 4, 2020, found at https://lawprofessors.typepad.com/business_law/2020/09/i-just-read-the-department-of-labors-new-erisa-voting-proposals-and-boy-are-my-fingers-tired-from-ty.html.

fallen 33 percent in recent years.[3] Moreover, DOL itself acknowledges in the Proposed Rule that shareholder resolutions makeup only two percent of all proxy votes.

**The "Permitted Practices" Violate ERISA Fiduciary Duties**

Because proxy votes are plan assets, DOL's longstanding interpretive guidance has provided that ERISA fiduciaries should manage proxy voting subject to the fiduciary duties of loyalty and prudence. The Proposed Rule, however, would incentivize fiduciaries to adopt proxy voting practices, so-called "permitted practices," that conflict with these fiduciary duties.

DOL acknowledges the Proposed Rule would increase compliance costs for ERISA plans as the documentation costs may exceed the benefits of a vote. As a result, the Proposed Rule provides for certain "permitted practices" plans can adopt as general rules for voting and thereby avoid these documentation costs. DOL states these "permitted practices" are "intended to reduce the need for fiduciaries to consider proxy votes that are unlikely to have an economic impact on the plan, thereby allowing plans to focus resources on matters most likely to have an economic impact."

The first "permitted practice" is to adopt a policy of simply voting with management all the time with "a proxy voting policy that relies on the fiduciary duties that officers and directors owe to a corporation based on state corporate laws." DOL's rationale is that ERISA plans can assume management is acting in their best interest because management owes a fiduciary responsibility under state law, in effect outsourcing employee benefit plan fiduciaries' duties under ERISA to corporate management. However, corporate management is not acting as fiduciary to ERISA plans, and state law is less stringent than ERISA because of the business judgement rule. Always voting with corporate management may violate the duty of loyalty, and abstaining from proxy voting in some or all cases may violate the duty of prudence. There are many proxy votes where the recommendation of management will be subject to financial conflicts of interest. For example, management has a self-interest in all votes on executive compensation matters. An ERISA plan fiduciary that always votes in favor of executive compensation plans that management has recommended, even when such compensation is excessive or wasteful, would be violating the duty of loyalty.

The second "permitted practice," a policy to vote only on particular types of proposals "such as proposals relating to corporate events (mergers and acquisitions transactions, dissolutions, conversions, or consolidations), corporate repurchases of shares (buy-backs), issuances of additional securities with dilutive effects on shareholders, or contested elections for directors," fails to consider that there are proxy votes on many proposals that are material to ERISA plans. Here, DOL fails to provide any economic analysis as to why these particular types of proposal are more material to shareholders than other issues. Voting on a variety of issues not covered by the list above is clearly in the pecuniary interests of ERISA plans. There is ample research contradicting the idea that other proposals have no economic impact. For example,

[3] "The average number of proposals submitted to S&P 500 companies has decreased from 1.85 in 2004 to 1.24 in 2018, representing a 33 percent decrease during our sample period, and the average number of proposals submitted to Russell 3000 companies has decreased from 0.38 in 2004 to 0.28 in 2018, representing a 26 percent decrease during our sample period." found at: https://www.sec.gov/rules/proposed/2019/34-87458.pdf.

statutorily required advisory "Say on Pay" votes on executive compensation have been shown to lead to increases in companies' market value and improvements in long-term profitability.[4]

The third and final "permitted practice" is to adopt a policy of not voting unless the plan has a significant holding. Refraining from proxy voting is inconsistent with the duty of prudence. The prudent expert rule requires that ERISA plan fiduciaries act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters." The overwhelming majority of prudent experts have determined that proxy voting is in their clients' interests. Ignoring this reality would invite ERISA plans to abandon the standard of care that has been widely adopted by investment managers for their clients.

**The Proposed Rules Ignores Values of Proxy Voting**

The proposed rulemaking ignores the substantial benefits of proxy voting for ERISA plans. The vast majority of ERISA plans delegate proxy voting to service providers such as asset managers or a specialized proxy voting fiduciary. For responsible fiduciaries, proxy voting is an economically significant right that allows them to monitor and hold boards accountable for creating and protecting long-term value. Investment managers widely view proxy voting to be a source of value creation because it helps to promote corporate accountability.

Following the collapse of Enron and WorldCom from accounting scandals in the early 2000s, investors recognized that good corporate governance can mitigate risks to investors. Fiduciary duty is widely understood to include active ownership, including informed proxy voting on shareholder proposals affecting companies owned by ERISA plans. Investors engaging with companies on corporate governance through shareholder proposals can increase long-term value. For example, AFSCME was deeply involved in the debate over shareholder access to the company proxy statement, including prevailing at the U.S. Court of Appeals for the Second Circuit in AFSCME v. American International Group, Inc. to require companies to include a proxy access proposal in a company's proxy statement pursuant to SEC Rule 14a-8.[5] Additionally, AFSCME was the first investor to use the shareholder proposal process to push for a management-proposed shareholder advisory vote on senior executive compensation.[6]

Proxy voting enhances investment returns by holding corporate management accountable to investors and reduces the risk of corporate wrongdoing such as accounting fraud. And there is also growing, widespread recognition that environmental and social matters present material risks that can be mitigated through proxy voting. Yet, the Proposed Rule dismisses shareholder proposals on environmental, social and governance ("ESG") topics as ineffective because many such proposals call for enhanced disclosure of such risks. This ignores the ample academic evidence that such shareholder proposals increase value by improving company performance.

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[4] Vicente Cuñat et al., Say Pays! Shareholder Voice and Firm Performance, 20(5) Rev. of Fin., Eur. Fin. Ass'n 1,799 (2016), available at https://ideas.repec.org/a/oup/revfin/v20y2016i5p1799-1834..html.
[5] AFSCME Letter to SEC re Facilitating Shareholder Director Nominations (File No. S7-10-09), August 7, 2009, found at https://www.sec.gov/comments/s7-10-09/s71009-88.pdf).
[6] "26 Companies Get AFSCME Shareholder Proposals," Pensions & Investments, December 7, 2005, found at: https://www.pionline.com/article/20051207/ONLINE/512070717/26-companies-get-afscme-shareholder-proposals.

As we explained in an earlier July comment letter,[7] ESG considerations are material factors for investors to understand risks that affect financial performance. This view is consistent with two influential 2015 academic studies that analyzed thousands of research studies showing the economic materiality of ESG information. The first analyzed 2,250 individual studies of the relationship between ESG data and corporate financial performance and concluded that improvements in ESG performance generally lead to improvements in financial performance.[8] The second found that 90 percent of studies showed that sound sustainability standards lower firms' cost of capital, 80 percent showed that companies' stock price performance is positively influenced by good sustainability practices and 88 percent showed that better E, S or G practices result in better operational performance.[9]

Despite clear evidence of the importance of shareholder proxy voting, DOL concludes – without documenting a thorough review of the research – that the evidence on the effectiveness of proxy voting is "mixed." Critically, DOL's economic analysis fails to consider the impact on the value of plan investments from foregone ESG reforms and boardroom accountability as a result of suppressed shareholder voting.

**The Proposed Rule Would Silence ERISA Plans**

The Proposed Rule will require that ERISA plans conduct an expensive economic analysis before casting any proxy vote. Although cloaked in language about the "best interests" of plan participants and beneficiaries, the DOL clearly intends to deter ERISA plans from voting proxies, especially on shareholder proposals. This will result in an overly burdensome and unjustified process for the consideration of voting proxies that would, in many cases, effectively prohibit ERISA plans from exercising their shareholder rights. Under the Proposed Rule, every single proxy vote would require a fiduciary to not only analyze the importance of the vote to the economics of the investment but also conduct a second analysis to determine how the vote impacts the plan as a whole. This second layer of analysis lacks specificity for a process that would be complex and difficult to conduct and likely be based on indeterminable facts.

Under previous DOL guidance, such economic analysis was only required when "in some special cases voting proxies may involve out of the ordinary costs or unusual requirements."[10] The proposed rule changes the default expectation that ERISA plans will vote proxies (subject to

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[7] AFSCME Letter to DOL re RIN 1210-AB95, July 30, 2020 ("The Proposed Rule is based on a faulty assumption that ESG factors are unconnected to shareholder value. A recent report by the Government Accountability Office found that 'most institutional investors... seek information on environmental, social, and governance (ESG) issues to better understand risks that could affect company financial performance over time.' The world's largest asset managers like BlackRock and Vanguard recognize the importance of ESG factors in investments."), found at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00589.pdf.

[8] Deutsche Asset & Wealth Management, "ESG and Corporate Financial Performance: Mapping the Global Landscape," December, 2015, available at https://www.unepfi.org/fileadmin/events/2018/sydney/ESG-and-Corporate-Financial-Performance.pdf.

[9] See Gordon L. Clark, Andreas Feiner & Michael Viehs, "From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance" (2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508281.

[10] Interpretive Bulletin 2016-01, at https://www.dol.gov/sites/dolgov/files/legacy-files/ebsa/2016-31515.pdf.

a cost-benefit exception) into a requirement that plans must always conduct an economic analysis before voting.

The cost to ERISA plans of conducting such an economic analysis will far exceed the actual costs of voting. DOL estimates that the new rule could cost ERISA plan service providers $535 million annually. Because this economic analysis will be costly, DOL encourages ERISA plans to adopt one of the "permitted practices." In effect, DOL is telling ERISA fiduciaries they should vote all proxies in favor of management or not vote at all if they want to avoid this new poll tax on proxy voting.

**The Proposed Rule's "Analytical Model" Is Flawed**

By its own admission, DOL "currently lacks complete data on plans' exercise of their shareholder rights appurtenant to their stock holdings, including proxy voting activities, and on the attendant costs and benefits" despite the fact that over 30 years have passed since DOL issued its original interpretive guidance on proxy voting. Instead of seeking such data, DOL provides an "analytical model" to estimate the Proposed Rule's potential impact. However, the analytical model does not use the status quo — not issuing a new burdensome regulation — as its baseline. Instead, DOL's analytical model considers the additional research costs imposed by the proposed rulemaking as the baseline, noting "the Department fully expects that most of these potential costs will not be realized, because plans will use the permitted practices to avoid incurring them."

DOL's "analytical model" estimates that "permitted practices" will save ERISA plans more than $1 billion annually in avoided proxy voting costs. It is illogical to claim ERISA plans will save over $1 billion annually if they simply cease to vote proxies under the "permitted practices," when the entire proxy voting advisory industry only generates an estimated $202 million to $228 million in annual revenue. The estimated cost savings of the "permitted practices" that are projected by the "analytical model" exceed the combined estimated annual revenue of all the proxy advisory firms by approximately five times over. In other words, the new costs created by the Proposed Rule will far exceed the cost savings even if the Department succeeds in driving all the proxy advisory firms entirely out of business. It is worth noting that any "permitted practice" cost savings will be illusory, given that most ERISA plan service providers will continue to bear the costs of proxy voting for their non-ERISA clients. Moreover, always voting with corporate management still requires the overhead costs of proxy voting. Nor will a decision to refrain from proxy voting relieve plan service providers from the duty to monitor the corporate governance of portfolio companies. Last, as noted above, DOL's model fails to account for the impact on the value of plan investments from foregone ESG reforms and boardroom accountability as a result of suppressed shareholder voting.

**The Proposed Rule's Possible Unintended Consequences on Public Funds**

While the rule is not binding on public plans, many of these plans, including those in which AFSCME members participate, follow ERISA as a matter of best practice. The Proposed Rule may have the unintended consequence of driving public plans to develop their own fiduciary codes. To address this, DOL should have consulted with state officials.

The DOL notes that direct stock holdings by ERISA plans make up a smaller percentage of total shares outstanding, and that many ERISA plan assets are now held in 401(k) mutual funds to which the Proposed Rule would not apply. Yet, ERISA's influence has always extended broadly because many state and local plans look to ERISA for guidance as to best practices.

As Professor Ann Lipton has noted, the concern here is that the more restrictive ERISA becomes, states may choose to break away from relying on ERISA for guidance and establish a new framework for fiduciary duties in public funds "since...a fiduciary standard that requires only consideration of the financial interests of the plan (ignoring negative externalities caused by profitable corporate behavior) is a poor fit for public plans."[11]

**Conclusion**

If adopted, the Proposed Rule will rescind DOL's longstanding proxy voting guidance and by imposing a new, costly regulatory burden, effectively require ERISA plans to always vote with corporate management or refrain from voting altogether. Overturning decades of precedent and practice should require real evidence of changed circumstances and thorough and rigorous cost benefit analysis. Those are clearly lacking here, however, with DOL having failed to provide a reasonable justification for the Proposed Rule or to have reconciled it with the substantial body of research on proxy voting and corporate governance issues. Instead, the Proposed Rule appears to be tailor made to serve the interests of corporate managers while undermining the retirement security of AFSCME members and other working people by reducing ERISA plans' proxy voting for good corporate governance.

For all of the reasons stated above, we urge DOL to withdraw the Proposed Rule in its entirety. In the alternative, we urge DOL to revise the Proposed Rule, provide adequate economic analysis to justify it and invite additional comment. We appreciate the opportunity to share our views. If you have any questions, or need additional information, please do not hesitate to contact John Keenan at jkeenan@afscme.org.

Sincerely,

/s/ Dalia R. Thornton

Dalia R. Thornton
Director
Department of Research and Collective
Bargaining Services

[11] Lipton, "Department of Labor's New ERISA Voting Proposals."