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Office of Regulations and Interpretations
Employee Benefits Security Administration Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary

Attention: RIN 1210-AC02

Dear Assistant Secretary Gomez,

I respectfully write in support of and to provide comments on the Department of Labor's (Department's) proposed rule, Retirement Security Rule: Definition of an Investment Advice Fiduciary (the Proposed Rule), 88 Fed. Reg. 75890 (November 3, 2023) and the related Prohibited Transactions Exemptions. Unless otherwise stated, I include reference to the PTEs in my discussion of the Proposed Rule.

I have spent more than 30 years as a legal scholar studying benefit plan regulation, particularly with respect to fiduciary duties. Earlier in my career, I worked in human resources at a large plan sponsor and worked in the employee benefits practice of a large law firm. The views I state here are my own and based on that experience.

My professional opinion is that the Proposed Rule and PTEs are imperative to protect the security of U.S. workers' pensions and are well within the Department's authority. Below, I offer some general comments, and then outline the important advancements made by the Proposed Rule, and respond to some of the industry's criticisms.

Overview

The Proposed Rule is essential to ensure that the advice retirement savers receive is governed by a best interest standard in accordance with the fiduciary requirements of the Employee Retirement Income Security Act of 1974 (ERISA). The Proposed Rule is needed to fill existing gaps in protection for retirement savers and to ensure all of their financial advisers live up to the trust those savers place in them.

Over the almost 50 years since the Department issued its first rule on investment advice, the landscape of financial products and employee responsibility for investment decisions in retirement plans has undergone monumental shifts. What has not changed is the primary responsibility that Congress assigned to the Department of Labor to protect Americans' retirement savings. Congress established retirement savings as a category of one. They are tax-advantaged. As employee benefits they must be available on a fair basis to a company's workforce, not just to the top executives. They are protected from creditors.

Currently, though, retirement savers are not sufficiently and uniformly protected from the dangers of conflicted advice. The U.S. financial regulatory system is a patchwork. For retirement savers the patchwork means that, depending on the circumstances and the product being recommended, their trusted providers of investment advice may be subject to ERISA's standards, or to standards promulgated by the SEC or by the states, or to no standards. That patchwork allows some advisers in whom retirement savers place their trust to provide those savers with conflicted advice that erodes savers' assets. Estimates of the costs of conflicted advice vary, but there are costs. Over the working life of a retirement saver, even small costs add up. Using a reasonable estimate of 100 basis points reduction in annual returns, a rollover made at age 45 will decrease a workers' savings by 17 percent at age 65.[1] Those costs are particularly pernicious for women, who accumulate fewer retirement assets because of the wage gap and need to rely on those assets during longer life spans, and for households of color, whose median retirement account balances are half those of white households.[2]

The proposed rule also would provide important protections to plans and plan fiduciaries. Plan fiduciaries are tasked with investment-related decision-making. They must make those decisions in the best interest of the plan, participants, and beneficiaries. They should be able to rely on all of their trusted investment advisers to provide them with advice that meets that same standard and thereby helps the fiduciaries meet their obligations. The cost of conflicted advice across $11 trillion in plan assets is enormous because even slightly lower returns on one investment in a DB plan or on a menu option in a 401(k) plan chosen by many participants proliferate across the plan and participants.

[1] Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* 18 (2015).
[2] GAO, Older Workers: *Retirement Account Disparities Have Increased by Income and Persisted by Race Over Time*, GAO-23-106342, July 2023.

The proposed rule, while modernized to address the monumental shifts in financial products and investment responsibility that have occurred since the promulgation of the 1975 rule, is not itself a monumental shift in regulation and is well within the Department's authority. It hews more closely to the statutory language than did the 1975 rule. The Department's definition of investment advisory actions that give rise to fiduciary status easily fits within the parameters of the statutory definition, which should be the end of the inquiry. It also, though, is consistent with the philosophical view that providing advice is in itself an invitation to trust the giver of advice. Professor Arthur Laby cites that view in explaining that, "an advisor's fiduciary duty arises from the nature of the trust relationship."[3] Furthermore, the proposed rule aligns with 2019 regulatory changes adopted by the SEC for investment products within that agency's jurisdiction.

The 1975 Regulation

The retirement savings environment has changed, as has the Department's knowledge and experience with the regulation of investment advice, since it promulgated the five-part test in its 1975 regulation. In 1975, most ERISA-governed retirement plans were defined benefit plans. Now, most plans are defined contribution plans. Plan fiduciaries establish plan investment menus and individual plan participants are responsible for making the investment decisions on which their retirement security rests. Although 1974 legislation authorized Individual Retirement Accounts (IRAs), many retirement savers could not contribute to them until 1982. It was even later, when retirement savers began to accumulate significant assets in defined contribution plans, that financial services firms began to popularize rollovers to IRAs. Moreover, since 1975, investment products have become more complex. In 2019, the Securities and Exchange Commission (SEC) recognized the increased complexity and the investment challenges individual investors face when it promulgated its regulatory package known as Reg. BI. The Proposed Rule is consistent with the SEC's regulation, but as discussed below fills gaps and ensures uniform protections for retirement savers in today's largely defined contribution landscape.

The five-part test has never been consistent with the statutory language. That language is simple and direct: "a person is a fiduciary . . . to the extent . . . (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . ."

As an example of the problems with the five-part test in the 1975 regulation, one prong requires advice be provided on a regular basis in order for the advice provider to be a fiduciary. Retirement savers may only seek advice at one point or periodically. For example, when they leave employment, they can decide whether to leave their assets in their prior employer's plan, roll them over to another plan or to an IRA, or take a distribution that may be subject to taxation. The decision may be one of the largest financial decisions the saver will make. Few

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[3] Arthur B. Laby, *Advisors as Fiduciaries,* 72 FLA. L. REV. 953 (2020).

savers would choose an investment adviser they knew was not acting in the savers' best interest to provide advice on such an important decision with long-term consequences. Yet, because the investment advice a retirement saver receives at that decision point may be the first and only contact between the saver and the adviser, it does not meet the "regular basis" requirement and the adviser would not be bound by ERISA's fiduciary obligation.

A second example of the problems with the five-part test results occurs due to the prong that requires the advice to serve as a primary basis for investment decisions. This allows advice providers to state in the fine print terms of their engagement that their advice is not to be used as the primary basis for investment decisions. Even if the retirement saver read those terms, it would not be obvious that the result is the saver cannot trust the adviser to provide advice in the saver's best interest.

Plan fiduciaries face similar loopholes when they engage advisers to provide advice on a defined contribution plan's investment menu. Consider the small employer that is establishing a plan. That employer's fiduciary should be able to expect that the menu advice provided by a professional adviser meet the same standards of loyalty and care to which the fiduciary is held. It should not matter that it is the first time the fiduciary has sought advice or that the fiduciary did not scour the fine print of the advisor's terms.

Other Regulation of Investment Advice

Some critics of the Proposed Rule argue that current regulation by the SEC and states is sufficient to protect the interests of retirement savers. They are wrong.

The SEC's Regulation Best Interest (Reg. BI) establishes some standards for investment advice provided to some savers on some investment products. The key words there are "some." Reg. BI's requirements provide important protections, however those requirements do not establish a fiduciary standard for the provision of advice. Reg. BI only applies to investment advice given on products within the SEC's jurisdiction, namely securities. It does not apply to other investment products, such as annuities that are not securities. Nor, does it apply to investment advice given to retirement plans, including defined benefit plans and defined contribution plans such as 401(k) plans. That leaves substantial gaps in the regulation of investment advice provided to retirement savers.

The National Association of Insurance Commissioners developed a model rule, NAIC Model Rule 275, which most states have adopted. The NAIC describes the model rule as "incorporat[ing] a "best interest" standard of care that requires producers to put the consumer's interest ahead of their own."[4] The description is misleading and the model rule's content is inadequate to protect retirement savers. What the description fails to say is that annuity producers are not

[4] NAIC, *The NAIC Annuity Suitability "Best Interest" Model Regulation,* Nov. 2023, https://content.naic.org/sites/default/files/government-affairs-brief-annuity-suitability-best-interest-model.pdf.

subject to a best interest standard of loyalty. The term "best interest" only applies to the standard of care and is no different in substance from a suitability standard. The model rule explicitly states that direct and indirect compensation is not a source of conflicts of interest, even though producers' compensation may be directly linked to the amount and type of products they sell. An annuity producer that recommends an annuity because that particular annuity pays a larger commission or will help the producer meet a sales goal or will ensure the producer wins an expensive trip will meet the requirements of the so-called "Best Interest" Rule so long as the annuity is suitable for the retirement saver. That is inconsistent with any sensible definition of conflicts of interest as well as with the reasonable expectations of retirement savers who look to the annuity producers to provide advice in the savers' best interest. The model rule also states that compliance with the rule does not obligate insurance producers to act as fiduciaries. The bottom line is that the model rule does nothing to attempt to mitigate the serious conflicts of interest that exist when a producer recommends an annuity.

Retirement assets are a category of one. The existing gaps in regulation and the lack of consistently high standards for investment advice threaten the integrity of those assets. The Department has the statutory authority and responsibility to ensure that all of the investment advice provided to retirement savers is given in the savers' best interest regardless of the nature of the investment product being recommended and the status of the saver as an individual or a plan fiduciary.

Rollovers to Individual Retirement Accounts

In 2019, I published an article pointing out that rollovers pose a last mile problem that undermines many of the gains retirement plans have achieved by applying insights from behavioral economics.[5] The data are clear. Generally, default settings work and are sticky. Automatic enrollment, escalation, and allocation increase retirement savings and investment diversification. The one default setting that is slippery is automatic retention. Above a set threshold, plans must retain the account assets of participants who leave employment unless the participant requests a distribution or rollover.[6] That default to keep assets in the plan often operates to the advantage of participants. A plan fiduciary has screened and continues to monitor the plan's investment menu, and institutional fund classes have lower fees than equivalent retail funds. In addition, participants retain all of the other benefits of ERISA's plan regulation.

Yet, in this and only this default setting, the default fails. That failure has been consistent over time and adds up to trillions of dollars of retirement savings. Between 1998 and 2007, more

[5] Dana M. Muir, *How Behavioral Science Ultimately Fails Retirement Savers: A Noble Experiment,* 56 AM. BUS. L.J. 707 (2019).
[6] Under Secure 2.0, beginning January 1, 2024 companies may cash out balances under $1,000 and may directly rollover balances of up to $7,000 to an IRA.

than 80% of the money that flowed into IRAs came from qualified plan rollovers.[7] In 2020, the most recent year for which I have IRS data, nearly 5.7 million Americans rolled over more than $618 billion and IRA assets currently total approximately $13 trillion.

I found in my research that both general behavioral observations and economic analysis indicated direct and indirect conflicted advice plays a role in overcoming automatic retention and in encouraging rollovers. A typical retirement saver only will make a decision to rollover plan assets once or a few times. They might never realize that the conflicted advice they followed reduced their retirement assets or they may only discover that many years later. As a result, that retirement saver has little to no ability to learn from the mistake of following conflicted advice.[8] That weakens the strength of the default setting. When an interested party with access to the saver, in this situation the provider of an IRA, recommends a rollover that is in the interested party's best interest, it should not be surprising that the saver who already has a behavioral inclination for a simple solution relies on the advice.

Scope of the Proposed Rule

Some critics have argued that the Proposed Rule exceeds the Department's authority. That argument has no basis in fact.

First, as I noted above, the statutory language is broad in its definition of when someone becomes a fiduciary by providing investment advice on plan assets for a fee. None of the limitations of the 1975 five-part test is present in the statute. The Department's identification in the Proposed Rule of investment advisory actions that give rise to fiduciary status easily fits within the parameters of the statutory definition, which should be the end of the inquiry.

Some critics, though, allege that the Proposed Rule exceeds the Department's authority and rely on the Fifth Circuit Court of Appeals' rationale in *Chamber of Commerce of the United States v. United States DOL.*[9] That decision nullified a regulation on investment advice the Department had promulgated in 2016 (2016 Final Rule).[10] I believe that the majority's rationale in that opinion was wrong. It held that the 2016 Final Rule conflicted with the statutory language because it expanded the definition of fiduciary beyond the common law definition of fiduciary from the law of trusts.

In fact, however, if Congress had wanted to limit ERISA fiduciary status to the trust law definition, it could have done so. It did not. As I have explained elsewhere, "ERISA's definition of

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[7] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-119, 401(K) PLANS: IMPROVED REGULATION COULD BETTER PROTECT PARTICIPANTS FROM CONFLICTS OF INTEREST 37 (2011), https://www.gao.gov/products/GAO-11-119.
[8] Muir, *supra* note 5, at 730-31.
[9] 885 F.3d 360 (5th Cir. 2018).
[10] *Definition of the Term "Fiduciary": Conflict of Interest Rule—Retirement Investment Advice,* 81 Fed. Reg. 20946 (Apr. 8 2016).

who is a fiduciary encompasses the traditional trustee, *but casts a broad enough net to sweep in many others* who act vis-a-vis employee benefit plans. Generally, individuals become ERISA fiduciaries whenever, and to the extent that, they have discretion over the assets, management, or administration of a benefit plan or are paid to provide investment advice to a plan."[11] There was no actual conflict between the 2016 Final Rule and the statutory language.

The *Chamber of Commerce* majority also erred in its analysis of the language of the investment advice prong of ERISA's functional fiduciary definition. As the Supreme Court wrote in *Bostock v. Clayton County,* "This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."[12] Whether in 1974 or today, the public meaning of investment advice encompasses advice on investments. There is no magic in those words. The word "advice" is widely understood and includes guidance and recommendations. In the context of plan assets, the term investment also is easily understood as being broad and including any product, venture, commercial item, or mechanism that might be a plan asset. According to the statute, someone who provides investment advice regarding plan assets for direct or indirect compensation is a fiduciary. As the dissent in *Chamber of Commerce* recognized, "Nothing in the phrase 'renders investment advice for a fee or other compensation' suggests that the statute applies only in the limited context accepted by the panel majority."[13]

Finally, because the Department's 2016 Final Rule was consistent with ERISA's text, *Chevron's* reasonableness test does not apply. For the sake of argument, though, the 2016 Final Rule met that test. The Department offered a reasoned explanation for its update of the 1974 regulation.

For the moment though, consider the result if I accept, for the sake of argument, the Fifth Circuit majority's cramped and nontextual standard that the statutory definition of fiduciary investment advisers is limited only to those who have a relationship of trust and confidence with their advisees. The result is clear. The Proposed Rule easily meets that standard.

To summarize, the Proposed Rule limits the actions that would result in fiduciary status to: (i) persons with discretionary authority or control over plan investments (discretionary control), (ii) persons who as part of their business regularly make investment recommendations to investors and the circumstances surrounding the recommendation in question indicates the advice is based on the particular needs or circumstances of a retirement saver who may rely on the advice as a basis for an investment decision in the saver's best interest (professional adviser), or (iii) the adviser represents or acknowledges they are a fiduciary adviser. It is difficult to see how any reasonable person could argue that someone with discretionary control over

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[11] Dana M. Muir, *Fiduciary Status As an Employer's Shield: The Perversity of ERISA Fiduciary Law*, 2 U. PA. J. LAB. & EMP. L. 391, 395 (2000) (emphasis added).
[12] 140 S. Ct. 1731, 1738 (2020).
[13] 885 F.3d at 391.

plan investments or someone who represents themselves as a fiduciary would not be in a relationship of trust and confidence with their advisees.

The definition of professional adviser also reflects a relationship of trust and confidence. First, it only includes professional investment advisers – those who regularly make investment recommendations as part of their business. Among that limited set of advisers, a provider of investment advice also must provide the recommendation under circumstances indicating the recommendation is based on the particular needs or individual circumstances of the retirement saver. Generic information in advertising or marketing, even if distributed by a professional adviser, would not subject the adviser to ERISA's fiduciary standard. Finally, the circumstances must indicate the retirement saver may rely on the advice as a basis for investment decisions in the saver's best interest. The multiple prongs of this standard work together to capture situations where a retirement saver receives tailored advice from a professional advice provider and the circumstances indicate the saver can rely on the advice as a basis for investment decisions in the saver's best interest. In that situation, a retirement saver legitimately and reasonably should expect the relationship to be one of trust and confidence.

If providers of advice do not want to be ERISA fiduciaries, they can avoid providing advice under any of the three prongs that give rise to fiduciary status. On the other hand, an adviser that meets one of these prongs has actively chosen to establish a relationship of trust and confidence. In those situations, the adviser will, and should, be an ERISA fiduciary.

Summary

Thank you for the opportunity to comment on the Proposed Rule and the associated PTEs. I reiterate my strong support for that rule. It will fill existing gaps in the regulation of investment advice and provide important protections for retirement savers who rely on the professionals who advise them to provide advice that is in those savers' best interest.

Very truly yours,

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