# Congress of the United States

## Washington, D.C. 20515

August 31, 2023

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

Dear Acting Secretary Su:

We write to oppose the Department of Labor's (Department or DOL) continuing efforts to promulgate a rule on "Conflict of Interest in Investment Advice"[1] to revise the definition of fiduciary under section 3(21) of the *Employee Retirement Income Security Act of 1974* (ERISA).[2] Over the last two years, the Department has espoused at least three separate positions on what it means to be an investment advice fiduciary.[3] By failing to articulate itself consistently, the Department has created unnecessary instability for retirement plans, retirees, and savers.

The Department's misguided efforts to revise the definition of investment advice fiduciary have created confusion in the marketplace and unwarranted compliance expenses. For example, a recent opinion by the U.S. District Court for the Southern District of New York criticized the Department for its shifting interpretations on fiduciary investment advice.[4] Specifically, the Court stated, "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." Clearly, DOL's shifting interpretations led the court to disregard DOL guidance altogether.

As Biden's DOL continues to change its stance in this area, we remind the Department of its attempt to promulgate a definition of fiduciary under ERISA section 3(21) in 2016 (the "2016 Fiduciary Rule"). This ill-conceived and overreaching rule was decisively vacated by the U.S. Court of Appeals for the Fifth Circuit,[5] and it should serve as a cautionary example. A Deloitte study demonstrated the damage resulting from the 2016 Fiduciary Rule, finding that 53 percent

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[1] Regulatory Agenda RIN 1210-AC02, "Conflict of Interest in Investment Advice," *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1210-AC02.
[2] ERISA § 3(21), 29 U.S.C. § 1002(21).
[3] DOL, EMP. BENEFITS SEC. ADMIN., NEW FIDUCIARY ADVICE EXEMPTION: PTE 2020-02 IMPROVING INVESTMENT ADVICE FOR WORKERS & RETIREES FREQUENTLY ASKED QUESTIONS (FAQs) (Apr.13, 2021), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption (one position); *Am. Secs. Ass'n v. DOL*, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023) (citing Department's motion to voluntarily dismiss appeal defending FAQs after adverse District Court ruling) (second position); and Regulatory Agenda RIN 1210-AC02, "Conflict of Interest in Investment Advice," *available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1210-AC02 (third position).
[4] *Carfora v. Teachers Ins. Annuity Ass'n of Am.*, No. 1:21-cv-08384 (S.D.N.Y. Sept. 27, 2022).
[5] *Chamber of Com. v. DOL*, 885 F.3d 360, 387–88 (5th Cir. 2018).

of U.S. financial advisors limited or eliminated access to brokerage advice for retirement investors.[6] Far from protecting savers, the 2016 Fiduciary Rule limited investors' opportunities.

Introducing yet another new definition of investment advice fiduciary would again harm savers. A Hispanic Leadership Fund study found that reinstating the 2016 Fiduciary Rule would 1) reduce the retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years and 2) have the greatest adverse effect on Black and Hispanic Americans.[7] The 2016 rule would have injured low-income Americans most of all, stripping them of education opportunities. Hiding under the guise of investor protection, the 2016 Fiduciary Rule threatened the security of Americans' retirements. No American deserves to have his or her financial security threatened for political gain.

Not only has the Department's continually shifting position significantly harmed investors, but it has also wasted taxpayer resources on legal challenges that could be dedicated to other pressing priorities like implementing the recently enacted SECURE 2.0 Act[8] and protecting retirement savers. For these reasons, we request that DOL cease further action on this rulemaking. We look forward to your prompt attention to this matter and to your response to this letter.

Sincerely,

Bill Cassidy, M.D.

Virginia Foxx

Bill Cassidy, M.D.
Ranking Member
Senate Committee on Health,
Education, Labor, and Pensions

Virginia Foxx
Chairwoman
House Committee on Education
and the Workforce

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[6] DELOITTE, THE DOL FIDUCIARY RULE: A STUDY ON HOW FINANCIAL INSTITUTIONS HAVE RESPONDED AND THE RESULTING IMPACTS ON RETIREMENT INVESTORS (Aug. 9, 2017).
[7] 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 (2021).
[8] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T (2022).