RITA
RETIREMENT INDUSTRY TRUST ASSOCIATION

December 28, 2023

Julie Su
Secretary
United States Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Re: Request for Comment on Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary

Dear Secretary Su,

On behalf of the Retirement Industry Trust Association ("RITA"), we appreciate the opportunity to comment on the proposed rule issued by the Department of Labor (the "Department") on November 3, 2023, which updates the definition of investment advice fiduciary under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[1] We believe that this rule will provide much-needed protection for retirement investors with self-directed individual retirement accounts ("self-directed IRAs") who seek to diversify their portfolios by investing in alternative assets, as permitted by the Internal Revenue Service ("IRS").[2] Specifically, this rule will regulate certain activities performed by sponsors and dealers of alternative assets, helping to safeguard investors against scams, exploitation, and undisclosed risk.

RITA is a professional trade association dedicated to the expansion of opportunities for all Americans to save and invest for retirement. Founded in 1987, our association is comprised of regulated banks, trust companies, and industry-related professionals. We exist to be the leading educator and advocate for the self-directed retirement plan industry by providing resources, information, communication, and support to our members and their customers.

Our members serve as custodians of self-directed IRAs, collectively holding nearly $134 billion in alternative investment assets in the self-directed retirement accounts of their customers. Their customers are individual retirement investors who choose to invest their savings in alternative assets through self-directed IRAs. These investors tend to value the flexibility and diversification that alternative assets can offer. The diversifying effect of alternative assets is specifically important to investors, because these assets may not be as correlated to the stock market, giving investors more options and control over their retirement planning. Self-directed

---

[1] 88 FR 75890.

[2] These alternative assets include, among others, precious metals, real estate, cryptocurrency, and private equity and debt.

IRA assets can also be used as a source of capital to fund small businesses, create jobs, and invest in the local economy.

However, self-directed investors also face significant risks and challenges due, in part, to the limited patchwork of laws, regulations, and government agencies that govern the dealers and sponsors of alternative assets (referred to herein as "alternative asset sponsors"). Unlike traditional securities, alternative assets may not be subject to many of the disclosure, valuation, and oversight standards set by the Securities Exchange Commission ("SEC") and other federal regulators. Instead, the laws governing alternative assets vary from state to state, with little consistency between them, creating "gaps" in the protections available to those who invest in alternative assets. These gaps, in turn, can create opportunities for unscrupulous alternative asset sponsors to take advantage of investors by providing misleading or fraudulent information, or engaging in other abusive practices. While RITA recognizes that the vast majority of alternative asset sponsors are responsible business practitioners who seek to help investors prepare for their retirement, the potential for "bad actor" asset sponsors to exploit investors requires the type of regulation presented by the Department's proposed rule.

Two recent examples of particularly egregious actions by alternative asset brokers demonstrate the need for this regulation. In 2019, the SEC obtained a $1 billion judgement against Woodbridge Group of Companies LLC and its former owner for operating a Ponzi scheme that defrauded 8,400 retail investors by selling them unregistered securities backed by purported loans to property owners.[3] Many of the defrauded investors were seniors who were convinced to invest their retirement funds in this scheme. Similarly, in 2017, the Commodity Futures Trading Commission ("CFTC") and 30 state regulators filed a joint civil enforcement action against two precious metals dealers for engaging in a $185 million fraudulent scheme targeting inexperienced, elderly investors across the country.[4] These precious metals dealers sold the elderly individuals vastly overpriced gold and silver coins, falsely claiming that they were safe, liquid investments.

While both of these examples fortunately resulted in federal enforcement against the bad actors, they required that the asset sponsors engage in large-scale fraud in order for the state and federal agencies to take action on behalf of the investors. This is too high a bar for relief for wronged investors, which fails to capture all of the potential harms to self-directed investors. There are, unfortunately, numerous ways that bad actors can take advantage of self-directed retirement investors without committing fraud or other financial crimes. They can rely on overvaluations of an asset's worth, or present optimistic projections of an asset's potential growth without disclosing the risks of investing in the asset. These activities may not be actionable under the existing laws and regulations in some jurisdictions, but they can harm investors nonetheless.

Although our members strive to educate and inform their customers about the risks and benefits of alternative assets, they recognize that there is only so much that they can do, as self-directed IRA custodians, to protect customers against potential bad actors. As custodians, our members

---

[3] SEC.gov, "Court Orders $1 Billion Judgment Against Operators of Woodbridge Ponzi Scheme Targeting Retail Investors," https://www.sec.gov/news/press-release/2019-3.
[4] CFTC.gov, CFTC and 30 States Charge Los Angeles Precious Metals Dealers in Ongoing $185 Million Fraud Targeting the Elderly," https://www.cftc.gov/PressRoom/PressReleases/8254-20.

do not provide investment advice to their self-directed IRA customers, do not perform due diligence on their behalf, and do not endorse any specific asset sponsors or investment assets. Indeed, our members do not purport to have the expertise or ability to perform these functions, and doing so would undermine the purpose of self-directed IRAs. Instead, our members' role is simply to execute the directions of their customers and hold the assets in their customers' accounts. Still, our members recognize the potential harms that can befall their customers. Therefore, we strongly support the Department's efforts to extend the fiduciary duty rule to include certain actions taken by alternative asset sponsors who provide investment advice to retirement investors.

The proposed rule would amend the regulatory definition of the term "fiduciary" to more appropriately define when a person provides retirement investment advice in the nature of a fiduciary, within the meaning of ERISA and the Internal Revenue Code. We believe that this rule, if adopted, will help to safeguard self-directed investors against potential exploitation, as it would apply to alternative asset sponsors who engage in certain covered activities while soliciting investors to purchase their investment products.

Specifically, we support the expansion of the "regular basis" test of the fiduciary rule. Under the proposed definition, alternative asset sponsors who make individualized retirement investment recommendations to customers and potential customers as a regular part of their business would be considered fiduciaries. Sponsors who do so would be subject to fiduciary liability if they fail to act in the best interests of the investor. We read the proposed rule as applying to asset sponsors who regularly market and sell their investment products to individuals, using their understanding of a given individual's financial situation to advise that the individual purchase their products as retirement investment assets. Such asset sponsors would—for example—be prohibited from relying on inflated valuations and uncritical growth projections when recommending investment assets to potential investors. Asset sponsors would also be required to understand individual investors' risk profiles and investment goals, and to account for them in recommending that the investor purchase the sponsor's assets.

Likewise, the proposed rule would explicitly apply to asset sponsors who advise individuals to "roll over" their investment accounts. For example, if a precious metals dealer were to provide individualized advice or a recommendation to an individual to roll over their 401(k) or traditional IRA into a self-directed IRA so that the individual could invest in gold and silver, and does so on a regular basis, the precious metals dealer would be considered a fiduciary under the proposed rule. The precious metals dealer would therefore be required to act in the best interest of the individual with respect to providing the rollover advice, and would be prohibited from advising that the individual roll over their account if doing so would be imprudent, based on all of the facts and circumstances affecting the investor. This requirement will empower investors and help to ensure that alternative asset sponsors provide prudent advice and recommendations based on reliable valuations, projections, and other information, or—alternatively—refrain from providing investment advice and recommendations in the course of marketing their products.

In addition to creating a duty for alternative asset sponsors to act in the best interest of investors when providing investment and rollover recommendations, we believe the proposed rule will have other positive effects.

First, the proposed rule would set a nationwide standard of accountability and transparency for alternative asset sponsors. States would still be free to regulate those asset sponsors as they see fit, but the legal "gaps" created by the patchwork of state laws will be significantly reduced, creating stronger, more consistent protections for self-directed investors. Second, the heightened standard should increase consumer confidence in investing in alternative assets, allowing more consumers to appropriately diversify their investment portfolios to prepare for retirement. And third, the increased accountability and scrutiny of alternative asset sponsors providing investment advice would likely discourage bad actors from attempting to take advantage of investors in the first place. The combined effect of this proposed rule would be to create a fairer, more transparent alternative asset market that would allow investors to feel a greater sense of trust and security in the quality of their investment assets.

In conclusion, because the proposed fiduciary rule is likely to provide increased protection for all retirement investors—including those that invest in self-directed IRAs—we strongly support its adoption. We commend the Department for its efforts in proposing this rule, and we thank you for your consideration of our comments.

Sincerely,

Mary L. Mohr

Executive Director

The Retirement Industry Trust Association