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AMERICA'S UNIONS

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January 2, 2024

Submitted via regulations.gov
Employee Benefits Security Administration
Office of Regulations and Interpretations
Room N-5655
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Re: Definition of Fiduciary—RIN 1210-AC02

Dear Sir or Madam:

On behalf of the AFL-CIO, I am writing to express strong support for the U.S. Department of Labor's ("DOL" or "the Department") proposed rulemaking titled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" ("the Proposed Rule").[1] This long-overdue update of the current loophole-ridden definition of a fiduciary investment advice provider[2] will protect workers and retirees from investment recommendations that may be sub-par, lack liquidity, and/or come with excessive fees that chip away at the hard-earned assets they are counting on for retirement.

The AFL-CIO is a voluntary federation of 60 national and international labor unions that together represent 12.5 million working people. We have one overarching goal: a better life for working people—and that includes a financially secure retirement. Retirement income security is always a key item on the collective bargaining table, and defined benefit pension plans and defined contribution retirement plans are a big part of union-negotiated compensation packages.

Union members have a huge stake in the private (and public) sector pension and retirement savings system. Eighty-four percent of union workers employed in private industry participate in workplace retirement plans, compared to just 50% of non-union workers.[3] While the vast majority of private-sector union members are fortunate to be covered by defined benefit pension plans (i.e. 66% compared to just 10% of non-union workers[4]), their financial vulnerability in retirement, too, is increasing, as many employers are backing away from offering pensions in favor of 401(k) plans.[5] And even where private sector union members have a collectively bargained defined benefit pension plan, they typically negotiate a supplemental defined contribution plan: More than half of all union members participate in defined contribution plans.[6] Further, union workers and retirees

from both the private and public sectors have retirement money invested through Individual Retirement Accounts ("IRAs"). Many of them, like their non-union counterparts, transfer assets from workplace retirement plans, both defined benefit[7] and defined contribution plans, to an IRA when they leave a job or retire.

Thousands of union members also serve as trustees jointly responsible with management-appointed trustees for administering retirement and employee benefit plans. Multiemployer defined benefit pension plan assets total some $618 billion,[8] and multiemployer defined contribution and other employee benefit plans have billions more in assets under management. These trustees, who are the multiemployer plan sponsors, count on financial professionals for best interest fiduciary investment advice.[9]

The Proposed Rule appropriately applies to all investment recommendations concerning the investment of retirement assets including proxy voting decisions. It is consistent with the Department's view, since the Reagan Administration, that ERISA's fiduciary duties of loyalty and prudence apply to proxy voting by pension and employee benefit plans.[10] This view is most recently reflected in the Department's proxy voting rule, strongly supported by the AFL-CIO, titled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights."[11] This proxy voting rule ensures that proxy votes are cast in the interests of plan participants and beneficiaries, and the Proposed Rule appropriately extends this fiduciary duty to proxy voting advice given to retirement investors.

The Department Makes a Compelling Case for Updating the Current Rule

Evolution of the Retirement Income Landscape

There is no disagreement among stakeholders about the dramatic changes that have occurred in how working families build and receive retirement income since ERISA was enacted, with the daunting, and sometimes overwhelming, responsibility for retirement investing increasingly falling on individuals, rather than employers. As the Department notes, when it promulgated the current definition of an investment advice fiduciary in 1975, IRAs only recently had been created, and 401(k) plans did not exist. Private retirement savings were mainly held in large employer sponsored defined benefit pension plans, so plan participants did not need to make investment decisions.[12] Today, in dramatic contrast, 78% of retirement plan participants are covered by defined contribution plans, and as of 2020, 94% of defined contribution plan active participants bear responsibility for directing the investment of some, if not all, of their account balances. Further, IRA assets now reach nearly $14 trillion[13] with most of the money coming from rollovers from employer-sponsored plans; by 2027, an additional $4.5 trillion in rollovers from defined contribution accounts is projected.[14] The enormous growth in IRAs has been accompanied by the growth of complicated and hard-to-unpack products in the financial marketplace, e.g. certain annuities, about which retirement savers may have little understanding. It is no wonder plan participants and retirees, who typically have limited investment experience, seek professional assistance for investment recommendations.

Current Regulatory Loopholes

The 1975 regulation narrows ERISA's broad definition of who is an investment advice fiduciary to the financial detriment of workers trying to maximize their retirement income.

The statute provides generally that "a person is a fiduciary with respect to a plan to the extent…(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so…."[15] Indeed, the Department reminds us, "As many Courts have noted, ERISA's obligations are the 'highest known to the law.'"[16] Thwarting the clear objective of the statute, the 1975 regulation requires that only a person (or firm) providing advice on a "regular basis" to a particular client is subject to a fiduciary standard. As a result, one-time recommendations, no matter how consequential, are excluded. But the rise of 401(k) accounts as the dominant retirement plan available to private sector workers means that today, unlike in 1975, most working Americans, when they sever employment, will be faced with the decision of whether to take a lump sum distribution from their account and roll it over into an IRA, or to keep their retirement money where it is. Investment advice for this decision, because it is one time, need not meet a fiduciary standard and, thus, the retirement saver will not necessarily receive all the key information that will allow them to make a decision that is in their best interest. Where defined benefit pension plan participants (most of whom are union members) have a lump sum distribution option when they separate from employment or retire, it often involves large dollar amounts. Investment advice for this decision, because it is one time, need not meet a best interest standard even though the irrevocable decision about benefit form–whether to take a lump sum or whether to take a full annuity or a qualified joint and survivor annuity–is enormously consequential, possibly affecting eligibility for other benefits, such as retiree healthcare benefits.

By eliminating the "regular basis" requirement for a professional financial advisor's obligation to provide fiduciary "best interest" advice, the Proposed Rule protects a retirement saver in all of the above scenarios. It protects against advice that workers or retirees take their lifetime of hard-earned savings and sink it into a high-cost, low-quality investment marked by excessive risk and substandard returns.

Union members who work for non-federal government employers,[17] primarily state and local governments, who need one-time advice with respect to the investment of IRA assets also could benefit from the Proposed Rule. Although their retirement plans are not covered by ERISA,[18] many are eligible to roll over their defined benefit pension[19] or defined contribution account assets into an IRA when they leave a job or retire, and they are likely to seek professional advice if they take the rollover option. Thus, the Proposed Rule provides all IRA holders with assurance that any professional investment advice they receive about how to invest their IRA is conflict free.

Another loophole in the current regulatory definition of "fiduciary investment advice" enables an investment professional or firm that does advise a client on a regular basis to nonetheless evade its fiduciary obligations by claiming it never intended for its investment recommendations to serve as "a primary basis" for the retirement saver's investment decision. Financial advisers often justify this claim by giving clients dense and lengthy disclaimers that contradict how they hold themselves out to those clients. As a result, financial firms and investment professionals currently are retirement investment advice fiduciaries only when they choose to be—even if they market themselves as trusted advisers and offer services retirement savers reasonably will rely on as fiduciary advice. By proposing to eliminate this component of the definition, the Department aligns the Regulation with the common sense expectations of retirement investors.

The Proposed Rule properly ensures anyone making a retirement investment recommendation in one of the following cases is a fiduciary: The person has discretionary authority over the retirement saver's investments; the person represents they are a fiduciary; or the person makes investment recommendations on a regular basis as part of their business and a recommendation is provided based on a retirement saver's particular needs.

Cost of Conflicted Retirement Investment Advice

There is no doubt that our nation is facing a retirement income crisis: 47 million households with older residents are financially struggling or are at risk of economic insecurity as they age.[20] Eliminating the costs of conflicted retirement investment advice is consistent with ameliorating that crisis. Indeed, the costs of conflicted advice are far from *de minimis*. According to the White House Council of Economic Advisors' 2015 research, retirement savers receiving conflicted advice sacrifice one percentage point in returns each year; the aggregate annual cost of conflicted advice is $17 billion.[21] American workers and retirees literally cannot afford the financial toll of these conflicts.

Because most workers and retirees have not acquired the expertise required for retirement investing, many turn to financial professionals for investment advice. Many of these professionals hold themselves out as unbiased advice providers, concerned only with the retirement investor's best interest. All too often, because of the current regulatory loopholes—and unbeknownst to the worker or retiree—their "trusted" financial professional's compensation is based on a business model rife with conflicts of interest. The result is hard earned dollars accumulated through a lifetime of hard work are siphoned out of retirement accounts and into the pockets of financial and insurance companies and investment professionals.

Other Regulators Have Not Fully Addressed the Conflicted Advice Problem

The DOL acknowledges that other regulators have acted to protect investors from advice providers' financial conflicts of interest and then carefully and correctly analyzes the regulatory gaps that its proposal fills.

The Inadequacy of SEC Regulation

While the Securities and Exchange Commission ("SEC") in 2019 finalized Regulation Best Interest ("Reg. BI")[22] to enhance the standard of conduct for broker-dealers, this standard does not apply to all investment professionals, all products, or all accounts. Specifically, Reg BI is limited to recommendations to retail customers about *securities*. If an investment professional provides recommendations about non-securities, such as some insurance products, real estate, futures or options, precious metals, or crypto-currency offerings, Reg. BI simply does not apply. Similarly, because retirement plans do not meet Reg. BI's definition of "retail customer," Reg. BI does not cover an investment professional's recommendations made to plan fiduciaries regarding the investment of plan assets.

The Inadequacy of the NAIC Model Rule

Attempts to shore up the standards applicable to annuity recommendations have proved ineffective. The National Association of Insurance Commissioners ("NAIC") 2020 update to

its Annuity Transactions Model Regulation[23] provides a meaningless standard. Unlike Reg. BI, which imposes an explicit best interest obligation on broker-dealers, the NAIC Model Rule ("Model Rule") states that an insurance producer has met their best interest obligation if they merely "*have a reasonable basis to believe the* recommended option *effectively addresses* the consumer's financial situation, insurance needs, and financial objectives (emphasis added)." This is a lower standard than the one Reg. BI places on broker-dealers. Moreover, unlike Reg. BI, which defines "material conflict of interest" broadly to include all forms of compensation and requires firms to mitigate conflicts of interest that create incentives for investment professionals to place their or their firm's interest ahead of the retail customer's interest, the Model Rule excludes both cash and non-cash compensation from its definition of "material conflict of interest." As a result, it does not require investment professionals to mitigate their compensation-related conflicts when recommending annuities.

This fractured regulatory environment has created uneven protections for investors and loopholes particularly in the regulation of annuities. Annuities that are regulated as securities are subject to Reg. BI while annuities that are not regulated as securities are subject to the weaker Model Rule. The Proposed Rule would close these loopholes and put an end to any confusion.

The AFL-CIO Supports the Proposed Rule in Full

Our nation's workers, retirees, and employee benefit plan trustees who rely on professional investment advice deserve no less than the protection contained in the Proposed Rule. These protections are consistent with ERISA's statutory mandate; without them, we would not recommend that our members ever seek professional retirement investment advice without written assurance that the professional is acting as a fiduciary. We support the Proposed Rule in full.

Thank you for your consideration of our views.

Sincerely,

William Samuel, Director
Government Affairs Department

Endnotes

[1] The proposal was published in the Federal Register on November 3, 2023 (88 Fed. Reg. 75890) and is available at Federal Register: Retirement Security Rule: Definition of an Investment Advice Fiduciary.

[2] 29 CFR §2510.3-21(c)(1).

[3] Employee Benefits in the United States, News Release, U.S. Bureau of Labor Statistics, U.S. Department of Labor, March 2023, *available at* https://www.bls.gov/news.release/pdf/ebs2.pdf.

[4] "Employee Benefits in The United States – March 2023," U.S. Bureau of Labor Statistics, September 21, 2023, *available at* https://www.bls.gov/news.release/ebs2.nr0.htm.

[5] Among the reasons for this change are the real and perceived volatility of employers' contribution obligations and complex, counterproductive legal and accounting requirements. Congress and the regulatory agencies should consider actions to reverse this trend.

[6] Employee Benefits in the United States, March 2023.

[7] According to the Department, about 36% of private sector defined benefit plan participants have this option. One third of state and local government workers participating in a traditional defined benefit pension plan have this option, as well. U.S. Bureau of Labor Statistics, National Compensation Survey: Retirement Plan Provisions in State and Local Government in the United States, 2016, Bulletin 2786 (April 2017), t.7, *available at* https://www.bls.gov/cbs/publications/pdf/bulletin-2786-april-201-retirement-plan-provisions-in-state-and-local-government-in-the-united-states-2016.pdf

[8] Multiemployer defined benefit plans hold $618 billion in assets. *See* Tim Connor, Rex Barker, Timothy J. Herman, and Nina Lantz, *Multiemployer Pension Funding Study: Midyear 2023, Milliman Pension Funding Study* (15 August 2023), *available at* https://www.milliman.com/en/insight/multiemployer-pension-funding-study-2023-midyear.

[9] Rightly unchanged by the Proposed Rule is that a plan sponsor's selection of such a professional is, itself, a fiduciary act.

[10] Letter from the Department of Labor to Mr. Helmuth Fandl, Chairman of the Retirement Board of Avon Products, Inc., February 23, 1988, 198 WL 897696 ("In general, the fiduciary act of managing plan assets which are shares of corporate stock would include the voting of proxies appurtenant to those shares of stock.")

[11] 87 Federal Register 73866 (December 1, 2022).

[12] In 1975, private sector defined benefit pensions, with assets of almost $186 billion, covered over 27 million active participants. In contrast, defined contribution plans—mostly not participant-directed, but professionally managed—had just $74 billion in assets and covered just 11 million participants. *See* U.S. Department of Labor, Private Pension Plan Bulletin Historical Tables and Graphs (Dec. 2010), *available at* http://www.dol.gov/ebsa/pdf/historicaltables.pdf.

[13] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent* (2023), *available at* https://www.cerulli.com/reports/us-retirement-markers-2022.

[14] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent* (2023).

[15] 29 U.S.C. §1002(21)(A).

[16] 88 Federal Register 75900, citing *Donovan v. Bierwirth*, 680 F.2d 263, 272, n. 8 (2d Cir.1982), *cert denied*, 459 U.S. 1069 (1982).

[17] The AFL-CIO unions that represent these workers include the American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers (AFT), Communications Workers of America (CWA), Laborers International Union of North America (LiUNA), Amalgamated Transit Union (ATU), Transport Workers Union of America (TWU), International Association of Firefighters (IAFF), and the American Federation of School Administrators (AFSA), among others.

[18] Eighty-one percent of state and local employees participate in a workplace retirement plan. U.S. Bureau of Labor Statistics, National Compensation Survey, t. 1, *available at www.bls.gov/news.release/pdf/ebs2.pdf.*

[19] One-third of state and local government workers participating in a defined benefit plan have a lump sum option at retirement. U.S. Bureau of Labor Statistics, National Compensation Survey: Retirement Plan Provisions in State and Local Government in the United States, 2016, Bulletin 2786 (April 2017) t. 7, *available at* https://www.bls.gov/ebs/publications/pdf/bulletin-2786-april-2017-retirement-plan-provisions-in-state-and-local-government-in-the-united-states-2016.pdf.

[20] National Council on Aging, "Addressing the Nation's Retirement Crisis: The 80%." April 10 2023 (analyzing 2018 data), *available at* https://www.ncoa.org/article/addressing-the-nations-retirement-crisis-the-80-percent-financially-struggling.

[21] "The Effects of Conflicted Investment Advice on Retirement Savings," White House Council of Economic Advisors (February 23, 2015), *available at* https://obamawhitehouse.archives.gov/blog/2015/02/23/effects-conflicted-investment-advice-retirement-savings.

[22] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019).

[23] *Available at* www.naic.org/store/free/MDL-275.pdf.