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January 2, 2024

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attention: Definition of Fiduciary—RIN 1210-AC02

Re: "Retirement Security Rule: Definition of an Investment Advice Fiduciary" RIN 1210-AC02

Dear Assistant Secretary Gomez,

The Center for American Progress (CAP) is pleased to submit these comments in support of the Employee Benefits Security Administration's ("EBSA" or "the Department") proposal entitled, "Retirement Security Rule: Definition of an Investment Advice Fiduciary" ("proposal" or "proposed rule").[1]

CAP is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans through bold, progressive ideas, strong leadership, and concerted action.

General comments

We applaud EBSA on the proposal, which is wholly within its statutory authority to promulgate under both Title I and Title II of the Employee Retirement Income Security Act of 1974 (ERISA)[2] and will provide significantly better protection for retirement investors seeking professional investment advice than the existing rule.

Congress explicitly granted the Department broad primary responsibility for the regulation of fiduciaries' advice to retirement investors under Title I and Title II of ERISA. In doing so, Congress recognized the heightened importance of investments of retirement savings to workers' financial security and to the qualification of plans and

[1] 88 FR 75890.
[2] Public Law 93-406

Individual Retirement Accounts (IRAs) for preferred tax treatment.[3] As the proposal rightly points out, Congress defined the scope of fiduciary coverage—and hence the scope of EBSA's authority in this regard—broadly and called for stringent obligations on fiduciaries, including that they refrain from transactions in which they have a conflict of interest.

Congress also expressly recognized the need for uniformity across different categories of investment advice providers and advisory relationships when it statutorily scoped in fiduciaries regardless of the products they recommend or their regulatory status.[4] Congress authorized the Department to create a regulatory definition of an investment advice fiduciary under ERISA that is uniformly applicable to all types of investments that retirement investors make.[5]

Defining the coverage of the term "fiduciary" is an essential step to effectuating the Department's responsibilities under Title I and Title II. We commend EBSA for exercising its clear statutory authority to clarify the definition of a fiduciary to address the significantly more complex and challenging environment in which retirement investors find themselves and to reflect the rapidly evolving standards of conduct for investment professionals adopted by other federal and state regulators.

The proposal appropriately aligns with the reasonable expectations of retirement investors that there exists a relationship of trust and confidence between themselves and the person advising them. Congress granted the Department authority to issue rules to ensure that those reasonable expectations are met. In lay terms, the Department is tasked with ensuring the law meets the reasonable, real-life expectations of retirement investors.

The Department should revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA, and we broadly support the manner in which the Department chose to do so in the proposal. If finalized, the proposal unquestionably will better protect the interests of retirement investors.

The proposal closes serious gaps in the protection of retirement investors under the existing rule

With this proposal, EBSA has filled some of the most critical gaps that exist today in the protection of retirement investors, entirely consistent with its regulatory authority. In closing these gaps, it has thoughtfully and successfully balanced the concerns of those who must comply with the proposal, who may also be subject to recent actions by other federal and state regulators, and its mission to protect retirement investors.

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[3] See ERISA, Title II.
[4] 88 FR at 75898.
[5] Proposal at 75900.

Updating the fiduciary rule is urgent. The Department issued the existing rule defining the circumstances under which a person rendering "investment advice" is a fiduciary for purposes of ERISA in 1975.[6] Retirement investors face a much more complex and challenging environment today for ensuring that their retirement savings will be adequate well into the future.

The changed environment today includes the dramatic shift from defined benefit to defined contribution plans and the corresponding onus on plan participants to manage their own retirement investments. In addition, there has been an extraordinary increase in the number and type of retirement-related investment vehicles and financial firms and advisers, as well as changes in the investment marketplace, which include the growth in high-risk private markets. Recently other federal and state regulators have acted to enhance fiduciary standards in adjacent investment scenarios in the face of these changes. As discussed in the proposal, the latter include the U.S. Securities and Exchange Commission's adoption of Regulation Best Interest, applicable to broker-dealers when making recommendations to retail customers,[7] and its Investment Adviser Interpretation, relating to conduct standards for investment advisers under the Investment Advisers Act of 1940.[8] In addition, the National Association of Insurance Commissioners developed a model regulation to provide that insurance agents must act in the consumer's best interest when making a recommendation of an annuity. The proposal has taken these recent standards into account and effectively incorporated appropriate provisions, while also ensuring that the proposal meets EBSA's unique mission and statutory mandate.

Together, the regulatory gaps in protection of retirement investors have resulted in the erosion of retirement investors' savings, unfairly shifting their hard-earned savings from years of employment to unscrupulous advisers through excessive fees and hidden compensation schemes—in circumstances where investors had a reasonable expectation of a relationship of trust and confidence.

Critical gaps that the Department has addressed with this proposal are the lack of fiduciary standards for retirement advice from broker-dealers to plans and plan fiduciaries; transactions involving insurance contracts used to fund retirement plans covered by ERISA; and transactions involving certain types of plan and IRA investments, such as real estate, fixed indexed annuities, certificates of deposit, and other bank products, which may not be subject to the SEC's Regulation Best Interest. EBSA's statutory mandate means that the category of investment product involved should not alter the fiduciary standard followed by a person providing retirement

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[6] 40 FR 50842 (Oct. 31, 1975).
[7] "Regulation Best Interest: The Broker-Dealer Standard of Conduct," 84 FR 33318 (July 12, 2019).
[8] "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," 84 FR 33669 (July 12, 2019).

investment advice, and the proposal more effectively aligns the fiduciary definition to the statute in this regard than the existing rule.

Importantly, the rule effectively addresses a regulatory gap that has allowed the loss of millions of retirement savings over the years—the lack of a fiduciary standard for one-time advice, such as occurs when retirement investors seek to roll over plan assets to an annuity. This aspect of the proposal appropriately and effectively addresses this gap in the existing rule's coverage. We support the Department's approach, which is an objective test based on the totality of facts and circumstances and which incorporates clear guidance on what is considered a recommendation.[9] We support related changes in the proposal to address this concern, including the provision to treat advice in connection with a rollover as fiduciary investment advice, even if not accompanied by a specific recommendation on how to invest assets,[10] and the inclusion of the broadly defined language on what constitutes advice provided "for a fee or other compensation, direct or indirect."[11]

The proposal also takes important steps to close loopholes created by disclaimers by clarifying that disclaimers will be insufficient if "at odds with the investment advice provider's oral communications, marketing material, State or Federal law, or other interactions…"[12] This would restore the fundamental fairness that underlies Congress's intent in ERISA to protect, not deceive, retirement investors.

In closing many regulatory gaps in the fiduciary standard, the Department has hewed closely to the 5th Circuit opinion in *Chamber,*[13] which vacated the 2016 Final Rule on the same topic.[14]

<u>The proposal establishes clear and concrete criteria for determining whether a recommendation has been made</u>

Application of the fiduciary standard requires that a recommendation has been made, and this is an area where the development of the marketplace has created many avenues for avoiding the standard. The proposal carefully and logically—within the scope of a retirement investor's reasonable expectations—identifies circumstances constituting a recommendation giving rise to a fiduciary duty, while also spelling out when seemingly related circumstances do not go far enough to constitute a recommendation.[15] Consistent with the Department's mandate to provide uniformity

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[9] 88 FR at 75902.
[10] 88 FR 75906.
[11] 88 FR 75909-75910.
[12] 88 FR at 75903.
[13] *Chamber of Commerce v. United States Department of Labor,* 885 F.3d 360 (5th Cir. 2018).
[14] "Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice," 81 FR 20946 (Apr. 8, 2016).
[15] 88 FR at 75904.

in retirement investment advice, it follows the SEC's well-developed approach for broker-dealers under Regulation Best Interest, basing the determination on facts.

The proposal also explicitly states that a "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property" includes, but is not limited to, "non-securities annuities, banking products, and digital assets (regardless of status as a security)."[16] In today's investing marketplace with its proliferation of complex and diverse products, strategies, and financial advice, such clarification is essential for the protection of retirement investors and in order to cover the transactions and strategies they may encounter when receiving retirement investment advice from a person they reasonably expect is dealing with them in a relationship of trust and confidence.

As the marketplace continues to diversify and grow, we believe the Department—or perhaps another regulator—will need to further clarify the application of a strong fiduciary standard to other types of investment transactions and strategies, including some that are explicitly not included in the proposal, such as health insurance policies, disability insurance policies, and term life insurance policies—many of which involve transactions and strategies in a relationship of trust and confidence and may not be adequately protected under existing federal or state regulations. That said, we are pleased that the proposal expressly includes a wider range of investment management and strategies within the scope of recommendations covered under the proposal, especially the voting of proxies.[17] These management and strategic considerations can have considerable impacts on the value of retirement investors' portfolios.

<u>The proposal wisely rejects the incorporation of a wealth or income exception to the rule</u>

As CAP has noted previously, the use of a wealth or income exemption from the public disclosure framework in securities regulation has contributed to an erosion of securities laws and extensive harms to retail investors.[18] We believe the use of such an exemption in the context of retirement advice is even less appropriate, given the heightened importance of protecting investors' retirement savings noted at the beginning of these comments. Indeed, the application of wealth exemptions in the securities context has exposed the employment savings of otherwise average retail investors to the substantial hidden risks of the private markets.[19] There is every reason to avoid compounding the risks to retirement investors. Inclusion of such an

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[16] 88 FR at 75905.
[17] 88 FR 75905.
[18] See, e.g., Tyler Gellasch, Alexandra Thornton, and Crystal Weise, "How Exemptions From Securities Laws Put Investors and the Economy at Risk," Center for American Progress, March 22, 2023, available at https://www.americanprogress.org/article/how-exemptions-from-securities-laws-put-investors-and-the-economy-at-risk/.
[19] Ibid.

exemption under the ERISA fiduciary rule would be in direct contravention of its purpose.

The proposal's inclusion of investment advice "for a fee or other compensation, direct or indirect" is an essential element and should be retained in its entirety

We commend the Department's broad definition of this part of the proposal,[20] and the extensive clarification and justification for including it.[21] As mentioned above, this gets at the heart of a serious gap in the protection of retirement investors in which hidden compensation to the advice provider leads to substantial loss of retirement coverage for retirees over time.

Conclusion

CAP strongly supports the Department's proposal and believes it provides exceedingly important and urgent protections for retirement investors in a time of changing markets, products, and financial advisers, even as retirement investors are forced to take on responsibility for investing their own retirement savings. We applaud EBSA's skillful adherence to its statutory mandate and its integration of appropriate aspects of similar standards advanced by other federal and state regulators.

Further strengthening of the rules may be necessary as time and marketplace changes unfold. In the meantime, this proposal will redirect retirement investment advice toward the interests of retirement investors and will provide clear guidance that honest retirement advisers will welcome. We urge the Department to act quickly to finalize this proposal for the protection of retirement investors.

For any questions regarding this comment letter, please contact Alexandra Thornton, Senior Director, Financial Regulation, at the Center for American Progress, athornton@americanprogress.org.

Sincerely,

Center for American Progress

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[20] 88 FR 75909.
[21] 88 FR 75909-75910.