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December 21, 2023

Submitted Electronically Through www.regulations.gov

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 12-10-AC02, Retirement Income Security Rule: Definition of an Investment Advice Fiduciary and Associated Proposed Amendments to Prohibited Transaction Exemptions

Dear Acting Secretary Su:

We write in opposition to the Department of Labor's (DOL) proposed rule entitled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to prohibited transaction exemptions (collectively, the Proposal), which would regulate transactions outside of DOL's jurisdiction.¹ The Proposal attempts to broaden the types of retirement advice subject to fiduciary standards, which would limit access to investment advice and investor choice. These consequences will disproportionately impact lower- and middle-income Americans. Codifying the Proposal would jeopardize the retirement savings of millions of hardworking Americans. DOL should reconsider this harmful effort and withdraw the Proposal.

The Proposal Would Harm Lower- and Middle-Income Americans

The Proposal would implement far-reaching regulatory changes to how services are delivered to retirement plans, retirees, and savers. The Proposal's reach is even broader than a similar DOL rule promulgated in 2016 (2016 Fiduciary Rule), which revised the definition of fiduciary under

¹ 88 Fed. Reg. 75,890 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75,979 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76,004 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76,032 (proposed Nov. 3, 2023).

section 3(21) of the *Employee Retirement Income Security Act of 1974*.² While the 2016 Fiduciary Rule was vacated by the U.S. Court of Appeals for the Fifth Circuit,³ a study on the effects of the rule before it was vacated found that 53 percent of financial institutions surveyed eliminated or limited access to brokerage advice services. Further, 95 percent of those financial institutions made changes to products available to retirement investors, including limiting or eliminating investment products.⁴ History is clear: the 2016 Fiduciary Rule harmed retirement savers by reducing investment choices.

The Proposal, which is even broader than the 2016 Fiduciary Rule, will have greater harmful results. The Hispanic Leadership Fund warned that the 2016 Fiduciary Rule would “hurt the very people it was intended to help.... However well-intentioned, this was the wrong approach in 2016, and the consequences of repeating this mistake will be even graver this time for low and middle-income families.”⁵ According to the Hispanic Leadership Fund’s analysis, reinstating the 2016 Fiduciary Rule would reduce the retirement savings of 2.7 million individuals with incomes below \$100,000 by an estimated \$140 billion over 10 years.⁶

The Proposal Would Create Confusion in the Marketplace

DOL’s position on the definition of investment advice fiduciary has, for the last decade, shifted constantly.⁷ Each time DOL shifts its position, significant and expensive burdens are imposed on retirement service providers as they adapt to comply. In addition to wasting resources, DOL’s shifting positions have created confusion in both the marketplace and in court.⁸ The U.S. District Court for the Southern District of New York cited DOL’s shifting interpretations as a reason to disregard DOL’s interpretations wholly in this area.⁹ The court asked, “How, then, should the Court interpret the investment advice fiduciary provisions in light of DOL’s shifting interpretations? There is no DOL interpretation binding on this court.”¹⁰

² On April, 8, 2016, DOL published a final regulation titled “Conflict of Interest Rule – Retirement Investment Advice” (81 Fed. Reg. 20,946) and two associated prohibited transaction class exemptions, “The Best interest Contract Exemption (PTE 2016-01)” (81 Fed. Reg. 21,002) and the “Class Exemption for Principal Transactions in Certain Assets Between Investment advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02)” (81 Fed. Reg. 21,089) as well as amendments to the following previously granted exemptions: PTEs 75-1, 77-4; 80-83; 83-1; 84-24; and 96-16 (81 Fed. Reg. 21,208; 21,139; 21,147; 21,181). Collectively, this regulatory package is referred to as the “2016 Fiduciary Rule.”

³ U.S. Chamber of Com. v. DOL, 885 F.3d 360 (5th Cir. 2018).

⁴ DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS (Aug. 9, 2017), <https://www.sifma.org/wp-content/uploads/2017/08/Deloitte-White-Paper-on-the-DOL-Fiduciary-Rule-August-2017.pdf>.

⁵ HISPANIC LEADERSHIP FUND, ANALYSIS OF THE EFFECTS OF THE 2016 DEPARTMENT OF LABOR FIDUCIARY REGULATION ON RETIREMENT SAVINGS AND ESTIMATE OF THE EFFECTS OF REINSTATEMENT (Nov. 8, 2021), https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf.

⁶ *Id.*

⁷ Carfora v. Teachers Ins. Annuity Ass’n of Am., 631 F.Supp.3d 125, 141-145 (S.D.N.Y. 2022), *amended in part by* Carfora v. Teachers Ins. Annuity Ass’n of Am., 2023 WL 5342404 (S.D.N.Y. 2023) (providing at pages 141-142 a history of DOL’s “evolving interpretation” of investment advice fiduciary).

⁸ *Id.* at 144 (referring to the inconsistency of DOL’s shifting interpretations of investment advice fiduciary).

⁹ *Id.*

¹⁰ *Id.*

The Proposal is the latest example of DOL's inconsistency in this space. This confusing regulatory morass creates unnecessary uncertainty in the marketplace—harming retirement professionals and savers alike.

The Proposal Would Lead to Costly Litigation

As Chairwoman Foxx stated in her letter of November 17, 2023, this Proposal will have far-reaching implications if finalized.¹¹ The letter noted the retirement community has had inadequate time to digest and respond to the Proposal. The letter also argued it is critical that stakeholders be provided with ample opportunity to consider the implications of this rule, but DOL provided a truncated comment period of only 39 working days spanning across the holiday season. This suggests that DOL is not interested in allowing the retirement community to develop its responses fully and that DOL does not value those responses.

Further, the retirement community has expressed concerns that DOL does not intend to consider the filed comments fully and has already determined a course of action.¹² Like the 2016 Fiduciary Rule, the Proposal will likely face litigation challenges if finalized. A significant amount of taxpayer resources would thus be directed to efforts to defend the rule in court.

The Proposal Reaches Transactions in the Jurisdiction of Other Regulators

Like the 2016 Fiduciary Rule, the Proposal attempts to regulate sales. In 1975, DOL established a five-part test to determine who is an investment advice fiduciary.¹³ Typically, under the five-part test, sales do not cause a person to become a fiduciary.¹⁴ The Proposal significantly expands the scope of transactions subject to DOL regulation by eliminating the five-part test. As a consequence, broker-dealer transactions and annuity sales would be subject to DOL regulation. Currently, broker-dealer transactions are regulated by the U.S. Securities and Exchange Commission (SEC), and annuity sales are regulated by the states.

After the 2016 Fiduciary Rule was vacated by the Fifth Circuit, the SEC and the states adopted rules and regulations to address conflicts of interest. The SEC's "Regulation Best Interest," which became effective on June 30, 2020, requires broker-dealers to act in their clients' best interest without putting their own interests first.¹⁵ Forty states and counting have adopted an annuity suitability and best interest standard for the sales of annuities since the 2016 Fiduciary Rule was vacated.¹⁶ These rules and regulations were promulgated by authorities with direct jurisdiction over (and deep knowledge of) these industries and their distribution chains. In the

¹¹ Letter from Chairwoman Foxx to Julie A. Su, Acting Sec'y of Lab. (Nov. 17, 2023), https://edworkforce.house.gov/uploadedfiles/11.17.23_final_fiduciary_rule_comment_period_letter_to_dol.pdf.

¹² *Id.*

¹³ See 40 Fed. Reg. 50,842 (Oct. 31, 1975), codified at 29 C.F.R. § 2510.3-21.

¹⁴ The five-part test requires, in relevant part, that a person render advice to the plan on a regular basis.

¹⁵ Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 Fed. Reg. 33,318 (July 12, 2019).

¹⁶ National Ass'n of Ins. Comm'rs, Annuity Suitability & Best Interest Standard (Nov. 1, 2023), <https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard>.

Proposal, DOL cites no evidence that these other rules and regulations are falling short of mitigating conflicts of interest. DOL is attempting to regulate outside of its jurisdiction and outside of its expertise to the detriment of American workers, savers, and retirees.

EBSA Must Address Performance Challenges

DOL's Employee Benefits Security Administration (EBSA) has often stated that it is a "small agency" with broad responsibilities.¹⁷ EBSA is already struggling to meet the scope of its responsibilities. In October 2023, the U.S. Governmental Accountability Office (GAO) found that EBSA's resource management is deficient.¹⁸ In May 2021, GAO reported that a whopping 16 percent (one in six) of investigations opened in fiscal year 2017 were still not closed four years later.¹⁹ In addition, EBSA's administrative exemptions practice has experienced a sharp and disappointing decline in individual exemptions over the last two decades.²⁰ Despite these performance deficiencies, EBSA has devoted significant resources to issuing and defending repeated expansions to the definition of investment advice fiduciary. EBSA's efforts should be redirected to addressing its own deficiencies rather than expanding its regulatory reach outside of its jurisdiction.

Conclusion

The Proposal is yet another instance of DOL creating unnecessary and burdensome regulations reaching well beyond its jurisdiction and expertise. This disastrous Proposal would reduce access to and choice of retirement products for millions of Americans, leaving them less financially secure for retirement. DOL should stop threatening the retirement security of hardworking Americans and should withdraw this harmful proposal. In addition, EBSA should direct its resources toward establishing efficient and effective controls over timely and focused investigations, providing individual transaction exemptions that assist employee benefit plans, and implementing the SECURE 2.0 Act.²¹

¹⁷ DOL, FY 2024 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2024/CBJ-2024-V2-01.pdf>; DOL, FY 2023 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-01.pdf>; DOL, FY 2022 CONGRESSIONAL BUDGET JUSTIFICATION: EMPLOYEE BENEFITS SECURITY ADMINISTRATION 10, <https://www.dol.gov/sites/dolgov/files/general/budget/2022/CBJ-2022-V2-01.pdf>.

¹⁸ U.S. GOV'T ACCOUNTABILITY OFF., EMPLOYEE BENEFITS SECURITY ADMINISTRATION: SYSTEMIC PROCESS NEEDED TO BETTER MANAGE PRIORITIES AND INCREASED RESPONSIBILITIES (Oct. 24, 2023) (reporting that EBSA's management of priorities and increased responsibilities is deficient), <https://www.gao.gov/assets/d24105667.pdf>.

¹⁹ U.S. GOV'T ACCOUNTABILITY OFF., EMPLOYEE BENEFITS SECURITY ADMINISTRATION: ENFORCEMENT EFFORTS TO PROTECT PARTICIPANTS' RIGHTS IN EMPLOYER-SPONSORED RETIREMENT AND HEALTH BENEFIT PLANS 12 (May 27, 2021), <https://www.gao.gov/assets/gao-21-376.pdf>.

²⁰ See Letter from Allison A. Itami & Jeanne K. Wilson, Principals, Groom Law Group, to Ali Khawar, Acting Assistant Sec'y, EBSA (May 27, 2022) (discussing the steady decline of individual exemptions and the associated chilling effect on otherwise beneficial industry practices and including detail, by year, since 1996 demonstrating the decline), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC05/00014.pdf>.

²¹ Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T (2022).

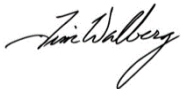
Sincerely,



Virginia Foxx
Chairwoman



Bob Good
Chairman
Subcommittee on Health, Employment,
Labor, and Pensions



Tim Walberg
Member of Congress



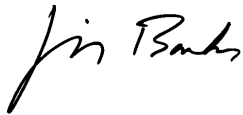
Glenn Grothman
Member of Congress



Elise M. Stefanik
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