January 2, 2024

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Re: Definition of Fiduciary (RIN 1210–AC02)
Amendment to PTE 2020-02 (ZRIN 1210-ZA32)
Amendment to PTE 84-24 (ZRIN 1210-ZA33)
Amendment to PTEs 75-1, 77-4, 80-83, 83-1, 86-128 (ZRIN 1210-ZA34)

Dear Sir or Madam:

Charles Schwab & Co., Inc., ("Schwab") appreciates the opportunity to submit a comment on the Department of Labor's proposal to expand the definition of investment advice fiduciary and modify several prohibited transaction exemptions (the "Proposal"). *See* Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75979 (Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76004 (Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76032 (Nov. 3, 2023).

We respectfully urge the Department to withdraw its Proposal, rather than embark on an ill-fated sequel to its 2016 rulemaking in this area. Our concerns are several.

First, the Department's proposed definition contradicts the statutory text and contravenes the Fifth Circuit's decision in *Chamber of Commerce of United States of America v. United States Department of Labor*, 885 F.3d 360 (5th Cir. 2018), which vacated the Department's last attempt to impose an overbroad definition of "fiduciary" under ERISA and the Tax Code. The term

"fiduciary" is not ambiguous, and may not be construed to capture broker-dealers and other financial professionals giving one-time advice. That the Department's proposed definition would encompass such personnel is, therefore, a fatal flaw. None of the fiduciary "contexts" the Department includes in the Proposal ameliorates its overbreadth. On the contrary, they highlight the Department's wholesale abandonment of common-law hallmark of a fiduciary status: a special relationship of trust and confidence.

Second, the Proposal circumvents statutory limits on the Department's regulatory authority, which plainly does not extend to policing IRAs, as the Fifth Circuit held in *Chamber of Commerce*. The inappropriateness of the Proposal is even clearer now than it was five years ago, in light of the Supreme Court's repeated invocation of the major questions doctrine to invalidate sweeping changes undertaken without clear statutory authority.

Third, the Department fails to provide a coherent rationale for the Proposal's adoption, which would result in regulatory confusion, not "uniformity," and undermine key regulatory developments of the last several years. And the fact the Proposal is animated by the Department's dissatisfaction with requirements administered by agencies expressly empowered to regulate financial services—the SEC and state insurance regulators—only confirms that the Proposal exceeds the Department's own regulatory ambit.

Finally, in tallying the massive costs of the Proposal, the Department fails to account for entire categories of costs and understates others. Meantime, the Department admits, as it must, that any benefits of this massive regulatory intervention are even less today than they were in 2016, because of the substantial changes in the financial markets and regulatory environment over the past seven years. The Proposal is a solution in search of a problem.

Altogether, the Proposal is wrong as a matter of law and policy, and is destined to meet the same fate as its 2016 predecessor. There are ample opportunities for industry and the Department to partner on expanding the accessibility and affordability of investment advice, where our collective energies would be better expended. The Department should dedicate its efforts there, and not proceed further with this mistaken rulemaking.

I. About Schwab and Our Clients

Schwab is one of the largest financial institutions in the United States with over $8.18 trillion in total client assets (combined data for Schwab and TD Ameritrade) under custody. Schwab's business model offers high-value, low-cost investment services to individual investors and the independent investment advisors, employers, and third-party administrators who serve them. Together with its affiliates, including Charles Schwab Trust Bank and Schwab Retirement Plan Services, Inc., Schwab provides a full range of advisory, brokerage, recordkeeping, and trust/custodial services for retirement plans, participants and beneficiaries, and IRA owners. Schwab's affiliates, Charles Schwab Investment Management, Inc. and Charles Schwab Trust Bank, offer mutual fund, exchange traded fund, and collective trust fund investment vehicles.

Schwab serves a wide range of investors with 5.2 million corporate retirement plan participants and almost 8 million IRAs in our retail business alone. Nearly thirty percent of all retail households at Schwab have at least one IRA. Over 15,000 independent registered investment advisors and their clients choose Schwab to custody their brokerage and retirement accounts and to provide trading and investment services. Schwab provides customers access to hundreds of branch offices, national call centers with 24/7 service, and thousands of pages of online information and resources. While a majority of our clients are self-directed investors who rely on online tools, research, and education to make their own informed investment decisions, a substantial and growing number seek occasional individualized guidance or ongoing investment advice for a reasonable fee.

II. The Proposal Deviates from the Plain Meaning of "Fiduciary" and Contravenes the Fifth Circuit's 2018 decision in *Chamber of Commerce*.

The Proposal is far from the Department's first on this subject. In 2016, the Department sought to reshape the finance and insurance industries by redefining "investment advice fiduciary" under the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 ("ERISA") (the "2016 Rule"). *See* Definition of the Term ''Fiduciary'': Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

Then, as now, the Department found fault in the 80-year-old legal framework that distinguishes between investment *advice* and investment *sales*, as well as the 50-year-old statutory framework that differentiates between employer-sponsored and individually-established

retirement savings plans. In the Department's view, these longstanding distinctions inadequately "protect[] plans, participants, beneficiaries, and IRA owners." *Id.* at 20946/3. In response, the Department in 2016 purported to "modernize" the term "fiduciary" and its coverage of professionals who give investment advice "for a fee or other compensation, direct or indirect." *Id.* at 20946-47. The change would have brought tens of thousands of salespeople under the fiduciary rubric, at a cost of billions of dollars. 81 Fed. Reg. at 20951/2.

In the litigation that followed the Fifth Circuit set aside the Department's rule in its entirety, terming the rulemaking an "abuse of power." *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360, 387-88 (5th Cir. 2018). The Fifth Circuit held that fiduciary status was "not ambiguous" in the statutory text. *Id.* at 369. Rather, the term had a straightforward, common-law meaning, denoting a "relationship of trust and confidence." *Id.*

In the 2016 rulemaking and subsequent litigation, the Department conceded that its broad definition of fiduciary was inconsistent with the common-law standard. *Id.* at 371. Now, the Department claims its current Proposal is "responsive to the Fifth Circuit's" decision—which affirmed the centrality of fiduciary's common-law meaning—but in fact the Proposal's redefinition of investment-advice fiduciary is little more than a do-over of the 2016 Rule. 88 Fed. Reg. at 75901/1. The Department again defines "fiduciary" in an expansive manner that draws in countless circumstances where there is no relationship of trust and confidence.

A. The Plain Meaning of "Fiduciary" Does Not Encompass Investment Sales Relationships or One-Time Advice.

The Department proposes three so-called "contexts" in which financial professionals may be deemed fiduciaries, none of which are consistent with a relationship of trust and confidence. But as a threshold matter, the Proposal falters because each "context" can be triggered by a single "recommendation."

For more than 80 years, federal and state laws have distinguished between two categories of financial professionals. On the one hand, investment advisers provide ongoing investment advice to clients, receiving compensation for that advice through a periodic or hourly fee. On the other hand, salespeople—such as brokers, dealers, and insurance agents—sell investment and insurance products, ordinarily receiving compensation on a transaction basis. In short, investment

advisers "are paid fees because they 'render advice,'" whereas salespeople "are compensated only for completed sales." *Chamber*, 885 F.3d at 373.

Salespeople, though they may offer incidental advice during an arms-length transaction, are not fiduciaries of prospective customers. *See, e.g.*, *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 113-14 (N.D. Ala. 1971) (broker not a fiduciary), *aff'd*, 453 F.2d 417 (5th Cir. 1972); Hughes, Exchange Act Release, No. 4048, 1948 WL 29537, at *7 (Feb. 18, 1948), *aff'd, Hughes v. SEC*, 174 F.2d 969 (D.C. Cir. 1949); *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.). The Department recognized as much when it first defined "investment advice fiduciary" in 1975 (the "1975 Rule"). 29 C.F.R. § 2510.3-21(j). That definition, which remains in place today, captured the hallmark of a fiduciary relationship at common law: a special relationship of trust and confidence. *See* George G. Bogert, George T. Bogert & Caryl A. Yzenbaard, *Bogert's Trusts & Trustees* § 481 (2016 update).[1] Crucially, the 1975 Rule limited fiduciary status to professionals who confer with their clients "on a regular basis," play a "primary" role in guiding those clients' investment decisions, and maintain that relationship with each client based on "a mutual . . . understanding." 29 C.F.R. § 2510.3-21(j).

Under the 2016 Rule, an individual was treated as a fiduciary if he received compensation as a result of a single "recommendation as to the advisability of" buying, selling, or managing "investment property." 81 Fed. Reg. at 20997/2. The term "recommendation" was defined extraordinarily broadly to include any "communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action." *Id.* at 20997/3. The Fifth Circuit in *Chamber of Commerce* held that this definition demolished the distinction between advisers and salespeople, which "flowed directly from contemporary understanding of 'investment advice for a fee.'" 885 F.3d at 374. The Fifth Circuit instead endorsed the 1975 Rule which "contemplated an intimate relationship between adviser and client beyond ordinary buyer-seller interactions." *Id.*

[1] The 1975 Rule defined an investment-advice fiduciary as someone who (1) "render[ed] advice as to the value of securities or other property, or [made] recommendation[s] as to the advisability of investing in, purchasing, or selling securities or other property"; (2) "on a regular basis"; (3) "pursuant to a mutual agreement, arrangement or understanding," with the plan or plan fiduciary; (4) where the advice "serve[d] as a primary basis for investment decisions with respect to plan assets"; and (5) the advice was individualized "based on the particular needs of the plan." 29 C.F.R. § 2510.3-21(j).

The current Proposal repeats the 2016 Rule's error of capturing routine sales conduct. The proposed regulatory text this time does not include a definition of the term "recommendation." But the Department in the preamble states that it ascribes the same broad meaning, using language pulled directly from the 2016 Rule's regulatory text. *See* 88 Fed. Reg. at 75904/1. The Department cannot cure a major problem with its 2016 Rule through an act of omission.

And the omission actually broadens the scope of the current Proposal. The 2016 Rule's regulatory text provided that "the more individually tailored the communication is to a specific advice recipient or recipients, . . . the more likely the communication will be viewed as a recommendation." 81 Fed. Reg. at 20997/3. While it allowed generalized sales pitches to serve as the basis for fiduciary status, the 2016 Rule's regulatory text at least suggested that communications which were not individualized were less likely to be a "recommendation." The Department now, however, relegates that soft limitation to the preamble only. A preamble is not law. *Wilgar Land Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 85 F.4th 828, 837 (6th Cir. 2023) ("preambles" cannot be used to modify "substantive duties"). The Proposal's regulatory text instead merely requires that a recommendation be made "to" the investor, and two of the three pathways to fiduciary status (discussed below) have no requirement that the recommendation even be "provided under circumstances indicating that [it] is based on the particular needs or individual circumstances of the retirement investor." 88 Fed. Reg. at 75977/2; *Bittner v. United States*, 598 U.S. 85, 94 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."). As discussed below, the Proposal thus sweeps in generalized sales pitches not directed to any particular person.[2]

The Proposal thereby makes a salesperson's performance of something a fiduciary may *not* do—selling a financial product—the basis to conclude the salesperson *is* a fiduciary. *See* 26 U.S.C. § 4975(c)(1), 29 U.S.C. § 1106(b). The Fifth Circuit specifically held that this aspect of the 2016

[2] The Proposal uses the term "retirement investor" to obscure the distinctions between the investments an individual holds in an ERISA plan, in an IRA, and in a brokerage account. In the Proposal's parlance, the ERISA account and IRA each make the individual a "retirement investor," which in turn supposedly makes all three accounts retirement-related and, therefore, appropriate subjects of the Department's regulatory attention. But the Department cannot use the non-statutory term "retirement investor" to wish away the fundamental differences among the legal regimes established by Congress for ERISA plans, IRAs, and securities investments.

Rule "mixe[d] apples and oranges" and was proof positive that the Department's fiduciary definition was impermissibly overbroad. *Chamber*, 885 F.3d at 382. The Department nevertheless doubles down, "reject[ing] the purported dichotomy between a mere 'sales' recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products." 88 Fed. Reg. at 75907/2. But its position has been squarely rebuffed by the Fifth Circuit and contravenes decades of federal law that draws just such a distinction.[3]

The Department protests that its "approach" is "similar to that taken by the SEC and FINRA in the broker-dealer context." 88 Fed. Reg. at 75904/2. But as explained above and confirmed by the Fifth Circuit, the default is that broker-dealers are *not* fiduciaries. *Chamber*, 885 F.3d at 373-76. The Department may not use the fact that the SEC has placed heightened duties on broker-dealers as a basis to treat broker-dealers as fiduciaries. Rather, the fact its "fiduciary" definition effectively sweeps in all broker-dealers is compelling evidence of its overbreadth.

The rule's overbreadth is evident, too, in the types of "investment transaction[s]" and "investment strateg[ies]" that trigger fiduciary status, when recommended by a financial professional. *See* 88 Fed. Reg. at 75978/3-7931. Most notably, the Proposal replicates the 2016 Rule's coverage of all rollovers from an ERISA Title I plan or an IRA. Yet as the Fifth Circuit explained, "it is ordinarily *inconceivable*" that a "one-time IRA rollover" is fiduciary advice. *Id.* at 380 (emphasis added).

Under the Proposal, moreover, mere "hire me" conversations—that is, pitches for a professional's or firm's services—may be denominated fiduciary advice. The Department candidly admits that the Proposal would cover "hire me" conversations if paired with discussion of what the professional or firm might actually do with the investor's assets. *See* 88 Fed. Reg. at 75906/1-2. But it is standard practice for a request for proposal to ask firms to describe, for

[3] In adopting the 2016 Rule, the Department attempted to partially correct for its overbreadth by carving out certain transactions involving ERISA Title I plans with more than $50 million in assets. The Department did so "to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser." *See* 81 Fed. Reg. at 20980/1-2, 20999/3. The Fifth Circuit held that the carve-out was "arbitrary and unreasonable" because "[o]nly DOL's fiat support[ed] treating smaller-scale sales pitches" as fiduciary advice. *Chamber*, 885 F.3d at 382. In its new Proposal, by retaining the "fiat" and removing the carve-out, the Department has deepened the problem, not solved it.

example, what investment strategies they would consider or what 401(k) menu options they could offer.[4] Without such basic information, the sales pitch would have little to pitch. The Department's claim to have excluded pure "hire me" conversations is therefore inaccurate.[5]

The Department errs, too, in treating referrals as "no different than recommendations of investments." 88 Fed. Reg. at 75905/3. A referral is merely a recommendation of another person who might be able to give investment advice; it is not itself investment advice. The Department may not make it so through diktat.

B. The Proposal's Three Fiduciary "Contexts" Do Not Cure the Definition's Overbreadth.

The Department's three proposed pathways to fiduciary status—what it calls "alternative contexts," 88 Fed. Reg. at 75901/2—do nothing to narrow the overbreadth described above. We discuss each pathway in turn.

1. The Proposal first provides that a person is a fiduciary with respect to an investment recommendation if he, "directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor." *Id.* at 75977/2.

Far from limiting the scope of the investment-advice fiduciary definition, this broad provision has no resemblance to the common-law relationship of trust and confidence between an adviser and the advised. Rather, this "context" imputes fiduciary status based on a relationship between the investor and *someone else*, even if that other person does not manage assets in an ERISA Title I plan or IRA.[6] The regulatory text is so capacious that it could be triggered by an affiliate's management of a mutual fund or ETF that the investor purchased. Under this language,

[4] We also discuss platform providers below. *See infra* at 10 & 13 n.9.

[5] The Department's claim is also belied by its proposal to amend PTE 2020-02 to prohibit "differential compensation," which the preamble explains is targeted in part to forbid "paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas." 88 Fed. Reg. at 75987/1.

[6] The 1975 Rule, by contrast, covers persons whose affiliates have "discretionary authority or control . . . with respect to purchasing or selling securities or other property for *the plan*." 29 C.F.R. § 2510.3-21(c)(1)(ii)(A) (emphasis added).

if an investor has a single dollar managed by a far-flung affiliate of a firm that employs a broker-dealer, that is enough to make the broker-dealer a fiduciary with respect to the investor. The inevitable result is that entire companies would become ERISA fiduciaries, or else would need to completely spin off operations concerning ERISA-covered assets or IRAs into separate, unaffiliated companies.

The Proposal's first fiduciary "context" would even pull in broker-dealers based on their mere execution of transactions for accounts that are neither ERISA-covered nor IRAs. The 1975 Rule contains an exception intended to cover such transactions, and the Proposal would retain it without material modification. *See* 29 C.F.R. § 2510.3-21(d)(1); 88 Fed. Reg. at 75910/3 (noting that the "[p]roposed paragraph (d) of the regulation is identical to paragraph (d) of the 1975 regulation, apart from updated references"). But that exception only applies to limit orders—i.e., orders for which "[t]he instructions specify . . . a price range within which such security is to be purchased or sold." 29 C.F.R. § 2510.3-21(d)(1)(i); 88 Fed. Reg. at 75978/1. Schwab's order flow, like that of many other financial institutions, is overwhelmingly "market orders" that do not specify a price range. The exception's restricted application to limit orders may make sense in the context of the 1975 Rule, under which a broker-dealer would be a fiduciary if it "[has discretionary authority or control . . . with respect to purchasing or selling securities or other property for *the plan*." 29 C.F.R. § 2510.3-21(c)(1)(ii)(A) (emphasis added). But it fails to provide meaningful relief from the Proposal's first fiduciary "context," which creates fiduciary status based on authority or control over assets not held in ERISA-covered accounts or IRAs.[7]

The overbreadth of this first "context" is exacerbated by the Department's sweeping concept of what constitutes a recommendation, which—as discussed above—is uncabined by any regulatory definition. Consider a broker-dealer or insurance agent, employed by a large financial firm, who speaks at a conference or hosts an event pitching her services to a group of potential clients. Under the Proposal, she risks becoming a fiduciary if she tells the audience that she thinks the market might be undervaluing a particular stock—or even observes that, based on economic trends, she sees upside to investing in stocks instead of bonds—because she cannot know whether anyone in the crowd has money managed by an affiliate of her financial firm.

[7] At minimum, the Department should clarify in the regulatory text that a market order—i.e., an order to purchase or sell at the market price—qualifies as a "price range."

This imputation of fiduciary status based on the authority of an affiliate over other investment property of an IRA owner also threatens to sweep in online educational tools. Many investors elect to make their own investment decisions, relying on online tools such as calculators, screeners, portfolio analyzers, planning tools, and investment research on stocks, bonds, mutual funds, and ETFs. The "research" tab on schwab.com alone averages approximately 1 million page views per day. If an affiliate of a company offering those tools has discretionary control over any of an investor's funds, all of those tools could be alleged to be fiduciary recommendations with respect to the investor's ERISA-covered assets or IRA. We appreciate that the Department in 2020 reinstated IB 96-1, which addresses investment education, and that the Department indicates in the preamble to the Proposal that IB 96-1 "would continue to provide accurate guidance." 88 Fed. Reg. at 75911/1. But guidance is not law, and provides cold comfort to firms and individuals who could face private lawsuits under ERISA as a result of the Proposal. The result will be that firms would provide fewer and less helpful educational resources.

Finally, the Department offers the purported assurance that "platform providers who merely identify investment alternatives using objective third-party criteria (*e.g.*, expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation." 88 Fed. Reg. at 75908/1. But the unconstrained breadth of the term "recommendation" could easily encompass menu-building. And the Proposal's first fiduciary "context" creates a roadmap for alleging that a platform provider is acting as a fiduciary to plan participants. In Schwab's case, for example, an individual might have both an employer-sponsored 401(k) for which Schwab is the platform provider, and a separately managed account advised by a Schwab affiliate. The Proposal could thus make Schwab a fiduciary for that individual with respect to the 401(k) plan because he has a separately managed account managed by a Schwab affiliate. Yet under the Proposal, Schwab presumably would not be a fiduciary for other plan participants who do not have separately managed accounts under Schwab's discretionary management. That result is inconsistent and illogical.

2. The Proposal's second "context" is similarly broad. It makes a person or firm a fiduciary with respect to an investment recommendation if "**[a]** directly or indirectly (*e.g.*, through

or together with any affiliate)," the person or firm "makes investment recommendations to investors on a regular basis as part of their business and **[b]** the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." *Id.* at 75977/2.

Prong (a) is no limitation at all. It can be met entirely by the actions of an affiliate that has no relationship whatsoever with the investor. The Department insists that this requirement "avoids concerns that the rule could sweep so broadly as to cover, for example, the car dealer who suggests that a consumer finance a purchase by tapping into retirement funds." 88 Fed. at 75902/1. Avoiding that absurd outcome, however, is hardly vindication of a rule that makes a broker-dealer a fiduciary simply because an *affiliated entity* employs investment advisers regulated by the Investment Advisers Act of 1940. The Department is simply wrong in saying that prong (a) only captures persons who are "in the business of providing investment recommendations." *Id.*[8]

More fundamentally, this new supposed "regular basis" test makes a mockery of the common-law relationship of trust and confidence associated with fiduciary status. The 1975 Rule appropriately captures the common-law meaning incorporated into ERISA by requiring that investment advice be given "on a regular basis *to the plan* pursuant to a mutual agreement, arrangement or understanding, written or otherwise." 29 C.F.R. § 2510.3-21(c)(1)(ii)(B) (emphasis added). Under the Department's new approach, however, there need be *no relationship* between the financial professional and the investor. That is wrong: A financial professional's services to one person cannot place her in a relationship of trust and confidence with *someone else*. At absolute minimum, the regulatory text for all these pathways to fiduciary status should allow financial professionals and their customers to enter into an express, written, and binding understanding that the provision of brokerage services only does not make the professional a fiduciary with respect to separate retirement investments.

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[8] The Proposal's second pathway to fiduciary status encompasses more than just broker-dealers. For example, an insurance company might offer a full suite of insurance products to customers, including not just home, car, and umbrella coverage, but also life insurance and annuities. Thus, under the Proposal, the agent selling motor vehicle insurance could be deemed an ERISA fiduciary because a subsidiary of the company sells annuities.

Prong (b) is similarly misaligned with the common-law of trusts. In place of the 1975 Rule's requirements that there be "a mutual agreement, arrangement, or understanding" between the professional and investor, and that the investment advice be "individualized" and "serve as a primary basis for investment decisions," *id.*, the Proposal would merely require that the "circumstances" suggest the "recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest," 88 Fed. Reg. at 75977/2. On its face, prong (b) is inconsistent with the common-law relationship of trust and confidence because it requires no actual understanding on the part of either party that a relationship of trust and confidence exists. Instead, the Department suggests it will rely on how professionals "market themselves" and the "titles" they use, rather than the actual substance of the relationship between the parties. Once again, the Department "dispenses" with elements of the 1975 Rule that ensured, consistent with the common law, "a substantial, ongoing relationship between adviser and client." *Chamber*, 885 F.3d at 366, 375. Like the rest of the Proposal, prong (b) creates a one-way ratchet: because financial professionals cannot know that they are *not* fiduciaries, they must assume they are, and either change their business model or subject themselves to the burdens of PTE 2020-02. *See infra* at 15.

The availability of PTE 2020-02 does not cure these flaws with the Department's vastly overbroad "fiduciary" definition. As an initial matter, the "fiduciary" definition must stand on its own; if it is overbroad and unreasonable unless paired with an exemption, then it is overbroad and unreasonable—full stop. In any event, there are serious pragmatic and cost concerns with PTE 2020-02. For example, a service representative often will not know whether an investor will ultimately rollover into an IRA, or will want or need investment recommendations. The representative should not have to gather and analyze all the information required by the proposed amendments to PTE 2020-02 to be able to even mention a rollover as an available option for the investor. Moreover, such a requirement would frustrate many investors, who may only want to know their options so they can make their own decision without the services of a fiduciary. Far

from protecting 401(k) participants from perceived conflicts related to rollover recommendations, the amendments to PTE 2020-02 would reduce access to guidance by ordinary investors.[9]

3. The Proposal's third fiduciary "context" is where "[t]he person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations." 88 Fed. Reg. at 75977/3. Schwab does not dispute that a financial professional who represents to an investor that he is acting as a fiduciary with respect to an ERISA-covered plan or IRA should be deemed a fiduciary as to that plan or IRA. But the Proposal's language is much broader than that. As written, it would transform a representation by a professional that he is acting as a fiduciary in a given situation into a representation that he is acting as a fiduciary in *all* situations.

Take, for example, a professional employed by a financial services firm that offers both broker-dealer services paid on a commission basis, and investment advisory services which includes ongoing account monitoring and advice as a fiduciary for an annual fee based on a percentage of the assets in the account. An existing client tells a friend about her professional at this firm, who has provided valuable investment advisory services for her account. The friend asks the professional how she might roll her 401(k) into a Roth IRA. The professional answers her question and sends her an FAQ from his firm describing how to open an IRA through a rollover. The client's friend never contacts the professional again; she later rolls her 401(k) into an IRA at the professional's firm and manages her account by herself without advice from the firm's advisers. Under the Proposal, the professional's one-time guidance to the client's friend—which at most amounted to a sales pitch and included no call to action—would constitute fiduciary investment advice under ERISA because the professional acknowledged to *someone else* that he is a fiduciary with respect to that *other person's* account. According to the Department, a relationship of trust and confidence existed between the professional and the client's friend, because the professional acknowledged such a relationship existed with his actual client. That is nonsensical.

[9] As another example, platform providers could be denominated fiduciaries for providing menus to 401(k) plans, because describing the menu options available and why they are being included conveys that they are suitable options, which the plan fiduciary might perceive and rely on as an indication that the menu reflects "the particular needs" of the plan. 88 Fed. Reg. at 75977/2.

4. A common thread running through all three of the Proposal's pathways to fiduciary status is that they ignore an important piece of ERISA's fiduciary definition: "a person is a fiduciary with respect to a plan *to the extent* . . . he renders advice for a fee or other compensation with respect to any moneys or property of *such plan*." 29 U.S.C. § 1002(21)(A) (emphases added). Under this statutory definition, an individual is a fiduciary to a plan where investment advice is given to *that* plan and only with respect to *the particular advice* given. As described above, however, each of the Department's three proposed "contexts" can be satisfied by circumstances arising from interactions between the professional and *others*—or even interactions between an affiliate of the professional's employer and others. ERISA and its common-law foundations require a relationship of trust and confidence between adviser and advised. The Proposal would impute a trusted relationship based on factors exogenous to *any* relationship between a professional and a plan, IRA, or individual investor. That is impermissible.

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In promulgating the 2016 Rule, the Department *conceded* that its broad redefinition of investment-advice fiduciary failed under the common-law, trust-and-confidence standard. It had put "all its eggs in one basket: displacement of the [common-law] presumption." *Chamber*, 885 F.3d at 371. The Department now casts its new Proposal as an expression of the common-law rule, with claims such as that the Proposal "describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider." 88 Fed. Reg. at 75901/1. The Department's belated recognition of ERISA's incorporation of the common law of trusts is welcome. But it is insufficient. For the reasons articulated above, the Proposal falls well short of capturing the special relationship of trust and confidence at the heart of fiduciary status.

III. The Proposal Abuses the Department's Narrow Legal Authority to Reshape the Financial Services and Insurance Industries.

The Proposal's problems do not end with misinterpretation of the key statutory term, "fiduciary." They inhere in the entire regulatory framework the Department would erect for IRAs—a framework that "is no everyday exercise" of regulatory power. *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117 (2022) (per curiam) (quotation marks omitted).

The Department is charged with regulating employer-sponsored benefits plans; it has no enforcement or regulatory authority over IRAs, which are governed by the Internal Revenue Code. 26 U.S.C. § 4975(a), (f)(8)(E). In order to regulate IRAs directly, the Proposal seizes on two slivers of authority. First, it deploys the Department's narrow authority to define "accounting, technical, and trade terms" to effectuate a dramatic expansion of who qualifies as a fiduciary to ERISA-covered plans and IRAs. 29 U.S.C. § 1135. Second, the Proposal gives these new "fiduciaries" a prohibited transaction exemption laden with burdensome preconditions—and by amending other existing exemptions, pushes professionals into the Department's preferred regulatory framework. 29 U.S.C. § 1108(a), (b). With this one-two punch, the Department turns its "exemptive" authority, meant to reduce regulatory burdens, into a vehicle for imposing industry-reshaping regulations that the Department could not issue directly.

The Fifth Circuit already held this approach to be unlawful in vacating the 2016 Rule: the Department may not "bootstrap[] what should have been safe harbor criteria into 'backdoor regulation.'" *See Chamber*, 885 F.3d at 387-88. The Proposal is on even shakier footing now, after a string of Supreme Court decisions confirming and clarifying the major questions doctrine, which had been mentioned only briefly in the Fifth Circuit decision. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam); *Nat'l Fed'n*, 595 U.S. 109. The law restricting an agency from bootstrapping its way into new regulatory powers is even clearer today than in 2018, yet the Department is replicating the same legal error.

The Proposal, like the 2016 Rule, would "transform the trillion-dollar market for IRA investments, annuities and insurance products, and . . . regulate in a new way the thousands of people and organizations working in that market." *Chamber*, 885 F.3d at 380. By the Department's own estimate, it will cost hundreds of millions of dollars, 88 Fed. Reg. at 75968; in truth, the costs will be far greater. The Proposal also inserts the Department into the regulation of securities and insurance markets wholly disconnected from the employment-related matters Congress charged the Department with overseeing. There is no "historical precedent" for "regulation of this kind" of IRAs—beyond, of course, the Department's failed 2016 venture. *Nat'l Fed'n*, 595 U.S. at 119 (quotation marks omitted). For these reasons, the Proposal must pass scrutiny under the major questions doctrine. No matter what the benefits of a "uniform" fiduciary

standard and of extending fiduciary duties to financial professionals who offer IRAs may be, 88 Fed. Reg. at 75890-91, the Department may not pursue sweeping reforms "without clear congressional authorization." *Nat'l Fed'n*, 595 U.S. at 118. No such authorization exists here.

Finally, it should be noted that in expanding the definition of fiduciary and tightening the strictures of PTE 2020-02 as it does, the Department places not only the Proposal in legal jeopardy—it risks litigation that could topple PTE 2020-02 for some of the same reasons set forth above.

IV. The Department's Justifications for the Proposal Are Flawed.

The Department claims that the Proposal is justified because the SEC cannot regulate all investment products in all circumstances, leaving a gap in federal regulation, and because a "uniform" standard is desirable. *See, e.g.*, 88 Fed. Reg. at 75890/3-75891/1, 75913/2, 75920/2-75321-2. These justifications suffer from several serious flaws.

1. The Department asserts that it, "uniquely among the regulators, can impose uniform standards for the provision of investment advice to retirement investors." 88 Fed. Reg. at 75927/3. This is an unfortunate boast, since it highlights the ultra vires purpose of the Proposal: to "impose" "standards" of conduct with respect to IRAs, despite the Department's complete lack of statutory authority to do so, and despite Congress's intent that the SEC establish standards for broker-dealers and the States do the same for insurance products. The claim is false for the additional reason that individuals provide for their retirement through many other investments beyond the ERISA plans and IRAs the Department undertakes to regulate here. The Department's claimed "uniform standard" is therefore unauthorized, and illusory.

In truth, moreover, the Proposal creates confusion, not uniformity. The Department could have made compliance with Reg BI sufficient to comply with PTE 2020-02, but it did not. Instead, the proposed amendments to PTE 2020-02 require, for example, that financial institutions conduct an extensive "retrospective review" of their compliance with the exemption at least annually, with a signed certification by a senior officer of the firm that the firm filed a Form 5330 with the IRS for "any non-exempt prohibited transactions" and that the firm "corrected those transactions, and paid any resulting excise taxes." 88 Fed. Reg. at 76001/2. Reg BI requires no such certification, and with good reason, because neither the SEC nor DOL has enforcement authority with respect

to the reporting of prohibited transactions or payment of excise taxes. *See Chamber*, 885 F.3d at 364, 384.

The proposed amendments to PTE 2020-02 would also require more detailed disclosures to customers than required by Reg BI. As noted above, before discussing a rollover, a service representative or financial professional would need to disclose not just the fees and costs associated with the destination account, but also collect and disclose substantial, detailed information about the investor's existing account. And, of course, the Proposal's extremely broad "fiduciary" definition pulls in so-called "recommendations" that would not be covered by Reg BI, such as call-center conversations and speeches at conferences. *See supra* at 9.

2. In any event, that the SEC imposed heightened obligations on broker-dealers through Reg BI is no basis for the Department to effectively declare all broker-dealers fiduciaries under ERISA and the Tax Code. In fact, Reg BI disproves the Department's authority to redefine "fiduciary" in the manner proposed: the SEC has jurisdiction over broker dealers *because they engage in sales*, an activity that indicates they are *outside* of ERISA's statutory fiduciary definition. *See supra* at 7. Congress in the Dodd-Frank Act gave the SEC, not the Department, additional authority to regulate broker-dealers. Dodd-Frank Act, § 913(g), 124 Stat. at 1828 (2010). What's more, Dodd-Frank specifically forbids the SEC from prohibiting broker-dealers from collecting "commission[s] or other standard compensation." *Id.* Yet that's exactly what the Proposal would do: presumptively prohibit transaction-based compensation, which would become permissible only if the broker-dealer can satisfy PTE 2020-02.[10]

3. The Department also errs in justifying its Proposal in part on supposed deficiencies in the regulatory frameworks of the SEC and the States. The Department acknowledges that the SEC and FINRA are both actively enforcing Reg BI, which the Department admits "has addressed many of the Department's concerns about conflicted advice." *See id.* at 75919/1, 75922/2. And the Department points to no evidence that—in the few years since its adoption—Reg BI has proved ineffective. On the contrary, the Department concedes that when the SEC and FINRA have found

[10] Moreover, as the Department admits, the SEC in promulgating Reg BI attested to "broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations." 88 Fed. Reg. at 75923/3-24/1 (quoting 84 Fed. Reg. 33318, 33319/3 (July 12, 2019)).

deficiencies, it has led to broker-dealers "modif[ying] their practices, policies and procedures." *Id.* at 75918/2.

With respect to state insurance regulation, the Department concedes that "43 states have enacted legislation, finalized regulation, or both that impose conduct standards and disclosure requirements on various financial institutions," based on the model regulation developed by the National Association of Insurance Commissioners ("NAIC") and revised in 2020. *Id.* at 75925/2-26/3. Again, the Department points to nothing showing the revisions to state-level insurance regulation have been insufficient to protect investors. And NAIC vigorously disputes such criticisms. *See* Press Release, "State Insurance Regulators Work to Protect Consumers Who Buy Annuities; NAIC Releases Statement on DOL Fiduciary Rule Proposal" (Nov. 1, 2023), https://tinyurl.com/y8a8s3re. The Department nevertheless says it is "especially concerned" that the States' regulation of fixed-indexed annuities is supposedly "less stringent" than Reg BI. *Id.* at 75925/1-2. But Dodd-Frank forbids the SEC from regulating fixed-indexed annuities in any State that has adopted NAIC's model regulation. Dodd-Frank Act, § 989J, 124 Stat. at 1949-50 (2010). The Department cannot regulate what Congress specifically told the SEC must be left to the States. *See Chamber*, 885 F.3d at 385-86.

Ultimately, a significant element of the Department's criticism of the SEC and state insurance regulation is that those frameworks rely on disclosures of conflicts of interest. Like it did in the 2016 Rule, the Department contends that such disclosures are ineffective or even counterproductive. 88 Fed. Reg. at 75922/1. But disclosure is the principal tool Congress provided in the federal securities laws to address conflicts of interests. The Department has no authority to judge and reject a bedrock of the financial regulatory framework established by Congress. On the contrary, the Department is obligated to accept Congress's judgment that disclosure *is* beneficial.

Finally, the Department's contention that the SEC and state regimes fall short belies its central justification for the Proposal: that it would create a uniform regulatory structure. The same products, sold by the same people to the same customers, would be regulated differently by different agencies. That is disuniformity, not uniformity.

V. The Department's Assessment of the Proposal's Costs and Benefits is Flawed.

The flaws in the Department's regulatory impact analysis are legion and catalogued by other commenters in detail. We stress a few of the most serious shortfalls here.

1. The Department improperly conceals the impact of the Proposal's redefinition of "fiduciary." A new Labor Department "fiduciary" definition that is unacceptably disruptive and costly unless accompanied by an exemptive rule is, for that reason alone, an unreasonable and improper interpretation of the statute. The Departments knows this, which is why it obscures the consequences of its interpretation—and suggest it possesses a reasonableness that it lacks—by considering the interpretation's consequences only in conjunction with the partially ameliorative exemption it has proposed.

2. Despite acknowledging that there have been enormous changes to the regulatory landscape and the investment services market since 2016, the Department relies heavily on the 2016 Rule's regulatory impact analysis. *See, e.g.*, 88 Fed. Reg. at 75916/3 ("The Department's 2016 RIA demonstrated . . . .); *id.* at 75917/2 ("The 2016 RIA cited evidence . . . ."); *id.* at 75917/3 ("As discussed in the 2016 RIA . . . .); *id.* at 75935/1 ("In the Department's 2016 RIA, it estimated . . . .). Relying on an outdated analysis—which supported a rule that was vacated, no less—is unacceptable, arbitrary, and capricious.

3. The Department severely underestimates the costs the Proposal would impose on the financial services industry. For example, the Department touts as a benefit that the Proposal would subject financial professionals to private lawsuits under ERISA and excise taxes by the IRS. *See id.* at 75942/2-3. Yet the Department does not consider the costs arising from those liability risks.

Similarly, the Department points favorably to a study that suggests imposing a "fiduciary duty" could result in "a 16 percent reduction in the number of broker-dealers." 88 Fed. Reg. at 75940/3. But the Department nowhere acknowledges the cost of lost jobs, nor does it address the fact that fewer broker-dealers would result in less education and guidance for investors or potential investors.

The Department's estimates of the costs of its enhanced disclosure requirements of PTE 2020-02 are also far too low. To date, firms often have been able to meet PTE 2020-02's disclosure requirements by complying with the requirements of Reg BI and Form ADV. But under the Proposal, PTE 2020-02 would need to be used in many more instances—including for "hire me" conversations and transactions currently covered by PTE 84-24 and other PTEs the Proposal would amend—and the disclosures under PTE 2020-02 would need to be much more detailed,

requiring the collection of much more information before a substantive conversation can occur with a plan fiduciary or individual investor. That is a substantial ongoing burden, that would also compel firms to substantially update their compliance systems at great cost.

If the Department requires additional website disclosures, as it suggests it might, that would be a further, unnecessary increase in firms' costs. Specifically, the Department requested comment on whether firms "should be required to provide additional disclosures" on "a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees." 88 Fed. Reg. at 75896/1. This disclosure would be duplicative of the detailed disclosures PTE 2020-02 would already require to customers, and would thus impose significant costs with little to no corresponding benefit. Indeed, the purpose of these disclosures would be to inform "the investing public," not plans and individual investors with whom the firms have a fiduciary relationship. *Id.* That is improper and well beyond the Department's regulatory authority.

The Department also fails to ascribe any costs to the expanded ineligibility provisions of PTE 2020-02. If a firm loses its ability to rely on PTE 2020-02, it would suffer severe costs, including potentially losing much of its workforce to competitors. The Department nowhere acknowledges this, much less that ineligibility could result from the conviction of an *affiliate* in a *foreign* court for violation of *foreign* law without due process protections, or based on the Department's subjective determination that an *affiliate* has not adequately complied with the exemption. The costs to firms of risking ineligibility from actions outside their knowledge and control need to be considered by the Department, if such an expanded ineligibility provision is to be included in a final rule.

4. Finally, the regulatory impact analysis does not adequately account for the Proposal's impact on plans and individual investors. The Department "acknowledges that there is significant uncertainty about the magnitude of savings that would result for retirement investors as a result of the proposed rulemaking." 88 Fed. Reg. at 75942/3. But of course, it is on precisely such matters the Department should have great confidence before disrupting markets that have been significantly reformed since the Department's last (failed) foray in the area. And the Department errs when it suggests that the Proposal would not reduce the availability of helpful

education and guidance for individual small investors. *See id.* at 75946/3.[11] In response to the 2016 Rule, major firms planned to curtail commission-based compensation and eliminate services for many customers. *See, e.g.*, Michael Wursthorn, *J.P. Morgan Moves Ahead With Plan to Drop Commissions in IRAs*, Wall Street Journal (March 13, 2017), https://tinyurl.com/3sj79hb4 (reporting that J.P. Morgan "told some wealth-management customers with individual retirement accounts that as of April 7 their 'financial adviser will no longer be able to provide investment guidance'"). Many of those firms reversed course after the 2016 Rule was vacated. *See, e.g.*, Imani Moise, *Merrill Lynch does about face on fiduciary-era policy*, Reuters (Aug. 30, 2018), https://tinyurl.com/mwxpxkzf. If the Proposal is finalized, the result—again—will be less education and guidance for individual small investors, lower savings, and reduced retirement security. History repeats itself.

VI. Conclusion

For all the foregoing reasons, the Department should withdraw the Proposal. It defies ERISA's statutory text, exceeds the Department's authority, and will curtail the availability of financial advice. There are better ways to bring prosperity and security to individual investors, which Schwab welcomes the opportunity to discuss.

Sincerely,

Peter J. Morgan III
Managing Director, General Counsel and Corporate Secretary
The Charles Schwab Corporation

[11] Studies have long shown that when plan participants receive help, they do significantly better in saving and investing for retirement. *See, e.g.*, David Blanchett, *The Impact of Expert Guidance on Participant Savings and Investment Behaviors*, Morningstar, Inc. (Aug. 20, 2014) (showing that roughly 87 percent of participants enrolled in an advisory program increased their savings deferral rates after receiving recommendations to save more).