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December 19, 2023

Employee Benefits Security Administration
Office of Regulations and Interpretations
Office of Exemption Determination
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Submitted via regulations.gov.

Re: Attention: Definition of Fiduciary—RIN 1210–AC02; Application No. D–12057; Application No. D–12060

Dear Sir or Madam:

The American Federation of State, County and Municipal Employees (AFSCME) appreciates the opportunity to comment on the U.S. Department of Labor's (DOL) proposed rulemaking entitled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" (the Proposed Rule) and its proposed amendments to Prohibited Transaction Exemptions (PTEs) 2020–02 and 84–24. AFSCME strongly supports the Proposed Rule and proposed amendments to the PTEs and urges DOL to issue a final rule and final amended PTEs that include the core components contained in the proposals.

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. Approximately 200,000 AFSCME members work for private-sector employers and therefore would be broadly covered by the proposed strengthened protections as participants in covered employer-sponsored retirement and other plans and owners and beneficiaries of any Individual Retirement Accounts (IRAs) or other individual account arrangements covered by the rule. AFSCME members who work for governmental employers, primarily state and local governments, would benefit from the proposed strengthened protections afforded to owners and beneficiaries of IRAs and other covered individual account arrangements. Although they and other governmental employees typically participate in retirement plans not covered by the Employee Retirement Income Security Act ("ERISA")[1], many are eligible to roll over plan assets into an IRA at

[1] In 2023, four-in-five (81%) state and local government employees participated in a retirement plan at work, with three-in-four (75%) participating in a defined benefit plan and one-in-five (18%) participating in a defined contribution plan. U.S. Bureau of Labor Statistics, National Compensation Survey, https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2023.htm.

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retirement[2] or upon termination of employment.[3] Some AFSCME members working in the public sector also have health savings accounts that would benefit from the application of the improved protections to those individually owned accounts.[4]

AFSCME supported DOL's 2015 fiduciary rule,[5] which would have required financial professionals to act in their customers' best interests when providing personalized investment advice. Plan fiduciaries, participants and IRA owners need to be sure those providing investment advice are subject to ERISA's fiduciary duties. The new Proposed Rule will close the legal loopholes that permit some advisers to recommend retirement investment options that may carry excessively high fees, lack liquidity and often do not align with the long-term goals of retirement savers but rather are driven by conflicts that add to advisers' own financial gain.

Current Rules Require Modernization

The Proposed Rule is urgently needed and long overdue. The current rules are insufficient to meet the needs and demands of the modern financial marketplace. The retirement landscape has changed and is dramatically different than it was almost 50 years ago. When the definition of a fiduciary was adopted in 1975, workers and retirees did not need investment advice because their retirement savings were being professionally managed.

Since then, there has been a dramatic shift in our private retirement system away from defined benefit pension plans and into 401(k)s and IRAs. The responsibility of saving for retirement and managing retirement savings has been shifted onto workers, and most workers participating in a

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[2] One-third (33%) of state and local government workers participating in a traditional defined benefit plan have a lump sum benefit available 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, 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. More than four-in-five (85%) state and local workers participating in savings and thrift plans have lump sums available. Id. at t. 34. Over one-third (37%) of state and local participating in a defined contribution plan are in a savings and thrift plan. Id. at t. 22.

[3] Unlike participants in private industry defined benefit plans, the vast majority of participants in state and local government defined benefit plans (91%) are required to contribute to the plan. U.S. Bureau of Labor Statistics, National Compensation Survey, https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2023.htm. These plans typically allow participants to claim a refund of any participant contributions upon separation from employment. These distributions can be rolled over into an IRA. We are unaware of any comprehensive data on the extent to which separating employees in such contributory defined benefit plans roll out their employee contributions and those that claim a refund of their contribution roll any or all of it into an IRA. A 2010 Rand Corporation study examining the decisions of government employees in North Carolina found that among a sample of government employees who left employment between 2000-2009, were younger than age 50 and did not immediately begin collecting a retirement annuity, 45% (approximately 78,700 out of a sample of over 175,000) took a lump sum within one year of separation. Clark, Robert and Melinda Sandler Morrill, Choices and Information Needs for Workers Leaving the North Carolina State Retirement Plan: Accepting a Lump Sum Payment or Receiving an Annuity at Retirement, RAND Corporation (2010) t. 3, https://www.rand.org/pubs/working_papers/WR804.html. Only a small share of those taking a lump sum rolled it directly into an IRA (84.51% took a direct cash payment). Id at t. 5.

[4] In 2023, two-in-five (39%) state and local government workers had access to a health savings account through work, about the same share as that of private-industry workers (36%). U.S. Bureau of Labor Statistics, National Compensation Survey, https://www.bls.gov/ebs/publications/employee-benefits-in-the-united-states-march-2023.htm.

[5] AFSCME Comment Letter, July 21, 2015, found at: https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA25/00218.pdf.

retirement plan today are in defined contribution plans, such as 401(k)s. Further, 401(k)s are interconnected with IRAs, as the majority of money in IRAs comes from rollovers from 401(k)s. The number of active participants in private-sector defined contribution plans increased from 11.2 million in 1975 to 87.9 million in 2021, while the number of active participants in private-sector defined benefit plans declined from 27.2 million to 11.6 million during the same time period.[6] According to the Investment Company Institute, 72% of U.S. households reported that they had employer-sponsored retirement plans, IRAs, or both at year-end 2022. Of the $33.6 trillion in assets for employer-sponsored retirement plans, the largest components of retirement assets were IRA and employer-sponsored defined contribution plans, holding $11.5 trillion and $6.6 trillion, respectively, at year-end 2022.[7]

Conflicted Advice Costs Retirement Savers Billions

Millions of Americans are counting on their retirement savings to be able to retire with dignity and security. Their retirement savings plans can involve complex investment decisions, so many investors turn to investment professionals for advice. When retirement investors do so, they reasonably expect that they will receive advice that is in their best interest, and they trust and rely on the advice they receive. According to a 2019 investor survey, 78% of investors had confidence that financial advisors and brokers are looking out for their best interests.[8] Unfortunately, this trust can be misplaced. Because of loopholes in the definition of who is considered a fiduciary under ERISA, some financial professionals are allowed to provide investment advice without being held to the high professional standards appropriate to their consequential role. They may steer retirement investors into products, services or account types that maximize their own revenues but come with excessively high costs, poor performance, unnecessary risks or illiquidity, thereby jeopardizing retirement investors' financial security.

These conflicts of interest can take a huge toll on the ability of millions of workers and retirees to have a financially secure and dignified retirement. Workers and retirees are losing thousands of dollars in much needed retirement income as a result of this conflicted advice. According to 2015 research by the White House Council of Economic Advisers (CEA), savers receiving conflicted advice earn returns roughly one percentage point lower each year, and CEA estimated the aggregate annual cost of conflicted advice to retirees is $17 billion each year.[9]

Advice Loopholes

A critical problem is that one-time advice is not covered, which could include recommendations to roll over assets from an ERISA-covered plan (whether a 401(k), defined benefit or other plan) to an IRA. Therefore, when an individual retires or leaves a job, a recommendation by an investment professional to roll over their 401(k) to an IRA or take a lump sum distribution from a

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[6] U.S. Department of Labor Employee Benefits Security Administration, Private Pension Plan Bulletin Historical Tables and Graphs 1975-2021 (October 2023), p. 9 (available at: https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.)

[7] 2023 Investment Company Fact Book, Investment Company Institute, pgs. ii, 99 (available at: https://www.ici.org/system/files/2023-05/2023-factbook.pdf).

[8] 2019 Main Street Investor Survey, Center for Audit Quality, p. 21 (available at: https://www.thecaq.org/wp-content/uploads/2019/09/2019_caq_main_street_investor_survey.pdf).

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

defined benefit plan may not be covered. This can be the most consequential piece of financial advice a retirement saver will receive in their lifetime. Yet, firms and advisors often have strong incentives to recommend rollovers because it can mean a big pay day for them. Conflicted advice leads to lower investment returns, resulting in serious harm to workers and retirees. Studies indicate the annual costs to retirement investors attributable to conflicted advice are huge, representing billions of dollars in lost savings every year. At an individual level, retirement investors may lose tens if not hundreds of thousands of dollars over time.

Another huge loophole in the current rules is the requirement that advice must form a primary basis for the investment decision. This enables firms and advisers to evade fiduciary duty requirements by using dense and lengthy legal disclaimers stating investors should not rely on their recommendations as a primary basis for their investment decisions. This is problematic, in that 78% of investors trust their advisors, yet these advisors can use fine print saying "buyer beware" and "do not rely on this recommendation."

Proposed Rule Protects Retirement Savers

The Proposed Rule is rightly designed to ensure ERISA's strong fiduciary standards uniformly apply to all situations where retirement investors reasonably expect their relationship with an advice provider is one in which the investor can — and should — place trust and confidence in the recommendation.

The Proposed Rule would close the current regulatory loopholes harming investors. It will cover rollover recommendations, where retirement savers currently lose billions a year. It will cover advice to employers who sponsor 401(k) plans to ensure the advice they receive about the menu of 401(k) plan investment options offered to their employees is not tainted by conflicts of interest for additional fees and commissions. And the proposal will apply to all retirement investments, including not only securities but also non-securities, such as many insurance products and a wide range of other investments not currently covered.

The Proposed Rule also ends the fine print disclaimer to avoid fiduciary status. Under the new rule, anyone making a recommendation in one of the following roles will be a fiduciary: if the person has discretionary authority over a retirement saver's investments; if the person represents they are a fiduciary; and if the person makes investment recommendations on a regular basis as part of their business and the recommendation is provided based on the particular needs of the retirement saver and may be relied upon as a basis for investment decisions that are in the retirement saver's best interest.

It is especially important that the Proposed Rule closes the one-time advice loophole that exists in the current definition of fiduciary investment advice. That loophole results in absurd outcomes in which financial professionals who make investment recommendations to investors on a regular basis as part of their business escape fiduciary status even when making specific, tailored investment recommendations to retirement investors. AFSCME strongly supports the approach contained in proposed section 2510.3-21(c)(ii), which will realign the investment advice fiduciary definition with the plain statutory language of ERISA.

When there is a potential conflict of interest for an advisor or firm, the proposed amended PTEs require compliance with certain conditions to ensure advice is in the retirement saver's best interests. These conditions include: meeting a professional standard of care when making investment recommendations (giving prudent advice); never putting their financial interests ahead of a retirement

saver's when making recommendations (giving loyal advice); avoiding misleading statements about conflicts of interest, fees and investments; charging no more than is reasonable for their services; following policies and procedures designed to ensure they give advice that is in retirement investors' best interest; and giving retirement investors basic information about conflicts of interest. AFSCME strongly supports these conditions as they are prescribed in the proposed amendments to PTE 2020-02 and PTE 84-24.

Industry arguments that the Proposed Rule will limit advice to certain retirement savers are disingenuous. A 2015 survey of investment advisers and brokers found that 83% did not believe that a fiduciary standard of care would price investors out of the market for investment advice. And nearly 91% did not believe it costs more to work with fiduciary advisors than brokers.[10] This survey's results refute the assertion that it costs more to work with an adviser under a fiduciary standard or that smaller investors will be shut out of the market. Further, AFSCME rejects the view, which is implicit in these industry arguments, that it is appropriate for conflicted investment advice to be the only kind of investment advice that is made available to retirement savers with fewer assets.

Inadequate Regulation of Insurance Agents

AFSCME strongly agrees with concerns about potential abuses by insurance agents who make investment recommendations to retirement investors given the lax standards under which insurance agents are regulated through state insurance laws and absent stronger rules applicable to ERISA-covered plans and plans and accounts defined in Internal Revenue Code section 4975(e)(1). Most state laws governing the standard of conduct required of insurance agents when recommending and selling annuities are based on the National Association of Insurance Commissioners (NAIC) model law that was adopted in revised form in 2020, the Suitability in Annuity Transactions Model Regulation. While often billed as imposing a best interest standard on insurance agents, the NAIC model law determines whether an insurance agent has satisfied this standard according to a significantly flawed and fragmentary set of obligations regarding care, disclosure, conflicts of interest and documentation. Perhaps most egregiously, the model law excludes categorically from its definition of conflict of interest any cash compensation or noncash compensation without regard to whether the nature of the specific compensation creates a material conflict.

AFSCME strongly supports DOL's proposed approach to insurance companies and insurance agents. It makes good sense to narrow the availability of the investment advice fiduciary exemption under PTE 84-24 to receipt of an insurance sales commission by independent insurance agents who work with multiple insurance companies to sell non-securities annuities or other insurance products not regulated by the U.S. Securities and Exchange Comission. This allows for a tailored approach that addresses the unique circumstances of and challenges presented by these lightly regulated salespeople when they provide investment recommendations to retirement investors. It also creates a more level playing field by channeling other newly excluded investment advice fiduciaries to use PTE 2020-02.

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We appreciate the opportunity to share our views on this important rulemaking, which will require financial advisers who are providing retirement investment advice to serve their clients' best interest. Given the importance of this issue to working people and retirees, we urge DOL to move

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[10] Seeking Trustworthy Advice for Individual Investors, fi360, February, 2015, pgs. 32, 34 (available at: http://www.fi360.com/uploads/media/2015fiduciarysurvey.pdf).

quickly to issue a final rule and final amended PTEs. 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