Congress of the United States
House of Representatives
Washington, DC 20515–1013

January 8, 2024

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

The Honorable Lisa Gomez
Assistant Secretary, Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Acting Secretary Su and Assistant Secretary Gomez:

We write to express our concerns about the Department of Labor's (DOL) proposed "Retirement Security" (RIN: 1210-AC02)[1] rule announced by President Biden at the White House on October 31, 2023, and published in the Federal Register on November 3, 2023. The proposal, which was previously referred to as the "Conflicts of Interest in Investment Advice" rule as described in DOL's Spring 2023 regulatory agenda,[2] includes significant, unnecessary, and counterproductive changes to the existing regulatory framework governing the conduct of financial professionals who provide personalized investment advice to retirement savers under the *Employee Retirement Income Security Act of 1974* (ERISA)[3] and the *Internal Revenue Code of 1986*[4] (the Tax Code). DOL's past efforts to expand these rules, which federal courts have repeatedly rejected, dealt a devastating blow to millions of American workers and retirees by impairing their ability to obtain much-needed affordable financial professional help to prepare for and achieve a secure and dignified retirement. We urge DOL to cease its efforts to adopt this proposal in order to prevent needlessly inflicting harm on millions of retirement savers across the country.

Harm to Lower- and Middle-Income Workers

In moving forward with this proposal, DOL has unreasonably dismissed the extensive research and real-world experience decisively demonstrating the 2016 DOL fiduciary rule significantly harmed lower- and middle-income workers before being vacated in federal court. The proposed fiduciary definition goes further than the 2016 fiduciary rule that was invalidated by a federal appeals court ruling. It would repeal the ERISA five-part test used to determine fiduciary status and replace it with a three-part test, one prong of which would impose fiduciary status on any financial professional who recommends financial products. The proposal also includes many changes to existing prohibited transaction exemptions (PTEs). Changes proposed to PTE 2020-02 and PTE 84-24 could, if adopted, significantly impair their utility for serving retirement savers.

As in 2016, the proposal, if adopted, could cause a large number of financial professionals, who currently serve a broad range of customers, to switch to providing service as investment advisers, rather than as insurance agents or registered representatives of a broker-dealer. This is the case because the proposals in 2016 and 2023 impose much more severe risks and burdens on broker-dealers and insurance representatives than on investment advisers. Investment advisers charge ongoing advisory fees and impose account minimums that low- and moderate-income workers and retirees cannot afford,

[1] U.S. Department of Labor, Employee Benefits Security Administration: Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary; Proposed Amendment to Prohibited Transaction Exemption 2020-02; Proposed Amendment to Prohibited Transaction Exemption 84-24; and Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, November 3, 2023.

[2] U.S. Department of Labor, Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions, June 13, 2023.

[3] ERISA § 3(21), 29 U.S.C. § 1002(21).

[4] Internal Revenue Code – Title 26, Code of Federal Regulations.

causing them to lose access to any financial professional.

A study of the 2016 fiduciary rule found that more than 10 million smaller retirement account owners lost the ability to work with financial professionals.[5] A more recent analysis found that if DOL adopts a new rule that is similar to the 2016 rule, the retirement savings of 2.7 million individuals with incomes below $100,000 would plummet by $140 billion over ten years. The analysis also found that people of color, particularly Black and Latino retirement account owners would be among the hardest hit, increasing the racial wealth gap by 20 percent.[6]

DOL's continued pursuit of this misguided policy objective will end up hurting the very same people it is tasked to protect. If adopted, the Retirement Security Rule proposal would deprive America's workers and retirees of much needed professional guidance to navigate the complex world of investing in order to achieve their retirement goals.[7]

Conflicts of Interest Are Being Addressed

In the years since the 2016 fiduciary rule was vacated, regulators at the federal and state levels have adopted and implemented significant and workable regulations that directly address the conflicts of interest that DOL asserts it is seeking to address with this new proposed rule to level the playing field. The U.S. Securities and Exchange Commission (SEC) adopted Regulation Best Interest (Reg BI),[8] which requires all broker-dealers and their registered representatives to always act in their client's best interest without putting their interests first. Reg BI went into effect on June 30, 2020, and the SEC, the Financial Industry Regulatory Authority, and state securities regulators have been actively and aggressively enforcing it. In addition, forty states[9] have now enacted an updated National Association of Insurance Commissioners (NAIC) model regulation[10] that requires insurance producers to satisfy a best interest standard that aligns well with Reg BI. Further, DOL adopted its own new rule in 2020 that provided cohesion with the newly emerging federal and state regulatory regime.[11]

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[5] The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors," Deloitte, August 9, 2017. This study represents results from institutions representing 43% of U.S. financial advisers and 27 percent of the retirement savings assets in the market. The study found that, as of the DOL rule's first applicability date, 53% of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and $900 billion in savings.
"The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers," U.S. Chamber of Commerce, Spring 2017. This report is a compilation of survey statistics and other data that was submitted to the U.S. Department of Labor during the comment period in response to the February 3, 2017, Presidential Executive Order on the Fiduciary Rule. The compilation showed if the rule is implemented, it could limit or restrict investment products for some 11 million households and affect up to 7 million individual retirement account (IRA) owners who could lose access to investment advice altogether. It also showed that the provision of advice to individuals with small accounts would be curtailed or cut off due to the risk and increased costs of the rule.

[6] "Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement," prepared by Quantria Strategies, LLC for the Hispanic Leadership Fund, November 8, 2021. This analysis found that if the vacated 2016 DOL Fiduciary Rule is reinstated, it would reduce the accumulated retirement savings of 2.7 million individuals with incomes below $100,000 by approximately $140 billion over 10 years. The analysis also found that reinstatement of the rule would result in a roughly 20% increase in the wealth gap for Black and Hispanic Americans when looking at accumulated IRA savings alone.

[7] "The Importance of Access to Financial Guidance to Moderate Income Retirement Savers," Matthew Greenwald, PhD, Greenwald Research, May 18, 2022. This survey examined views on access to financial professionals for those ages 55 to 70, with life savings in the lower half of financial wealth when compared to all Americans of their age. The survey found that a majority of moderate-income savers who are in or near retirement are concerned that a fiduciary-only regulation would keep them from the professional financial guidance they want and need, especially during difficult economic times (85% believe they have at least a somewhat great need for financial guidance from a professional, 81% feel the guidance they receive helps them feel reassured during difficult economic times). Of those without a financial professional, almost all believe it would be important to work with one to feel reassured through difficult economic times (97%) and during times of high inflation (97%).

[8] U.S. Securities and Exchange Commission, Regulation Best Interest: The Broker-Dealer Standard of Conduct, adopted June 5, 2019.

[9] Map of 40 states that adopted NAIC Suitability in Annuity Transaction Model Regulation, Insured Retirement Institute, October 2023.

[10] National Association of Insurance Commissioners, Suitability in Annuity Transaction Model Regulation, adopted February 2020.

[11] U.S. Department of Labor, Employee Benefits Security Administration, Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, adopted February 16, 2021

Neither DOL nor any other federal or state regulatory agency has presented evidence suggesting that this newly implemented comprehensive framework is not working effectively to protect retirement savers or demonstrates there is a need to make changes such as those provided for in the proposed rule. Without any evidence of deficiencies in the existing rules, it is difficult to justify the need for the proposed rule and the unnecessary instability it would cause for retirement plans, retirees, and savers.

Ignoring Federal Court Rulings

For more than a decade, DOL has sought to increase its role and broaden the requirements of the fiduciary standards imposed under ERISA and the Tax Code beyond the authorizing statute. Federal courts have rejected these efforts numerous times in recent years.[12] While DOL claims the proposed rule is in alignment with the 2018 Fifth Circuit Court ruling that invalidated the 2016 fiduciary rule, it disregards the court's finding that Congress intentionally structured ERISA to recognize the distinction between investment advice and sales. Instead, the proposal, if adopted, would extend fiduciary duty to all who make recommendations while failing to recognize that when ERISA was enacted, there was a fundamental difference in obligations between (i) investment advisers who are paid fees for advice, and who have long been considered fiduciaries, and (ii) stockbrokers and insurance agents, who generally assumed no such status in selling products to their clients.

Furthermore, the proposed rule defines several key terms and concepts, including "recommendation," "retirement investor," and "fees," in a manner that similarly ignores the distinction between investment advice and sales commissions as established in the 2018 Fifth Circuit Court of Appeals ruling . Finally, the proposed rule would apply ERISA fiduciary status to rollover recommendations – a decision that is inconsistent with the intent and text of ERISA as interpreted in federal courts.[13] We firmly request DOL respect the limits set forth by Congress and abide by the decisions upheld in our federal courts.

Focus on Implementing New Retirement Security Laws

The proposed DOL rule purports to protect workers and retirees from fees tied to commissions that are inherent in the annuity distribution chain for certain retirement products, such as annuity sales. However, rather than protecting workers and retirees, the proposal could effectively prohibit annuity sales through the existing distribution channels. As a result, this could likely to retirement product distribution chains and reduce access to annuities and other retirement products.

Instead of pursuing this problematic and counterproductive rulemaking effort, DOL should focus its resources and efforts on implementing the critically important retirement security provisions enacted by Congress in recent years through the *SECURE Act*[14] and *SECURE 2.0 Act*.[15] These bipartisan legislative measures provide clear and appropriate opportunities for DOL to help America's workers and retirees have opportunities to build their retirement nest eggs and enjoy a financially secure retirement.

For the reasons above, we urge DOL to withdraw and cease efforts to adopt the "Retirement Security" (RIN: 1210-AC02) rule proposal and accompanying amendments to the PTEs announced by President Biden at the White House on October 31 and published in the Federal Register on November 3, 2023.

We look forward to your attention on this matter and your response to our request.

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[12] See, e.g., Chamber of Com. v. U.S. Dep't of Lab., 885 F.3d 360 (5th Cir. 2018); Carfora v. Teachers Ins. Annuity Ass'n of America, 631 F. Supp. 3d 125 (S.D.N.Y. 2022); Am. Sec. Ass'n v. U.S. Dep't of Lab., 2023 WL 1967573 (M.D. Fla. 2023); Fed'n. of Ams. for Consumer Choice v. U.S. Dep't of Lab., Case No. 3:22-cv-00243-K-BT (N.D. Tex. June 30, 2023) (Rutherford, Mag. J).

[13] Id

[14] Consolidated Appropriations Act, 2020, Pub. L. No. 116-34, Div. O (2020).

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

Sincerely,

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David Scott
Member of Congress

Ann Wagner
Member of Congress

Henry Cuellar
Member of Congress

Bill Huizenga
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Jake Auchincloss
Member of Congress

Barry Loudermilk
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