April 15, 2024

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

The Honorable Shalanda Young
Director
Office of Management and Budget
1650 Pennsylvania Avenue, NW
Washington, DC 20503

The Honorable Richard Revesz
Administrator
Office of Information and Regulatory Affairs
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Acting Secretary Su, Director Young, and Administrator Revesz:

On behalf of our members across the country, the undersigned organizations write to you concerning significant rulemaking flaws in the regulatory process at your two agencies associated with the Department of Labor's recently proposed "Retirement Security Rule: Definition of an Investment Advice Fiduciary," RIN 1210-AC02. In light of these flaws, we are asking you to stand up for the integrity of the regulatory process and continue the public input process, rather than finalize the fiduciary rule now.

The ramifications of this proposed rulemaking are extensive, making the need for public comment and careful review critical. In the view of many experts, DOL's 2016 rule had devastating effects on low- and middle-income individuals. We anticipate similar impacts should the proposal go final with little change.

- The national accounting firm Deloitte studied 21 financial institutions that represented 43% of U.S. financial advisors and 27% of the retirement savings assets in the market. The study found that as of the DOL rule's first applicability date on June 9, 2017, ***53% of study participants reported limiting or eliminating access to brokerage guidance for retirement accounts, which the firms estimated as impacting 10.2 million accounts and $900 billion AUM.***[1]

- In 2021, the Hispanic Leadership Fund released a study[2] showing the devastating effects of reviving the 2016 fiduciary rule, as would be done by the 2023 proposal. The 2023 proposal would have the most adverse effects on Blacks and Hispanics – reducing their projected accumulated IRA savings by approximately 20 percent over 10 years –

[1] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB82/00599.pdf
[2] https://hispanicleadershipfund.org/wp-content/uploads/2021/11/FINAL_HLF-Quantria_FiduciaryRule_08Nov21.pdf

contributing to ***an approximately 20 percent increase in the wealth gap attributable to IRAs for these individuals.***

It is paramount that the rulemaking process include careful scrutiny and a robust public policy dialogue. We have grave concerns regarding DOL and the Office of Information and Regulatory Affairs' ("OIRA") extremely short review of a major rule that displayed little interest in public input and collaborative discourse.

DOL's process raises questions regarding their interest in public input. For example:

- **President Biden publicly supported finalizing the proposal in its original form prior to the comment period.** In his formal remarks[3] announcing the fiduciary proposal on October 31, 2023, the President made it very clear that he wanted the proposal adopted as proposed, stating: "If this rule is finalized as proposed, it's going to protect workers, and it's going to save for — that are saving for their retirements."

- **DOL rushed the process to finalize the proposal.**
  - **Historically short comment period.** The comment period for the proposal was 60 days, compared to 119 days for the 2010 version of the fiduciary proposal and 105 days for the 2015 fiduciary proposal. Despite the rulemaking period's inclusion of several significant holidays, DOL summarily dismissed stakeholders' requests for an extended comment period.
  - **Unprecedented hearing in the middle of the comment period.** For perhaps the first time in history, DOL held a hearing in the middle of the comment period, rather than waiting for commenters to finish their review of the proposal. As such, stakeholders were prohibited from addressing issues raised in many other stakeholder comment letters in their testimony. An extensive study of substantive retirement rules still in effect concludes that over the past 15 years, DOL spent the shortest time by far finalizing the current fiduciary rule – 66 days – with the next shortest time being 110 days.
  - **Democrats' concerns about process ignored.** On December 20, 2023, Democrat Senators Tester, Peters, Coons, Cardin, Sinema, Hassan, Hickenlooper, and Manchin wrote as follows, all of which was ignored by DOL: *"[W]e believe it is critically important to significantly extend the comment period* . . . In fact, especially because of the history of failed DOL rulemakings on this subject, and the concerns expressed during those processes by retirement savings providers, stakeholders, Members of Congress, and ultimately our court system, it is critical that the public process for any final rule provide enough time and reflect input received during the comment period. . . . [*W]e are concerned that you are rushing this project and the people that will be hurt are the ones you are trying to help the most*." (emphasis added)
  - **Moving too fast to allow for a study of the effects of the proposal.** In the process of moving too quickly to adopt a rule that will have far-reaching effects

[3] https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/10/31/remarks-by-president-biden-on-protecting-americans-retirement-security/

on retirement savers, both the DOL and now OIRA have missed the opportunity to conduct the detailed research that is needed to understand both the intended and perhaps unintended effects of the rule on small balance savers, older savers, new savers, and savers from communities that have experienced and continue to experience wealth and retirement savings gaps.

- **DOL's process appear driven solely by political deadlines, not policy.** The motivation for this rushed process appears to be driven by a May 2024 deadline to ensure that the final rule cannot be subject to a Congressional Review Act vote in 2025. In other words, DOL's efforts are not driven by a desire to get this rule right, but rather by political deadlines. DOL's rush to judgment is further evidenced by its inadequate study of the effects of the proposal, as referenced above and reinforced by a 2024 study:
  - An Oxford Economics Study revealed that "the literature the DOL uses to support its potential benefits of the rule all rest on data from before the effective date of Reg BI."[4]
  - The same study found that "[o]verall, our estimate of one-time upfront costs of $238 million is over six times that of the DOL's estimates of $37 million, and our ongoing annual cost estimate of $2,535 million is almost 11 times that of the DOL's $216 million."

- **<u>OIRA process has been equally dismissive of public input.</u>**
  - **<u>OIRA's review of DOL's fiduciary rules has consistently fallen short of adequate, and OIRA has repeatedly approved invalid fiduciary rules.</u>**
    - On October 22, 2010, DOL published a proposed fiduciary rule – approved by OIRA – that was so lacking in basis that DOL had to publicly announce in September 2011 that it would not be finalized.[5]
    - On April 8, 2016, DOL published a final fiduciary rule – approved by OIRA – that (1) was invalidated by the Fifth Circuit Court of Appeals in 2018[6] as flatly inconsistent with the law, and (2) had well-documented devastating effects on low- and middle-income individuals, as noted above.
    - On December 18, 2020, DOL completely rewrote – with OIRA approval – the definition of a fiduciary in a preamble to a new prohibited transaction exemption,[7] and the core of that new definition has been invalidated by one court, rejected by another court, and is expected to be invalidated by a third court.[8]

---

[4] See figure 8 on page 25 of the Oxford Economics Study at https://media.financialservices.org/wp-content/uploads/2024/01/OE-FSI-DOL-Fiduciary-Rule-economic-analysis-final-January-2024.pdf.

[5] https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32

[6] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F. 3d 360 (5th Cir. 2018).

[7] https://www.govinfo.gov/content/pkg/FR-2020-12-18/pdf/2020-27825.pdf

[8] American Securities Association v. US Department of Labor, 8:22-cv-330-VMC-CPT (M.D. Fla. Feb. 13, 2023); Federation of Americans for Consumer Choice v US Department of Labor, 3:22-cv-00243-K-BT (N.D. TX, June 30, 2023); Carfora v. Teachers Insurance Annuity Association of America, 21 Civ. 8384 (KPF) (S.D. N.Y., September 27, 2022 and August 21, 2023).

- **<u>OIRA showed a clear disregard for public input by the timing of their approval of the final rule on April 10, mere hours after some meetings and before other scheduled meetings, or what OIRA termed "listening sessions."</u>** All of the organizations referenced below are major organizations that deserved to have their views heard and carefully considered.
  - The approval was issued mere hours after OIRA's separate meetings with the Financial Services Institute, the American Bankers Association, and the National Association of Insurance & Financial Advisors.
  - The approval was issued *before* a scheduled meeting on April 12 with the Alternative & Direct Investment Securities Association, whose meeting was canceled without notice.
  - The approval was issued *before* a scheduled meeting on April 15 with a coalition run by Davis & Harman, whose meeting was also canceled without notice.
  - The approval was issued a mere day after meetings with Finseca, the US Chamber of Commerce, and the American Council of Life Insurers.
  - The approval was issued a mere two days after meetings with the Investment Company Institute and the Insured Retirement Institute
  - The approval was issued a mere five days after meetings with SIFMA and the National Association for Fixed Annuities.

The undersigned strongly believe in our governmental processes to develop legislation and regulations. However, we are deeply disappointed and gravely concerned about the process used here. It is reasonable to assume, based on the real-world experience garnered during the two years before the 2016 fiduciary rule was invalidated, that this new DOL retirement security rule will negatively impact the financial security of millions of retirement savers in a significant way. Further, we have serious doubts that the Regulatory Impact Analysis will illustrate that the benefits of this rule justify its cost to millions of American retirement savers.

The impact of the process failures will be felt by millions of low- and middle-income workers, especially those most impacted by the wealth gap and it will deepen the anxiety and widespread retirement insecurity they now have. If the proposed rule is made final, it will make it nearly impossible to access the products and services they need to realize the benefits of the SECURE Act and the SECURE 2.0 Act, two laws that offer measures to strengthen and enhance retirement security and will allow millions more to achieve a secure and dignified retirement.

For the sake of the regulatory process' integrity and to prevent and protect harm from accruing to millions of America's workers and retirees, we ask you to reconsider this rush to judgment and allow for further input and constructive dialogue before this rule is finalized. The consequences of this rule are too significant to be overlooked.

Alternative & Direct Investment Securities Association
American Council of Life Insurers
American Securities Association
Committee of Annuity Insurers
Davis & Harman on behalf of the Broker Dealer Coordination Group
Financial Services Institute
Finseca
Indexed Annuity Leadership Council
Insured Retirement Institute
National Association for Fixed Annuities
National Association of Insurance & Financial Advisors

cc:

The Honorable Sherrod Brown
The Honorable Bill Cassidy
The Honorable Mike Crapo
The Honorable Virginia Foxx
The Honorable Patrick McHenry
The Honorable Richard Neal
The Honorable Bernie Sanders
The Honorable Bobby Scott
The Honorable Tim Scott
The Honorable Jason Smith
The Honorable Maxine Waters
The Honorable Ron Wyden