



October 20, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

The Honorable Richard Revesz
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Executive Office of the President
725 17th Street, NW
Washington, DC 20503

Re: Department of Labor Retirement Security Proposal
(RIN 1210-AC02)

Dear Director Young and Administrator Revesz:

On behalf of the Board of Directors of the Insured Retirement Institute (IRI),¹ I am writing this afternoon to follow up on our meeting earlier today with the Office of Information and Regulatory Affairs (OIRA) regarding the Department of Labor's (DOL) "Retirement Security" proposal (RIN 1210-AC02) (the "Proposal"). We hope this written summary of our comments during the meeting will be helpful as OIRA conducts its analysis of the Proposal.

Based on our review of the DOL's [Spring 2023 Regulatory Agenda](#) and Acting Secretary of Labor Julie Su's recent responses to questions for the record posed earlier this year by members of the House Committee on Education and the Workforce, our understanding is that the Proposal will include amendments to the regulatory definition of the term fiduciary set forth at 29 CFR 2510.3-21(c) as well as amendments to currently available prohibited transaction class exemptions. In light of the language used by the DOL in the preamble to PTE 2020-02 and related FAQs issued in April of 2021, we believe the DOL intends, through this Proposal, to once again attempt to treat all financial professionals who sell retirement planning products and services as fiduciaries despite the clear invalidation of that position, as arbitrary and capricious rulemaking, by the U.S. Court of Appeals for the Fifth Circuit in 2018.

As we discussed during our meeting today, if we are correct about the nature and content of the Proposal, it will have a significant adverse impact on the ability of lower- and middle-income workers to access professional retirement planning assistance and affordable retirement planning products, including guaranteed lifetime income products such as annuities. As such, the Proposal is inconsistent and incompatible with the Biden administration's priorities and the goal of Bidenomics to grow the economy from the middle out and bottom up by investing in all of America, empowering workers, and lowering costs for families.

¹ IRI is the leading association for the entire supply chain of insured retirement strategies, including life insurers, asset managers, broker-dealers, banks, marketing organizations, law firms, and solution providers. IRI members account for 90 percent of annuity assets in the U.S., include the foremost distributors of protected lifetime income solutions, and are represented by financial professionals serving millions of Americans.

In recent years, through the enactment of the *SECURE Act*² and the *SECURE 2.0 Act*,³ Congress and the administration have made critical enhancements to our retirement security system – and the ability of America's middle- and lower-income workers and retirees to achieve greater retirement security. These laws embodied the most sweeping changes to enhance the private sector retirement system in over a decade. The measures in the new laws will generate billions more in retirement savings and, most importantly, strengthen retirement security for millions of America's workers and retirees seeking a secure and dignified retirement.

DOL should be focused on adopting rules as necessary to fully implement the bipartisan measures enacted by Congress in the SECURE Act and the SECURE 2.0 Act and to work with Congress to enact additional laws that will enhance and strengthen the retirement security of America's workers and retirees, such as those IRI has proposed for consideration in our 2023 Federal Retirement Security Blueprint. If, however, the DOL moves ahead with rules similar to the 2016 rule, the effectiveness of those critical pieces of legislation will be significantly impaired by making it much harder and more expensive – and in many cases, simply impossible – for those workers and retirees to obtain the professional financial advice they will need to achieve their retirement goals. Such ill-conceived policies would deprive American workers and retirees of access to the professional guidance they need to navigate the complex world of investing and achieve their retirement goals.⁴

Despite the DOL's assertion that the Proposal will enhance and strengthen the retirement security of American workers and retirees, we believe the real-world impact will be a ***significant increase in retirement insecurity***, just as we saw when the 2016 rule was in effect. More than 10 million smaller retirement account owners, with more than \$900 billion in retirement savings, lost the ability to work with their preferred financial professionals as a direct result of that rule.⁵ A recent study found that reinstatement of the 2016 rule or adoption of similar regulations would reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years and increase the wealth gap for Black and Hispanic Americans by roughly 20 percent in terms of their accumulated Individual Retirement Accounts (IRA) savings.⁶

² [Consolidated Appropriations Act, 2020, Pub. L. No. 116-34, Div. O \(2020\)](#)

³ [Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. T \(2022\)](#)

⁴ [“The Importance of Access to Financial Guidance to Moderate Income Retirement Savers,”](#) Matthew Greenwald, PhD, Greenwald Research, May 18, 2022. This survey examined views on access to financial professionals for those ages 55 to 70, with life savings in the lower half of financial wealth when compared to all Americans of their age. The survey found that a majority of moderate-income savers who are in or near retirement are concerned that a fiduciary-only regulation would keep them from the professional financial guidance they want and need, especially during difficult economic times (85% believe they have at least a somewhat great need for financial guidance from a professional, 81% feel the guidance they receive helps them feel reassured during difficult economic times). Of those without a financial professional, almost all believe it would be important to work with one to feel reassured through difficult economic times (97%) and during times of high inflation (97%).

⁵ [“The DOL Fiduciary Rule: A Study on How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,”](#) Deloitte, August 9, 2017. This study represents results from institutions representing 43 percent of U.S. financial advisers and 27 percent of the retirement savings assets in the market. The study found that, as of the DOL rule's first applicability date, 53 percent of study participants reported limiting or eliminating access to brokerage advice for smaller retirement accounts, impacting an estimated 10.2 million accounts and \$900 billion in savings. [“The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers,”](#) U.S. Chamber of Commerce, Spring 2017. This report is a compilation of survey statistics and other data that was submitted to the U.S. Department of Labor during the comment period in response to the February 3, 2017, Presidential Executive Order on the Fiduciary Rule. The compilation showed if the rule is implemented, it could limit or restrict investment products for some 11 million households and affect up to 7 million individual retirement account (IRA) owners who could lose access to investment advice altogether. It also showed that the provision of advice to individuals with small accounts would be curtailed or cut off due to the risk and increased costs of the rule.

⁶ [“Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement,”](#) prepared by Quantria Strategies, LLC for the Hispanic Leadership Fund, November 8, 2021. This analysis found that if the vacated 2016 DOL Fiduciary Rule is reinstated, it would reduce the accumulated retirement savings of 2.7 million individuals with incomes below \$100,000 by approximately \$140 billion over 10 years. The analysis also found that reinstatement of the rule would result in a roughly 20% increase in the wealth gap for Black and Hispanic Americans when looking at accumulated IRA savings alone.

Additionally, we explained during today's meeting that there is no demonstrated need for this rulemaking at this time. Our members and the vast majority of financial professionals who sell securities and insurance products are dedicated to acting in the best interest of their customers, as they are already required to do under the existing regulatory framework. This framework includes (a) Regulation Best Interest ("Reg BI"), which was established by the Securities and Exchange Commission ("SEC") in 2019,⁷ (b) the fiduciary standard imposed on registered investment advisers and investment adviser representatives under the *Investment Advisers Act of 1940*; (c) existing DOL regulations, including Prohibited Transaction Exemption ("PTE") 2020-02, which was adopted by the DOL in 2020,⁸ and (d) state insurance laws and rules based on a model regulation developed by the National Association of Insurance Commissioners ("NAIC") in 2020.⁹

These are rigorous standards that effectively protect consumers and directly address the DOL's underlying concerns regarding conflicts of interest without imposing new and onerous costs and compliance obligations that will ultimately harm Main Street Americans. Reg BI, the Advisers Act fiduciary standard, and PTE 2020-02, which apply nationally, require that all financial professionals act in their clients' best interests when making recommendations without putting their own interests first. Moreover, these rules require firms and financial professionals to identify and mitigate any conflicts of interest that could create incentives not to act in their customers' best interest. The NAIC model regulation, which has been adopted in 40 states to date¹⁰ and covers more than 75 percent of the population (with the remaining states on track to adopt similar laws and rules in 2024), imposes nearly identical requirements on state-licensed insurance producers.

Neither DOL nor any other federal or state regulatory agency has presented evidence suggesting that this newly implemented comprehensive framework is not working effectively to protect retirement savers. Without any evidence of deficiencies in the existing rules, it is difficult to justify this effort and the unnecessary instability it would cause for retirement plans, retirees, and savers.

Our perspective on this critically important issue is consistent with the Fifth Circuit ruling and the decisions issued by federal courts in a number of other related cases in recent years. For more than a decade, DOL has sought to expand its reach and tighten the requirements of the fiduciary standards imposed under the Employee Retirement Income Security Act of 1974 (ERISA) and the Tax Code. In rejecting these efforts numerous times in recent years,¹¹ the federal courts have consistently recognized that DOL went far beyond its statutory authority to change the existing rules. Despite these court decisions, DOL continues to expend significant funds in costly legal battles to defend unnecessary, redundant rules that fall outside its jurisdiction. DOL should respect the limits Congress and the federal courts have placed on its authority.

For all the reasons set forth above, we respectfully urge OIRA to **return the Proposal to the DOL for further consideration** of the benefits and costs of the Proposal and the extent to which it is inconsistent

⁷ U.S. Securities and Exchange Commission, [Regulation Best Interest: The Broker-Dealer Standard of Conduct](#), adopted June 5, 2019.

⁸ U.S. Department of Labor, Employee Benefits Security Administration, [Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees](#), adopted February 16, 2021.

⁹ National Association of Insurance Commissioners, [Suitability in Annuity Transaction Model Regulation](#), adopted February 2020.

¹⁰ [Map of 40 states that adopted NAIC Suitability in Annuity Transaction Model Regulation](#), Insured Retirement Institute, October 2023.

¹¹ See, e.g., *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018); *Carfora v. Teachers Ins. Annuity Ass'n of America*, 631 F. Supp. 3d 125 (S.D.N.Y. 2022); *Am. Sec. Ass'n v. U.S. Dep't of Lab.*, 2023 WL 1967573 (M.D. Fla. 2023); *Fed'n. of Ams. for Consumer Choice v. U.S. Dep't of Lab.*, Case No. 3:22-cv-00243-K-BT (N.D. Tex. June 30, 2023) (Rutherford, Mag. J).

with the Biden administration's economic policies and duplicative of the SEC's Regulation Best Interest. As noted above, past efforts by DOL to expand the reach of the ERISA fiduciary standard dealt a devastating blow to millions of America's workers and retirees by impairing their ability to obtain much-needed affordable financial advice to help them prepare for and achieve a secure and dignified retirement. We sincerely hope that you will not allow this to occur again.

Thank you for considering our views on this critically important issue. IRI has been and remains committed to being a constructive part of this rulemaking process. Please feel free to contact me at any time if we can be of any further assistance as OIRA conducts its analysis of the Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Berkowitz", written over a large, light-colored scribble or stamp.

Jason Berkowitz
Chief Legal & Regulatory Affairs Officer
Insured Retirement Institute