December 13, 2021

Ali Khawar
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

RE: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights (RIN 1210-AC03)

Dear Acting Assistant Secretary Khawar:

On behalf of the American Federation of State, County and Municipal Employees ("AFSCME"), I am writing to provide comments on the U.S. Department of Labor's ("DOL") proposed rulemaking entitled "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights" (RIN 1210-AC03) (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, childcare 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. 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.

We strongly support the Proposed Rule, which replaces and corrects problems with the two previous, hastily adopted 2020 rules addressing these matters: "Financial Factors in Selecting Plan Investments" ("Financial Factors Rule") and "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights" ("Proxy Voting Rule"). AFSCME commented on both rulemakings, noting that the

Financial Factors Rule created legal uncertainty for fiduciaries considering ESG factors despite the growing investor consensus on their materiality, and the Proxy Voting Rule created unnecessary and burdensome requirements that would disenfranchise plans from voting proxies in the interests of plan participants and beneficiaries.[1] The Proposed Rule clarifies the position that prudent fiduciaries can incorporate environmental, social and governance ("ESG") factors when measuring investment risks, and removes uncertainty and costly and burdensome record-keeping from the exercise of shareholder rights, including proxy voting.

Financial Factors Rule

The Proposed Rule correctly restores fiduciary authority to consider all relevant, financially material factors when making investment decisions. We agree the Financial Factors Rule "has created a perception that fiduciaries are at risk if they include any ESG factors in the financial evaluation of plan investments, and that they may need to have special justifications for even ordinary exercises of shareholder rights."[2] The Financial Factors Rule was a hastily conceived departure from long-established DOL precedent acknowledging the materiality of ESG in fiduciaries' investment decision-making and portfolio construction. That rule created confusion and uncertainty, including the specter of liability, for fiduciaries incorporating ESG factors into investment decisions.

DOL's analysis noted "climate change and other ESG factors are often material and that in many instances fiduciaries should consider climate change and other ESG factors in the assessment of investment risks and returns."[3] Growing investor consensus and numerous studies reinforce this reality. For example, the world's largest asset managers like BlackRock and Vanguard recognize the importance of ESG factors in investments.[4] A collection of empirical research from the Council of Institutional Investors finds ESG connected to improved firm performance and risk mitigation.[5] The latest EY investor survey finds 90% of investors attached greater importance to corporations' ESG performance for investment strategy and decision-making since the COVID-19 pandemic.[6]

---

[1] AFSCME Comment Letter to DOL, July 30, 2020, available at: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00589.pdf; AFSCME Comment Letter to DOL, Oct. 5, 2020, available at: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB91/00243.pdf.

[2] "Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, RIN 1210–AC03, 86 Fed. Reg. 57,275 – 57,276 (Department of Labor, Oct. 13, 2021), available at: https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021- 22263.pdf.

[3] 86 Fed. Reg. at 57,276.

[4] BlackRock, Inc., "Blackrock ESG Integration Statement," May 19, 2021, available at: https://www.blackrock.com/corporate/literature/publication/blk-esg-investment-statement-web.pdf. The Vanguard Group, "Vanguard's Approach to ESG," 2021, available at: https://institutional.vanguard.com/iam/pdf/VGESG_052021_Final.pdf ("We believe that material environmental, social, and governance (ESG) risks can impact long-term value creation in portfolio companies.").

[5] "Empirical Research on ESG Factors and Engaged Ownership," Council of Institutional Investors, August, 2021, available at: https://www.cii.org/files/publications/July%202021%20update%20bibliography%20final%20(3).pdf.

[6] "Is your ESG data unlocking long-term value?" EY, Nov. 3, 2021, available at: https://www.ey.com/en_ca/assurance/is-your-esg-data-unlocking-long-term-value.

The Proposed Rule establishes that a fiduciary's investment duties "may often require an evaluation of the economic effects of climate change and other environmental, social, or governance factors on the particular investment or investment course of action." This reestablishes that a prudent fiduciary may evaluate ESG factors in making investment decisions. We support DOL dropping the "pecuniary" and "non-pecuniary" portions of the Financial Factors Rule and agree that their addition had a chilling effect upon fiduciaries integrating ESG factors into investment decisions.

We support the Proposed Rule's new paragraph noting a prudent fiduciary "may consider any factor in the evaluation of an investment or investment course of action that, depending on the facts and circumstances, is material to the risk-return analysis." This reinforces the principle that fiduciaries are in the best position to determine which factors are relevant for their investment decision-making process, subject to the fiduciary duties of care, prudence and loyalty. The new paragraph also provides three examples of the types of factors a fiduciary may consider: climate change-related factors, governance factors and workforce practices. DOL notes that this list of examples is not exclusive. As to whether more or fewer examples would be helpful, we believe DOL has struck the right balance with these three non-exclusive examples. DOL appropriately takes a broad view of which factors might have materiality and provides that additional ESG factors not specifically named in the proposed rule may be considered material as well.

Tie-Breaker Standard

We support the proposed amendment to the "tie-breaker" or "all things being equal" test. Until it promulgated the Financial Factors Rule, DOL had long recognized fiduciaries could make economically targeted investments ("ETIs") so long as the investments did not sacrifice investment returns or incur greater risk.[7] Returning to this longstanding standard will permit fiduciaries to consider collateral benefits when choosing between competing investment choices that would "equally serve the financial interest of the plan." As we noted in our Financial Factors Rule comment, pension plans have long relied on DOL's interpretive guidance on ETIs to make job-creating investments and to provide other collateral benefits for communities, such as by supporting infrastructure projects, economic development, small businesses and affordable housing. The Proposed Rule would allow fiduciaries to invest responsibly under strict conditions — as they have for decades — while removing burdensome documentation requirements from the Financial Factors Rule.

We believe the approach taken for the tie-breaker test is sufficiently clear and appropriate for fiduciaries to understand their duties. We do not believe the Proposed Rule should place

[7] 86 Fed. Reg. at 57,273 ("The Department stated in the preamble to IB 94–1 that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as the deciding factor for an investment decision."); Ian Lanoff, "The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully Under ERISA?" Labor Law Journal, Vol. 31, Iss. 7 (July 1, 1980), p. 387.

parameters on collateral benefits to be considered. Any collateral benefits considered will be subject to a fiduciary's duty of prudence and loyalty. Further, we support the Proposed Rule's rescission of the Financial Factors Rule's requirement for a fiduciary to document its analysis. The Proposed Rule generally tracks and restores DOL's original interpretive guidance, which stated in the preamble that when competing investments serve the plan's economic interests equally well, plan fiduciaries can use such collateral considerations as the deciding factor for an investment decision.[8] We agree the "ERISA general prudence obligation is sufficiently protective in this context and, unlike the heightened documentation requirements in the current regulation, does not tip the scale against the particular investment that offers collateral benefits."

Qualified Default Investment Alternatives (QDIAs)

We are pleased to see the Proposed Rule drops the Financial Factors Rule's prohibition on the selection of QDIAs if the QDIA included, considered or indicated the use of one or more non-pecuniary factors. The Financial Factors Rule, in effect, substituted an outright ban for a fiduciary's prudent judgment. There was no justification or evidence provided for doing so. The Proposed Rule does require the collateral-benefit characteristic of the fund, product or model portfolio to be prominently displayed in disclosure materials provided to participants and beneficiaries. We believe additional guidance would be useful here to give fiduciaries a model or examples for how to disclose this collateral benefit information.

Proxy Voting and Exercise of Shareholder Rights

We support the proposed changes to the Proxy Voting Rule, which overestimated the costs of proxy voting while ignoring its substantial benefits. The Proposed Rule properly restores fiduciary authority to make prudent decisions in proxy voting and reinforces the long-held principle that proxy voting is a plan asset to be executed in the best interests of plan participants and beneficiaries. Since the Avon Letter,[9] DOL has held that proxy voting is a plan asset subject to fiduciary obligations. We agree "voting proxies are a crucial lever in ensuring that shareholders' interests, as the company's owners, are protected." As we noted in our Proxy Voting Rule comments, proxy voting is an economically significant right that allows fiduciaries to monitor and hold boards accountable for creating and protecting long-term value.

We support the elimination of the Proxy Voting Rule's guidance that fiduciary duty "does not require the voting of every proxy or the exercise of every shareholder right." 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-covered plans. Investors engaging with companies on corporate governance through shareholder proposals can increase long-term value.

[8] Interpretive Bulletin 94–1, June 23, 1994.
[9] Letter from Alan D. Lebowitz, Deputy Assistant Secretary to Mr. Helmuth Fandl, Chairman of the Retirement Board, Avon Products, Inc. (Feb. 23, 1988).

We support the Proposed Rule's elimination of the two safe harbors in the Proxy Voting Rule. We believe the safe harbors for only voting on certain types of proposals or only voting if a certain ownership threshold is met were generally inconsistent with the duty of prudence. We also agree the "no vote" statement and two safe harbors could be misconstrued by fiduciaries as regulatory permission to broadly abstain from proxy voting without properly considering plans' interests as shareholders. We also support the elimination of recordkeeping requirements on proxy voting activities and other exercises of shareholder rights. We agree proxy voting and other exercises of shareholder rights should be treated no differently than other fiduciary activities.

Conclusion

We commend DOL for its thoughtful approach. The Proposed Rule fixes serious deficiencies in the Financial Factors and Proxy Voting Rules, removing confusion and ambiguity over the integration of ESG factors into investment decisions and restoring the longstanding principle that proxy voting and the exercise of shareholder rights are full-fledged plan assets subject to the full scope of ERISA's fiduciary duty.

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