Mindset

January 2, 2024

By electronic submission via www.regulations.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
Department of Labor
200 Constitution Ave, NW
Washington, D.C. 20210

cc: Luisa Grillo-Chope, Office of Regulations and Interpretations, EBSA
Susan Wilker, Office of Exemption Determinations, EBSA

Re: Retirement Security Rule: Definition of Fiduciary (RIN 1210-AC02)
Proposed Amendment to Class Exemption PTE 2020-02 (Application No. D-12057)
Proposed Amendment to Prohibited Transaction Exemption 84-24 (Application No. D-12060)
Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128 (Application No. D-12094)

Dear Assistant Secretary Gomez:

We write on behalf of the Insurance Coalition (the "Coalition"), a group of various types of insurance providers that share a common interest in federal regulations affecting the insurance industry. The group was formed during congressional negotiations on the Dodd-Frank Act and continues to represent a diverse cross-section of life and property and casualty insurance companies. We appreciate the opportunity to provide comments on the Department of Labor's (the "Department") proposed "Retirement Security Rule: Definition of Fiduciary,"[1] Proposed Amendment to Class Exemption PTE 2020-02,[2] Proposed Amendment to Prohibited Transaction Exemption 84-24,[3] and Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128[4] (referred to collectively hereinafter as "the Proposal" or "Proposed Rule").

Executive Summary

While the Coalition is supportive of the Administration's goal of protecting retirement savers, we are greatly concerned that this Proposal may indeed hurt those it is intended to protect not only

[1] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75,890 (proposed Nov. 3, 2023).
[2] Proposed Amendment to Prohibited Transaction Exemption 2020-02," 88 Fed. Reg. 75,979 (Nov. 3, 2023).
[3] Proposed Amendment to Prohibited Transaction Exemption 84-24," 88 Fed. Reg. 76,004 (Nov. 3, 2023).
[4] Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76,032 (Nov. 3, 2023).

by reducing access to financial education but also restricting or eliminating consumer choice as well as reversing the progress Congress has made over the last several years in improving access to lifetime income. To that end, the members of the Coalition are concerned that the negative implications of the Proposal far outweigh the intended benefits. The Proposal is a significant departure from current law as well as the complicated landscape of other federal regulations and state laws governing the insurance industry.

The Coalition has included in this comment letter the questions we asked during the Department's hearing on the Proposal, and as requested, we have provided our preferred answers to certain questions as the Coalition is concerned that some of these questions raise greater structural issues regarding the entirety of the Proposal than we could resolve in this comment letter.

Congressional Intent Regarding Lifetime Income

While Congress has a reputation for partisan impasse, retirement policy remains one of the few areas of bipartisan agreement and cooperation, which is why it was able to pass two major retirement bills in the past three years. The shift from defined benefit plans to defined contribution plans has long been a focus as Americans are now expected to save on their own. Congress has worked diligently to optimize savings in a defined contribution plan by permitting automatic enrollment and automatic escalation. The next frontier of innovation is ensuring that individuals do not outlive their assets as retirees are generally quick to spend down their DC retirement savings and vastly underestimate their life expectancy, with retirees on average spending their entire lump sum distributions in just a few years. During the saving years, retirement savers often look to their employer and plan recordkeeper for helpful information regarding savings strategies as well as available products and services.

The 2020 census found that 1 in 6 people were age 65 or older, which marked a 38% increase over the previous decade and continues to trend upward.[5] The growing retirement-aged population is a significant issue, which is why Congress has been so focused on trying to address the challenges facing retirement savers today.

In 2019 with the first SECURE Act,[6] Congress tried to help retirement savers think about their retirement savings differently by including the Lifetime Income Disclosure Act in that legislation, which would require defined contribution plans to include an estimate of the monthly lifetime income their retirement account balance would provide.[7] Additionally, plan sponsors were concerned about the fiduciary liability of selecting an insurer to provide lifetime income options in their plan, so the SECURE Act also included a safe harbor that plan sponsors could use to determine the financial capacity of an insurer.[8] Finally, Congress included a provision to provide for portability of lifetime income options.[9]

---

[5] Zoe Caplan, "U.S. Older Population Grew From 2010 to 2020 at Fastest Rate Since 1880 to 1890," (May 25, 2023), https://www.census.gov/library/stories/2023/05/2020-census-united-states-older-population-grew.html#:~:text=In%202020%2C%20about%201%20in,million%20(16.8%25)%20in%202020.
[6] Further Consolidated Appropriations Act of 2019, Pub. L. No. 116-94 (2019).
[7] *Id.* at Division O § 203.
[8] *Id.* at Division O § 204.
[9] *Id.* at Division O § 109.

And just last year, Congress passed the SECURE 2.0 Act,[10] which also sought to facilitate lifetime income solutions with a provision aimed at increasing the use of qualified longevity annuity contracts ("QLAC") by repealing the 25% limit and allowing up to $200,000 (indexed) to be used from an account balance to purchase a QLAC as well as facilitating sales of QLACs with spousal survival rights.[11] SECURE 2.0 also eliminated regulatory barriers to the availability of life annuities in qualified plans and IRAs stemming from the required minimum distribution ("RMD") rules.[12] And finally, SECURE 2.0 eliminated a penalty on partial annuitization.[13]

Despite these advances in lifetime income policy, there are additional bipartisan lifetime income proposals remain that would further improve access to these important products. One example would allow guaranteed annuities that have a delayed liquidity feature to be included in a default investment option[14] and another that would allow indexed and variable annuities with guaranteed benefits to qualify as a QLAC.[15] There are even discussions about requiring a full or partial lifetime income distribution option in defined contribution plans. Congressional intent is clear: lifetime income is a critical component of retirement and retirement savers should have more, not fewer, options when it comes to the decumulation phase.

Just last year, Secretary Walsh and other Department officials kicked off an initiative to make retirement security part of the social justice movement. One of the core principles of that campaign was to promote lifetime income – "first through a strengthened Social Security system, and second through a robust system of workers' savings."[16] In a press release touting this initiative, the Department noted they wanted to focus on "transforming lump-sum payments to lifetime income that is affordable and easy to understand."[17] This stands in stark contrast to the Administration's aggressive misrepresentation of lifetime income as "junk fees."[18]

The members of the Insurance Coalition agree wholeheartedly with the Department's focus on the goals outlined in 2022. The Proposal at issue in this comment letter, however, puts the industry on a path away from those goals – making it more difficult and expensive for plans to offer lifetime income. The only practical way to incorporate lifetime income into defined contribution plans is through insurance products like annuities. Efforts that would restrict or nearly eliminate the use of such products in defined contribution plans are contrary to

---

[10] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (2022).
[11] *Id.* at Division T § 202.
[12] *Id.* at Division T § 201.
[13] *Id.* at Division T § 204.
[14] Lifetime Income For Employees (LIFE) Act of 2023, H.R. 3942, 117th Cong. (2023).
[15] Retirement Security and Savings Act of 2021 § 201(5), S. 1770, 117th Cong. (2021).
[16] "Be Our Guest: Kathleen Kennedy Townsend – On Retirement Security and Critical Policy Goals," Massena Associates, Apr. 2019, https://www.massenaassociates.com/blog/be-our-guest-kathleen-kennedy-townsend#:~:text=In%20her%20own%20words%3A,robust%20system%20of%20workers'%20savings.
[17] News Release, Dep't of Labor, Readout: Secretary Walsh Launches Series of US Department of Labor Roundtables, Welcomes New Stakeholders' Views (Apr. 25, 2022), https://www.dol.gov/newsroom/releases/osec/osec20220425-0.
[18] Fact Sheet, The White House, President Biden to Announce New Actions to Protect Retirement Security by Cracking Down on Junk Fees in Retirement Investment Advice (Oct. 31, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/31/fact-sheet-president-biden-to-announce-new-actions-to-protect-retirement-security-by-cracking-down-on-junk-fees-in-retirement-investment-advice/.

Congressional intent. We are left wondering how the Department would reconcile the Proposed Rule with its efforts to promote lifetime income and whether there is another method by which the Department believes companies should incorporate lifetime income in defined contribution plans outside of annuities.

Retirement Security Rule: Definition of an Investment Advice Fiduciary

The Proposal alters the five-part test that has long been used to determine when a recommendation constitutes fiduciary advice. Unlike earlier iterations of this rule, this proposal does not address investment education. The Proposal lacks clearly defined parameters throughout, but most importantly between sales, education, and when something becomes fiduciary advice. The subjective test based on the facts and circumstances of a situation provides cold comfort to companies as it is impossible to build policies and procedures and train a workforce around such loose and unclear standards. Interpretive Bulletin 96-1 has long provided guidance for the provision of investment education without crossing the line into fiduciary status.[19] Without mutual agreement, whatever the perception of the individual or entity on the other end is what dictates the relationship under the Proposal. Recordkeepers, recordkeeping support, and call centers do not provide advice, they provide education.

Members of our Coalition that have recordkeeping functions are struggling to determine how to continue having basic conversations without worrying they will become a fiduciary. It would be nearly impossible for these conversations to cease between recordkeepers and participants. For example, a company phone representative fields incoming questions from individuals through a hotline. This individual explains they have multiple IRAs and an employer-sponsored retirement plan. The phone representative identifies that this person needs more advice and guidance from a more specialized representative. This is not investment advice, but it is a referral for such. Under the Proposed Rule, would that be considered fiduciary advice? Would the phone representative then be responsible for the advice that the representative to whom they referred the individual ultimately provides the individual since the phone representative helped facilitate such conversation? Does this proposal mean that a phone representative who is not licensed would now need to be licensed? Should the phone representative simply not refer the individual due to fear of triggering fiduciary status? Did the Department intend to eliminate these basic conversations about retirement plans? The Coalition proposes that the Department clearly provide that such conversations are not investment advice and include such clarification within the text of the rule rather than the preamble.

As drafted, this Proposal will result in exponentially more expensive recordkeeping in an already competitive environment. Adding additional burdens and restrictions on recordkeeping will drive many of the small recordkeepers out of the market, consolidating the industry into just a few, large companies, thereby driving up prices. This result seems antithetical to the Administration's push for more competition to benefit consumers.

The Department also states that they do not think that "wealth and income are strong proxies for financial sophistication"[20] but then go on to suggest that "[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within [such status]."[21]

---

[19] Interpretive Bulletin 96-1; Participant Investment Education, 61 Fed. Reg. 29,586 (June 11, 1996).
[20] Retirement Security Rule, *supra* note 1, at 75,907.
[21] *Id.*

This is also after the Department notes "the investment advice provider's fiduciary or non-fiduciary status would depend on the parties' understandings under the particular facts and circumstances."[22] This suggests a subtle sophisticated parties exemption and that would allow them to operate outside of the rule, but the proposal also explicitly states that individuals cannot disclaim fiduciary status. While Congress may not have explicitly denied fiduciary protection to sophisticated investors, Congress typically treats sophisticated investors much differently than your average retirement saver. Does the Department not differentiate between a retail and an institutional investor? Would the Department differentiate between an investor not represented by a plan fiduciary or other advisor vs one that is? Should the provider become a fiduciary to a plan that already has someone serving as a fiduciary or independent advisor to it? The Coalition would propose that the Department explicitly include a sophisticated investor exception and such exemption should be included in the text of the rule rather than the preamble.

Although the preamble states the Department believes "communications to financial intermediaries would typically fall outside the scope of [the proposal], because [it] would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary,"[23] it still presents a risk that wholesaling activities, particularly those where the wholesaler meets with the customer and financial professional directly, will be viewed as fiduciary activities. It is unclear how the Department would view a direct meeting between a wholesaler and a customer and financial professional as fiduciary activity. The Coalition requests that the Department include a wholesalers' exception in the text of the rule rather than the preamble.

If there is no mutual agreement required for a relationship of trust and confidence, it is unclear what determines the existence of such relationship other than a retirement investor's expectations. What if those expectations are unrealistic given that a retirement saver may be a savings novice with no point of comparison? To assist the Department in establishing clearer lines, the Coalition would recommend reinstituting a seller's exception.

It is unclear what the definition of "Investment Property" includes as it relates to insurance products issued in a group versus a retail setting.[24] Does the Department intend to apply this in instances where such products have an associated funding arrangement or premium stabilization reserve? Term life insurance policies are excluded from the definition of Investment Property,[25] so does the Department agree that group term life insurance policies should also be excluded? Similarly, would the Department agree that employer group term life insurance issued with a premium stabilization reserve (a "PSR") that inures to the benefit of the employer also be excluded because group term life policies do not "contain an investment component."[26] Finally, does the Department agree that group annuity contracts should be excluded from the definition of Investment Property? The Coalition proposes that the Department explicitly exclude these products from the definition of Investment Property.

Finally, it is unclear whether the Department intended for an insurance company to be deemed an investment advice fiduciary merely because the company is affiliated with an institutional asset manager. The institutional asset manager and the plan typically agreed to the scope of

---

[22] *Id.*
[23] Retirement Security Rule, *supra* note 1, at 75,907.
[24] *Id.* at 75,905.
[25] *Id.*
[26] *Id.*

fiduciary duty via a negotiated, bespoke investment management agreement. As the parties have agreed to the scope of the asset manager's fiduciary duties, it seems inappropriate to expand that scope extra-contractually to the entire consolidated group. The Department should narrow the companies that are deemed fiduciaries to exclude the consolidated group beyond the company that provides covered investment advice.

Proposed Amendment to Prohibited Transaction Exemption ("PTE") 84-24

The Proposal drastically alters what has been known as "the insurance exemption" for almost forty years. PTE 84-24 has been utilized by insurance companies and its agents for insurance sales and only for the receipt of commissions related to such sales. The Proposal would require all insurance companies save for a select few to move from PTE 84-24 to PTE 20-02,[27] and the narrow application of the proposed PTE 84-24 would apply only to independent insurance agents who sell annuities for two or more unrelated insurers and is not an employee of an insurance company.[28] While the insurance company is not considered a co-fiduciary with the independent agent,[29] the proposed PTE does impose new disclosure, recordkeeping, annual review, and oversight obligations on the insurance company[30] in addition to expanded enforcement authority for the Department to determine an insurance company's compliance with the proposed PTE in which such companies are explicitly not considered fiduciaries.[31]

Moreover, in the health space there has been significant litigation over the line between ERISA preemption and ERISA's saving clause, which ultimately led to the Supreme Court establishing a very broad reading of the saving clause.[32] Applying similar principles to retirement, this proposal would regulate the business of insurance by eliminating forms of compensation permitted under state insurance regulation by virtue of whether you are an independent or captive insurance agent. The Proposal casts all insurance companies in the same light, but it fails to recognize that insurance companies are each structured very differently and are permitted to structure their businesses in various ways that result in the Proposal having very different impacts across the industry. Though the Department asserts it is trying to create a "level playing field,"[33] it simply has changed the playing field and leveled some while creating inequities in others. For example, the proposed PTE effectively prohibits almost all variations of compensation under 84-24 that are allowed under state law and some under 20-02. Why is non-cash compensation allowed under 20-02, but not in 84-24?

The Coalition is unable to propose specific fixes to this proposed PTE as there is a fundamental structural issue with the concept of insurance companies supervising independent agents. The insurance company can provide training on their products, and they can control their products' position, and manage compensation, but they cannot truly supervise the activities of independent agents. Even state insurance laws do not ask the companies to supervise because they know that they are independent, and this may implicate worker classification issues and put insurance companies in an untenable position. It is unclear to what end the Department would require supervision of independent agents.

---

[27] *See generally* Proposed Amendment to PTE 84-24, *supra* note 3.
[28] *Id.* at 76,005.
[29] *Id.* at 76,006.
[30] *Id.* at 76,009-12.
[31] *Id.* at 76,014.
[32] *Id.* at 76,013.
[33] *Id,* at 76,005.

Proposed Amendment to Class Exemption PTE 20-02

The Department published PTE 20-02 just over three years ago on December 18, 2020,[34] and it has only been fully enforceable since July 1, 2022,[35] a mere year and a half before the Department decided to make significant changes.[36] The Department did not justify why such changes were merited so quickly. The rushed changes with respect to this PTE seem premature. Moreover, even the companies that have altered their operations to rely on PTE 20-02 already are unsure how to apply the proposed changes to this PTE; however, this does not begin to address the severity of the situation for companies that have long relied on PTE 84-24 and are now being forced to rely on PTE 20-02 under the Proposal. The Department should reconsider its amendments with respect to this proposed exemption and allow sufficient time to see how the industry evolves around PTE 20-02 now that it is fully enforceable.

As drafted, it is unclear in a multivendor situation if an individual has part of their money with financial institution A and part with insurance company B, how a company is supposed to get all of the relevant information. Would a financial institution have to amend advice once it receives information from the other financial institution? A company would now be forced to rely on an individual, who may or may not be in a relationship of trust and advice. What if they do not provide the requested or relevant information? Is a financial institution unable to proceed until it receives the information, which may prevent such company from providing timely investment advice. There are also questions if companies can even obtain this information or remedies if they cannot.

It is unclear whether proprietary annuity sales by captive agents are covered by the revised version of PTE 20-02, given the definition of covered principal transactions and lack of relief for the purchase and sale of an annuity if the insurer is deemed to be a fiduciary.[37] Moreover, by limiting the investment types in covered principal transactions,[38] it is not clear if one is prohibited from representing that type of investment. The Coalition would ask the Department to provide clarity on these topics.

There are considerable issues with respect to the amendments regarding domestic criminal convictions. By changing the once-narrow application of an exclusion from a "conviction of any crime described in ERISA section 411 arising out of [such person's] provision of advice to Retirement Investors"[39] to an incredibly broad exclusion of a conviction resulting from "any felony involving abuse or misuse of such person's employee benefit plan position *or employment*, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a

[34] Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82,798 (Dec. 18, 2020).
[35] Dep't of Labor, Field Assistance Bulletin 2021-02 (Oct. 25, 2021) (announcing a temporary enforcement policy for PTE 2020-02 and that "the Department will not pursue prohibited transactions claims against investment advice fiduciaries who are otherwise in compliance with PTE 2020-02" from 12/21/21 through 06/30/22).
[36] *See* Proposed Amendment to PTE 2020-02, *supra* note 2.
[37] *Id.* at 75,981.
[38] *Id.*
[39] PTE 2020-02, *supra* note 36, at 82,841.

crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411,"[40] the Department has created an unworkable proposal for large financial institutions. For example, a large financial institution works with local second chance organizations to hire former incarcerated individuals as there is an incredibly tight labor market. These individuals are trained and work in the institution's call center where such worker handles basic intake questions for pension participants. Later this worker is convicted of felony assault or a felony DUI stemming from attendance at a workplace holiday party. These felonies could jeopardize the institution's ability to utilize the exemption. These actions are wholly unrelated to the institution's management of retirement assets, yet the institution would have to operate as if they were. This part of the Proposal seems contrary to the Administration's efforts to bolster classification as employees.[41] The likely result is that the financial institution may outsource these lower-level jobs to a separate company resulting in independent contractor status for these once-employees rather than face the dire consequences of the Proposal for employees far removed from the actual management of retirement assets. The amendments in this section are unworkable and seem to be a solution in search of a problem.

Similarly, there are considerable issues with respect to convictions in foreign affiliates. It is difficult for companies to fully understand their liability in this space given the final qualified professional asset manager ("QPAM") rules are currently at the Office of Management and Budget ("OMB").[42] The Coalition is left wondering whether the revisions to PTE 20-02 have been coordinated with those final QPAM rules. Will a company with a foreign affiliate that faces a conviction have to apply for both a QPAM exemption and an individual exemption to continue using PTE 20-02? The final rules altering the PTE procedures recently left OMB but have not yet been issued by the Department. The proposed rules made it more difficult to obtain an individual exemption.[43] Requiring companies to seek multiple exemptions for the same conviction is likely to strain EBSA's already-thin resources even further.[44] The members of our Coalition are left to wonder how they should reconcile these rules or comment about their interaction when there are multiple moving parts. Finally, there are serious concerns that some of these changes would allow for potentially hostile foreign governments to interfere in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets.[45]

---

[40] Proposed Amendment to PTE 2020-02, *supra* note 2, at 76,001 (emphasis added).
[41] *See generally* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (proposed Oct. 13, 2022).
[42] *See* Office of Information and Regulatory Affairs, List of Regulatory Actions Currently Under Review, https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp?agency_cd=0000&agency_nm=All&stage_cd=4&from_page=index.jsp&sub_index=0 (last visited Jan. 2, 2024).
[43] *See* Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications, 87 Fed. Reg. 14,722 (proposed Mar. 15, 2022).
[44] *See generally* U.S. Gov't Accountability Office, Employee Benefits Security Administration: Systematic Process Needed to Better Manage Priorities and Responsibilities (Nov. 16, 2023), https://www.gao.gov/assets/d24105667.pdf ("EBSA's Congressional Budget Justifications show that, over the 2013 to 2021 period, EBSA's annual appropriations have generally remained unchanged in nominal terms, but declined when accounting for inflation…EBSA also experienced a decline in staffing…[while] the agency has received many new responsibilities through legislation.").
[45] *See* Letter from Sen. Bill Cassidy to Julie Su, Acting Secretary of the Dep't of Labor (Nov. 29, 2023).

It is also unclear how the self-correction program would work in PTE 20-02.[46] A financial institution must notify the Department of its self-corrections where there have been violations of the conditions of the exemption. How would a financial institution make a retirement investor whole for any resulting losses related to a violation of the conditions of the exemption? For example, if a condition has been violated and a rollover occurred, how would a retirement saver be made whole?

Additionally, to correct any violations of the exemption conditions, a financial institution must pay its excise tax related to the prohibited transaction. Currently insurers are not included in the 14 types of entities who must file the Form 5330 nor does the Department consider them fiduciaries in certain instances.[47] How can an entity that is not a fiduciary, that did not commit a prohibited transaction, and is not listed among the entities eligible to file Form 5330, file such form and pay an excise tax covering a prohibited transaction it did not commit?

To satisfy the conditions of PTE 20-02, financial institutions are prohibited from using "quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in the Retirement Investors' Best Interest."[48] For companies already complying with this exemption, this particular revision makes compliance incredibly difficult, if not impossible. There must be clear and objective lines of what is acceptable rather than a completely subjective test only the Department can discern.

As discussed earlier, recordkeepers are having difficulty determining how to continue having initial, basic conversations with plan participants without worrying they will become a fiduciary since the line between education and advice is so unclear. It would be nearly impossible for these conversations to cease between recordkeepers and participants, and recordkeepers cannot adopt a 20-02 strategy as they do not have the infrastructure to adapt to the proposed PTE.

Finally, PTE 20-02 unfairly calls into question the types of compensation that can be paid to financial professionals that are permitted by other best interest compliance regimes. This change has the potential to impede access to much-needed retirement advice. Compensation structures, incentives, and educational and training processes supported by proper policies, procedures, and disclosure that, on their whole, do not operate to subordinate the interest of the firm or the adviser to the interests of the retirement savers, should always be permitted.

Timing of Implementation

Despite the significant input that the Department has received over the history of this rulemaking, it still had 180 questions embedded within the Proposed Rule. As members of the Coalition have earnestly grappled with and continue to study this Proposal and its impact to their businesses, they too are wrestling with a considerable number of questions that make implementation difficult, if not impossible in certain instances as outlined throughout this comment letter. Certainly, this Herculean task could not be completed and implemented within the proposed 60 days of a final rule especially since the Department has recognized in the past the time needed to implement such drastic changes as changes must be made to business

[46] Proposed Amendment to PTE 2020-02, *supra* note 2, at 75,988.
[47] I.R.S., Instructions for Form 5330 (Rev. Dec. 2022), https://www.irs.gov/pub/irs-pdf/i5330.pdf.
[48] Proposed Amendment to PTE 2020-02, *supra* note 2, at 75,987.

practices including sales protocols and compensation agreements, recordkeeping, and communications. This Proposal requires no less from businesses than prior versions, yet the Department has provided an insufficient implementation and compliance period – even with a greater amount of uncertainty and unanswered questions in the Proposal.

In the first iteration of this rule in 2010, the Department initially proposed an effective date 180 days after the publication of the final rule and asked stakeholders whether the rule should become effective on a different date; however, the rule was withdrawn before it could become effective.[49] In 2015, the Department proposed "the final rule would be effective 60 days after publication in the Federal Register and the requirements of the final rule would become applicable eight months after publication of a final rule."[50] When the Department promulgated the final rules, the final rule became effective on June 7, 2016, but was not applicable until a year later on April 10, 2017 to provide sufficient time for the regulated to make the necessary changes to meet the new requirements for the final exemptions, and full compliance was not required until January 1, 2018.[51] This rule did not become applicable as the Department under a new administration proposed and finalized a 60-day delay.[52] During this delay, the Department issued an RFI,[53] then proposed and ultimately finalized an 18-month delay of the January 2018 applicability date of certain provisions of the 2016 final rule.[54] The Fifth Circuit vacated the rule in toto in early 2018.[55] As such, the Insurance Coalition respectfully requests the Department provide at least 18 months for the final rule to become applicable to provide ample time for proper implementation.

Process Concerns

In addition to the significant substantive concerns, the concerns relating to the process of this Proposal are serious and call into question the Department's compliance with the requirements of the Administrative Procedure Act. Though Department officials have stated that this proposal

---

[49] Definition of the Term 'Fiduciary,' 75 Fed. Reg. 204 (proposed Oct. 21, 2010).
[50] Definition of the Term 'Fiduciary,' 80 Fed. Reg. 21,928 (proposed Apr. 20, 2015).
[51] Definition of the Term 'Fiduciary;' Conflict of Interest Rule- Retirement Investment Advice, 81 Fed. Reg. 20,946 (Apr. 8, 2016) (to be codified at 29 C.F.R. pts. 2509, 2510, and 2550); Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters, 81, Fed. Reg. 21,147 (Apr. 8. 2016) (to be codified at 29 C.F.R. pt. 2550); Best Interest Contract Exemption, 81 Fed. Reg. 21, 002 (Apr. 8, 2016) (to be codified at 29 C.F.R. pt. 2550).
[52] Definition of the Term 'Fiduciary,' 82 Fed. Reg. 12,319 (Mar. 2, 2017); Definition of the Term Fiduciary; Conflict of Interest Rule – Retirement Investment Advice; Best Interest Contract Exemption, etc.," 82 Fed. Reg. 16,902 (Apr. 7, 2017).
[53] Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 Fed. Reg. 31,278 (July 6, 2017).
[54] 18-Month Extension of Transition Period and Delay of Applicability Dates; Best Interest Contract Exemption (PTE 2016-01), 82 Fed. Reg. 56,545 (Nov. 29, 2017); Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (PTE 2016-02), 82 Fed. Reg. 16,902 (Nov. 29, 2017); Prohibited Transaction Exemption 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters (PTE 84-24), 82 Fed. Reg. 18,902 (Nov. 29, 2017).
[55] *Chamber of Commerce of the U.S. et al v. Acosta,* No. 17-10238 (5th Cir. Mar. 15, 2018).

is dramatically different from prior versions of the rule[56] and narrowly tailored to reflect the 2018 Fifth Circuit decision,[57] the Department suggested in its denial of the Coalition's request to extend the comment period (and push back the hearing date until after the close of the comment period), that "EBSA believes that its current proposal reflects significant input it has received from public engagement with this project since 2010…."[58] It is unclear how an allegedly different proposal merits such a brief comment period despite the years of stakeholder engagement on distinct rules spanning three different administrations.

When the Department first proposed a fiduciary rule in 2010, the Department provided a 90-day comment period.[59] The Department then extended the comment period by two weeks for a 104-day comment period.[60] For that iteration of the rule, the Department also gave stakeholders five months to prepare for a hearing.[61]

The second iteration of the fiduciary rule was proposed in 2015, and stakeholders were provided an initial 75-day comment period[62] that was later extended by 15 days[63] for a 90-day comment period. In that instance, the Department held four days of public hearings approximately a month after the close of the comment period.[64]

For the current Proposal, the Department has requested stakeholders provide comments on specific portions of the Proposal (including the proposed amendments to the various prohibited transaction exemptions) over 180 times. The Department has steadily been working on this rule for over a decade, but specific to this effort, the Department signaled that it began rewriting the

---

[56] *See, e.g.,* transcript of interview with Tim Hauser, Deputy Assistant Secretary for Program Operations, Employee Benefits Sec. Admin., Dep't of Labor (Nov. 9, 2023) ("This isn't the 2016 rule…This is really very, very focused on what is the relationship between the person making the recommendation and use the customer, and is it one where the person really reasonably should expect that they can rely upon this advice is based on their interests."), https://www.listennotes.com/podcasts/dc-pension-geeks/tim-hauser-navigating-the-iOAPSm5rbGh/.

[57] Retirement Security Rule, *supra* note 1, at 75,961 ("[T]he Department has crafted a more focused definition that would consider the scope of issues identified by the Fifth Circuit while still protecting retirement investors.").

[58] Letter from Lisa Gomez, Assistant Secretary, Employee Benefits Sec. Admin., Dep't of Labor, to Kendra Isaacson, Principal, Mindset (Nov. 14, 2023).

[59] Definition of the Term 'Fiduciary,' 75 Fed. Reg. 204 (Oct. 22, 2010).

[60] Dep't of Labor, "US Department of Labor Announces a Public Hearing on Proposed Definition of Fiduciary Regulation," (Dec. 2010), https://www.dol.gov/newsroom/releases/ebsa/ebsa20101222-0.

[61] *See* Dep't of Labor, Definition of the Term "Fiduciary" Proposed Rule – Historical Information, https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32#comments.

[62] Definition of the Term 'Fiduciary,' 80 Fed. Reg. 21,928 (Apr. 20, 2015).

[63] Mark Schoeff, "DOL extends comment period on fiduciary duty proposal," Investment News (May 15, 2015), http://www.investmentnews.com/article/20150515/FREE/150519925/dol-extends-comment-period-on-fiduciary-duty-proposal.

[64] Dep't of Labor, "Public Hearing Agenda: Conflict of Interest – Definition of Fiduciary Investment Advice," (Aug. 10-13, 2015), https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/proposed-regulations/1210-AB32-2/hearing-agenda.

rule in 2021.[65] The Department spent at least two years on this rewrite and still has almost 200 questions for stakeholder input. In just two months that include several national and significant religious holidays, stakeholders are expected to grapple with and respond to this Proposal. The public cannot be expected in such a brief time to digest the considerable changes the Proposal would make to a complex industry and determine responses to the Department's numerous outstanding questions even after their multi-year effort. Stakeholders need sufficient time to engage in a comprehensive, multidisciplinary, and deliberative process over these numerous critical questions to provide thoughtful responses. The Proposal not only makes significant changes to rules relating to the provision of investment advice, but it interacts with other regulatory schemes outside of the jurisdiction of the Department as well as other pending rulemaking proposals from the Department.

In addition to a comment period that is entirely too short, the Department held a hearing on the Proposed Rule in the middle of the comment period,[66] which effectively shortened the already brief comment period. In fact, after receiving numerous requests to extend the comment period, the Department scheduled it earlier than it had originally suggested.[67] This is an unprecedented move as we cannot find any examples of the Department holding other hearings during a comment period for an ongoing rulemaking.

As of January 2, 2024, 18,414 comments have been submitted just on the Retirement Security Rule, but only 95 are publicly available, the majority of which are requests to extend the comment period rather than substantive comments.[68] This seems contrary to the transparency goals in the Administrative Procedure Act to enable all stakeholders to see the entire public record so information can be easily accessible and not available only to those in certain meetings.[69] We understand that the Department may need to screen comments before posting them; however, if the Department cannot keep up with the sheer volume of comments, perhaps the process was too compressed. If there had been a sufficiently long comment period, the Department may have been able to keep up with the submissions.

Although there is a lengthy history with the various iterations of this rule and the stakeholders as well as the Department are suffering from fiduciary fatigue, the Department must engage in a

---

[65] Eversheds Sutherland, "DOL Fiduciary Rule 3.0: The sprint to December 20," (Sept. 7, 2021), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/244824/DOL-Fiduciary-Rule-30The-sprint-to-December-20 (noting that "[i]n DOL's most recent regulatory agenda, proposed Rule 4.0 was slotted for December 2021").

[66] Hearing on Retirement Security Rule: Definition of an Investment Advice Fiduciary and Associated Prohibited Transaction Exemption Amendments, 88 Fed. Reg. 80,649 (Nov. 29, 2023).

[67] Retirement Security Rule, *supra* note 1, at 75,890 (stating that "[t]he Department anticipates holding a public hearing approximately 45 days following the publication in the Federal Register" which was December 18, 2023).

[68] *See* Rulemaking Docket, Definition of an Investment Advice Fiduciary , https://www.regulations.gov/docket/EBSA-2023-0014 (last visited Jan. 2, 2024); *see also* Dep't of Labor, Retirement Security Rule: Definition of an Investment Advice Fiduciary Public Comments, https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02 (last visited Jan. 2. 2024).

[69] *See generally* Meghan Stuessy, Cong. Research Serv., Access to Government Information: An Overview (Dec. 18, 2023), https://crsreports.congress.gov/product/pdf/R/R47058.

robust process supported by the Administrative Procedure Act. Each rulemaking must stand on its own.

Conclusion

We appreciate the opportunity to provide these comments and thank you in advance for your consideration of our views. Please do not hesitate to contact us should you have any questions or need additional information as you continue your work on this rulemaking.

Sincerely,

Kendra Isaacson, The Insurance Coalition