

Office of Regulations and Interpretations
Office of Exemption Determinations
Employee Benefits Security Administration

Attn: Conflict of Interest Rule (RIN 1210-AB32) and Proposed Best Interest Contract Exemption (ZRIN 1210-ZA25)

U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Sir or Madam:

We appreciate the opportunity to respond to the request by the Department of Labor ("Department") for comments on the Department's proposed regulations on the definition of the term "fiduciary," Conflict of Interest Rule--Retirement Investment Advice (the "Proposed Rule")¹ and the Proposed Best Interest Contract Exemption (the "BIC Exemption"),² (collectively, the "Proposal").

A number of commenters have raised challenges to the Department's authority to replace the current and longstanding regulation describing what constitutes "investment advice" in the context of the statutory definition of "fiduciary" in section 3(21) of ERISA (the "Current Definition").³ We agree with such challenges.

The Department lacks the statutory authority to replace the Current Definition. Because Congress has ratified the Current Definition, overturning it as the Proposed Rule does in such a broad fashion requires legislative, not regulatory action. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'"⁴

ERISA was enacted in 1974 and the Current Definition adopted in 1975, almost immediately thereafter. Title I of ERISA has been amended nearly 80 times since it was enacted; the definition section of Title I, Section 3 of ERISA,⁵ 14 times. Part 4 of Title I of ERISA, delineating fiduciary responsibilities, has been amended 22 times. In 2006, Congress adopted sweeping amendments to ERISA in the Pension Protection Act of 2006 ("PPA").⁶ In the PPA, Congress specifically addressed the issue of conflicted investment advice by adopting a new statutory exemption for such advice⁷ and incorporating the

¹ 80 Fed. Reg. 21928 (Apr. 20, 2015).

² 80 Fed. Reg. 21960 (Apr. 20, 2015).

³ 29 C.F.R. § 2510.3-21(c), 40 Fed. Reg. 50843 (Oct 31, 1975).

⁴ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)).

⁵ 29 U.S.C. § 1002.

⁶ Pub. L. 109-280, 120 Stat. 780 (2006).

⁷ ERISA § 408(g).

Current Definition into that exemption.⁸ Altering the Current Definition thus rewrites statute, an act not within the Department's authority.⁹

The DC Circuit has held that where Congress re-enacts a statute following the issuance of regulations that interpret that statute, "Congress is presumed to be aware of an administrative [] interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."¹⁰ Under this principle of Congressional ratification, regulations that amend statutory definitions and that are promulgated after Congressional re-enactment of the statute are inconsistent with the intent of Congress, and thus invalid.

Following the D.C. Circuit's decision in *Public Citizen*, district courts have relied upon the principle of Congressional ratification in vacating amended regulations because they are inconsistent with Congressional intent. For example, the court in *American Mining Congress v. U.S. Army Corps of Engineers*,¹¹ expressly considered Congress' re-enactment of the Clean Water Act in holding that the Environmental Protection Agency's ("EPA") attempt to amend regulations re-defining terms in the statute after ratification rendered the new regulations invalid. There, as here, the agency had previously issued regulations defining key terms of the statute, and later sought to amend the regulations in a manner that would substantially expand the regulatory impact. In addition, as here, Congress had re-enacted the statute on several occasions since promulgation of the original regulations defining the key terms, and had chosen not to alter the agency's definitions. Finally, as here, the agency went through notice and comment rulemaking, and asserted that the new rule was consistent with the original intent of Congress and that the court should defer to its expertise.

Upon review, the court in *American Mining* expressly considered that "the Act has been amended several times since it was enacted," and recognized that "Congress has not modified the longstanding administrative determination."¹² As a result, the Court concluded that "Congress, through its lack of amendment, ratified 18 years of agency and judicial interpretation that excluded [EPA's new interpretation],"¹³ rendering EPA's new regulations inconsistent with the intent of Congress and invalid. Finally, in response to the agency's assertions that it was merely attempting to "close a loop-hole" in its previous definitions, the Court stated that "the appropriate remedy for what the agencies now perceive to be an imperfect statute, however, is Congressional action."¹⁴

⁸ ERISA § 408(g)(11)(A).

⁹ Accordingly, the Department's new interpretation would not be entitled to deference under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). Here, where Congress has spoken, there is no ambiguity in the statute or any gaps for an agency to fill. Even in the case that there were remaining ambiguities, courts will not read into a statute an implicit delegation of Congressional authority when an agency acts outside its area of expertise. See *King v. Burwell*, 135 S. Ct. 2480 (2015), citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006). Determining whether a fiduciary standard for broker-dealers is appropriate is a task delegated specifically to (and within the expertise of) the Securities and Exchange Commission, not the Department.

¹⁰ *Public Citizen v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) (citation and quotation marks omitted).

¹¹ 951 F. Supp. 267 (D.D.C. 1997).

¹² *Id.* at 276.

¹³ *Id.* at 275.

¹⁴ *Id.* at 278.

In summary, in cases such as this, where Congress has ratified the terms of previous regulations and chooses not to amend those definitions through its own action, it is not the province of the agency to do so. Instead, such action is plainly contrary to the intent of Congress, and must be rejected. If the Department believes the Current Definition should be changed, we urge the Department to work with Congress towards an appropriate legislative solution.