Filed Electronically

December 27, 2023

Ms. Lisa M. Gomez
Assistant Secretary
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue NW, Room N-5655
Washington, DC 20210

Re: *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, RIN 1210-AC02; *Proposed Amendment to PTE 2020-02*, Application No. D-12057; *Proposed Amendment to PTE 84-24*, Application No. D-12060; *Proposed Amendment to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128*, Application No. D-12094

Dear Assistant Secretary Gomez:

The American Securities Association (ASA)[1] writes to oppose the Department's proposed changes to ERISA's definition of an "investment advice fiduciary." This proposal and related changes to the Department's Prohibited Transaction Exemptions (PTEs) dramatically expand ERISA's definition of fiduciary status without statutory basis, do not adequately address reliance interests, deprive the public of a meaningful ability to comment, and violate the Appointments Clause.

This is the fourth time the Department has pursued this unlawful policy. After an aborted attempt in 2010, the Department issued a 2016 rule on fiduciary status that the Fifth Circuit vacated as inconsistent with ERISA and the APA.[2] The Department then resurrected the policy through sub-regulatory guidance in 2020 and 2021. But ASA sued, and the Department's policy was struck down *again*, this time by the Middle District of Florida.[3] In defiance of these decisions, the

[1] ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. ASA's mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

[2] *See Chamber of Com. v. DOL*, 885 F.3d 360 (5th Cir. 2018).

[3] *See ASA v. DOL*, No. 22-cv-330, 2023 WL 1967573, at *1 (M.D. Fla. Feb. 13, 2023).

Department is now reenacting the same policy with only cosmetic changes. This latest effort will fail in the courts just like the others.

The Department has asked for comments on "any adjustment [that] should be made to the regulatory text to address issues discussed herein."[4] ASA urges the Department to abandon its proposals and maintain its longstanding common law definition of fiduciary status, as required by the text of ERISA and judicial precedent.

COMMENTS

I. The Department's new definition of "investment advice fiduciary" violates ERISA.

The Department is proposing to abandon its 50-year-old definition of "investment advice fiduciary" and adopt an unprecedented expansion of ERISA fiduciary status to include anyone who gives any investment advice concerning an IRA, including one-time rollover advice.[5] ERISA forbids this interpretation.

The proposal lacks statutory authority for at least three reasons. *First*, its definition of "fiduciary" concerns a major question, but ERISA does not provide a clear statement authorizing it. *Second*, the proposal extends fiduciary duties to one-time rollover advice, but the term "fiduciary" in ERISA is defined by the common law, which limits fiduciary duties to investment advice that is given on a regular basis and that forms the primary basis of the client's investment decisions. *Third*, the proposal extends fiduciary duties to investment advice for IRAs, but ERISA limits fiduciary duties to investment advice for employer-sponsored retirement plans.

A. The Department lacks a clear Congressional statement to justify its proposal.

When agencies claim statutory authority to act, courts ordinarily ask "whether Congress in fact meant to confer the power the agency has asserted."[6] But when agency actions concern "major questions," courts demand "something more than a merely plausible textual basis for the agency action."[7] The agency instead "must point to 'clear congressional authorization' for the power it claims."[8] The Department's proposal presents a major question, but the Department has failed to identify clear statutory authority for its expansion of ERISA fiduciary status.

The Department's proposal concerns a major question for several reasons. To begin, the rule would have "vast 'economic and political significance.'"[9] The Department acknowledges the significance of its proposal. The Department admits that its proposal would extend ERISA

[4] 88 Fed. Reg. 75890, 75907 (Nov. 3, 2023).

[5] *Id.* at 75977-79.

[6] *West Virginia v. EPA*, 142 S.Ct. 2587, 2607-08 (2022).

[7] *Id.* at 2609.

[8] *Id.*

[9] *Ala. Ass'n of Realtors v. HHS*, 141 S.Ct. 2485, 2489 (2021).

jurisdiction and fiduciary duties over trillions of dollars of assets in IRAs that are currently beyond its regulatory reach.[10] It also admits that the rule would prohibit (absent an exemption) one-time commercial recommendations to perform "rollover transactions [that] are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make."[11] And it admits that the proposal would impose hundreds of millions of dollars in costs per year on investment advisors who make such recommendations.[12]

The Department's proposal also has been "the subject of an 'earnest and profound debate' across the country."[13] The Department concedes that it has tried to implement this same basic proposal multiple times before, that its proposal is controversial and opposed by many stakeholders, and that it has been struck down twice already in court.[14] And the proposal has garnered years of attention from Congress, with bipartisan majorities passing several bills to stop it and representatives writing letters urging the Department to take a different approach.[15] From the time the Department's original 2010 proposal was released, the issue has been a topic of great interest and concern to elected representatives in Congress.

The Department's proposal is also "'unprecedented.'"[16] The Department admits that for decades federal law has not treated advice concerning IRA plans and one-time rollovers as creating a fiduciary relationship.[17] The fact "that it took DOL [nearly fifty] years to 'discover' its novel interpretation" is further reason to regard this proposal as a major question.[18] And Congress did not grant this "sweeping and consequential authority" to expand fiduciary status in a "'cryptic . . . fashion.'"[19]

To justify its interpretation, the Department invokes an out-of-context provision in ERISA, which says the following:

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[10] *See* 88 Fed. Reg. at 75915.

[11] *Id.* at 75894.

[12] *See id.* at 75929, 75948-63.

[13] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

[14] 88 Fed. Reg. at 75893-96.

[15] *See, e.g.*, H.Amdt. 758 to H.R. 5894 (2023), https://bit.ly/3RdBM4T; H.R. 1090 (2015), https://bit.ly/3Gwlak9; H.R. 2374 (2013), https://bit.ly/3RbM7hT; Mark Schoeff Jr., *House Democrats Seek Changes to DOL Fiduciary Rule*, Investment News (Sept. 29, 2015), https://bit.ly/4acFIeP.

[16] *West Virginia*, 142 S.Ct. at 2608 (quoting *Ala. Realtors*, 141 S.Ct. at 2489).

[17] *See* 88 Fed. Reg. at 75891-96.

[18] *Chamber of Com.*, 885 F.3d at 380-81, 387.

[19] *West Virginia*, 142 S.Ct. at 2608.

> [A] person is a fiduciary with respect to a plan to the extent
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> (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,
>
> (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
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> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.[20]

But this provision is not a clear statement in support of the Department's position.

First, this provision speaks only about fiduciary status "with respect to a [Title I employer-sponsored] plan," not a Title II IRA.[21] Second, the provision is not a definition of "fiduciary" status at all.[22] ERISA leaves the term "fiduciary" undefined, incorporating the common law definition.[23] As for clauses (i)-(iii), they merely provide that "fiduciary" status exists only "with respect to" a Title I plan and only "to the extent" a person exercises asset management, renders investment advice, or has administrative authority.[24] Third, even if this provision defined fiduciary status, it would still require adherence to the common law definition of fiduciary. "[T]he phrase 'investment advice for a fee' and similar phrases generally referenc[e] a fiduciary relationship of trust and confidence between the adviser and client," and "[t]he phrase 'control and authority' necessarily implies a special relationship beyond that of an ordinary buyer and seller."[25]

B. ERISA adopts the common law definition of "fiduciary," which prohibits the Department's interpretation.

Even without the major-questions doctrine, the plain text of 29 U.S.C. §1002(21)(A) does not give the Department authority to redefine Title I fiduciary status to cover one-time rollover advice.

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[20] 29 U.S.C. §1002(21)(A); *see* 88 Fed. Reg. at 75891-92 (citing this provision for its authority).

[21] 29 U.S.C. §1002(21)(A).

[22] *Chamber of Com.*, 885 F.3d at 371 ("In §1002, ERISA's definitional section, 41 of 42 provisions begin by stating, '[t]he term ['X'] means' . . . [but not for] the term 'fiduciary.'" Congress "did not place 'fiduciary' in quotation marks," and Congress used "the words 'to the extent,'" which are "'words of limitation.'").

[23] *Id.* at 369-71; *see also* 88 Fed. Reg. at 75895 n.38 (observing that under Fifth Circuit precedent, "'the phrase "renders investment advice for a fee or other compensation" suggests that the statute applies only in the limited context accepted by the panel majority'").

[24] *See Chamber of Com.*, 885 F.3d at 369-71.

[25] *Id.* at 373-78.

As noted, ERISA incorporates the common law definition of "fiduciary."[26] Thus, one year after Congress passed ERISA, the Department promulgated a five-part common law test to determine fiduciary status under ERISA and the IRS Code. Under that test, a person who renders investment advice is a "fiduciary" when:

> Such person [1] renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; . . . [2] on a regular basis to the plan [3] pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services [4] will serve as a primary basis for investment decisions with respect to plan assets, and that such person [5] will render individualized investment advice to the plan based on the particular needs of the plan[.][27]

This definition "captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client."[28]

Elements two (the "regular basis" prong) and four (the "primary basis" prong) are critical for determining ERISA fiduciary status. A financial advisor and client can only have an "underlying relationship of trust and confidence"—which is "the touchstone of common law fiduciary status"—if the advisor performs "'regular' work on behalf of [the] client" that forms "the 'primary basis' for [the client's] investment decisions."[29]

But the Department's proposal abandons these crucial elements. Under its new definition, any person who renders any investment advice related to any employer-sponsored retirement plan or IRA is a fiduciary as long as:

> (i) The person either 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; [or]
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> (ii) The person either directly or indirectly (*e.g.*, through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and 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

[26] *Id.* at 369-71.

[27] 29 C.F.R. §2510.3-21(c)(1).

[28] *Chamber of Com.*, 885 F.3d at 365.

[29] *Id.* at 364-65, 369.

investor as a basis for investment decisions that are in the retirement investor's best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[30]

None of these definitions require a fiduciary to give regular advice with respect to a particular retirement plan (only regular investment advice *in general* "as part of their business"). And none of them require that such regular advice form the primary basis of the client's investment decisions. While this definition has some limits, it still confers fiduciary duties on financial transactions (such as one-time rollovers to an IRA) that lack any "special relationship of trust and confidence between the fiduciary and his client."[31]

Because this proposal "expressly includes one-time IRA rollover . . . transactions where it is ordinarily inconceivable that financial salespeople or insurance agents will have an intimate relationship of trust and confidence with prospective purchasers," it violates ERISA.[32] The Department must adhere to the "regular basis" and "primary basis" elements of common law fiduciary status and abandon its proposed redefinition.

C. The Department's interpretation conflicts with ERISA's statutory structure.

The Department's proposal also conflicts with the structure of ERISA. "'It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[33] The structure of ERISA silos fiduciary duties in Title I of the statute, thus prohibiting the Department from imposing fiduciary duties on advice related to IRAs.

Title I of ERISA gives the Department regulatory authority over employer-sponsored retirement plans,[34] and it designates certain service providers to retirement plans as "fiduciaries," subjecting them to duties of loyalty and prudence.[35] Consistent with these duties, Title I prohibits fiduciaries from engaging in certain "prohibited transactions," such as transactions in which the fiduciary receives a commission paid by a third party or compensation that varies based on the fiduciary's investment advice.[36]

[30] 88 Fed. Reg. at 75977.

[31] *Chamber of Com.*, 885 F.3d at 365.

[32] *Id.* at 380.

[33] *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012).

[34] *Chamber of Com.*, 885 F.3d at 364 (citing 29 U.S.C. §§1108(a)-(b), 1135).

[35] 29 U.S.C. §1104(a)(1)(A)-(B).

[36] *Id.* §1106(b)(3); *see also id.* §1108(a)-(b) (authorizing exemptions to prohibited transactions).

Title II of ERISA, by contrast, created tax-deferred personal IRAs and similar accounts within the Internal Revenue Code.[37] Unlike Title I of ERISA, Title II does not give the Department authority to supervise financial service providers to IRAs.[38] Moreover, Title II fiduciaries to IRAs do not have duties of loyalty and prudence.[39] Instead, Title II authorizes the Treasury Department, through the IRS, to impose an excise tax on "prohibited transactions" involving IRA fiduciaries.[40] The Department of Labor is authorized only to grant exemptions from the prohibited transactions provision,[41] and to "define accounting, technical and trade terms" that appear in both laws.[42]

Titles I and II thus form a "basic division" in the statute.[43] Because of "the differences between ERISA Title I and II, DOL [cannot] trea[t] IRA financial services providers in tandem with ERISA employer-sponsored plan fiduciaries."[44] Moreover, Title I fiduciary duties are "plan"-specific, applying to Title I "plans" and not Title II IRAs.[45] Under Title I, a person is a "fiduciary with respect to a [Title I] plan."[46] A Title I fiduciary has no fiduciary duties toward a Title II IRA.[47]

The Department's proposal disregards this statutory division, conferring fiduciary status for "'investment advice' with respect to moneys or other property of a [Title I] plan *or [Title II] IRA* if the person makes a recommendation of any . . . investment transaction or . . . strategy involving . . . investment property . . . to the [Title I] plan, plan fiduciary, plan participant or beneficiary, *[or Title II] IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor)*."[48] And instead of treating Title I fiduciary duties as "plan"-specific, applying only to Title I "plans" and not Title II IRAs, the Department announces that "fiduciary status is determined on a transactional basis" without regard to the plan.[49]

The Department also appears to be trying to expand Title I's provision for private lawsuits. "[U]nlike . . . Title I, Title II contains no private lawsuit provision."[50] But under the Department's

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[37] 26 U.S.C. §4975(e)(1)(B).

[38] *Chamber of Com.*, 885 F.3d at 364.

[39] *Id.*

[40] 26 U.S.C. §4975(a)-(b).

[41] *Id.* §4975(c)(2), 29 U.S.C. §1108(a).

[42] 29 U.S.C. §1135.

[43] *Chamber of Com.*, 885 F.3d at 381.

[44] *Id.*

[45] 29 U.S.C. §1002(3), (21)(A); *see id.* §§1003(a) ("[T]his subchapter shall apply to any employee benefit plan."); 1101(a) ("This part shall apply to any employee benefit plan.").

[46] 29 U.S.C. §1002(3), (21)(A).

[47] *See id.*

[48] 88 Fed. Reg. at 75977 (emphasis added).

[49] *Id.* at 75901.

[50] *Chamber of Com.*, 885 F.3d at 384.

revisions to PTE 2020-02, an investment advisor working with an IRA must "acknowledge fiduciary status" in writing and thus agree to be bound by fiduciary duties,[51] which risks exposing the adviser to private fiduciary duty lawsuits under state law that ERISA prohibits. "[T]o authorize new claims under the fifty states' different laws . . . [is] no more than an end run around Congress's refusal to authorize private rights of action enforcing Title II fiduciary duties."[52]

II. The Department's new definition of "investment advice fiduciary" violates the APA.

The Department's proposal is also unlawful because it changes longstanding policy without properly weighing reliance interests or adopting a reasonable alternative.

Under the Administrative Procedure Act, "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'"[53] "When an agency changes course, as [DOL] did here, it must 'be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."'"[54] The agency must also "consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'"[55]

"Rule changes [thus] face a higher burden when departing from prior policy."[56] The agency must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns."[57] And "'a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'"[58]

The Department has not carried its high burden of justifying this proposal given the reliance interests at stake. Because of the popularity of IRA rollovers, millions of American investors rely on one-time commercial advice from investment advisors in making a rollover transaction. But the Department does not grapple with the fact that its proposal will discourage advisors from offering this advice entirely, even when such advice is in the investor's best interest.[59] The Department also

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[51] 88 Fed. Reg. 75979, 75980, 75999-76003 (Nov. 3, 2023).

[52] *Chamber of Com.*, 885 F.3d at 384.

[53] *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

[54] *DHS v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1913 (2020) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016)).

[55] *Id.*

[56] *City & Cty. of San Fran. v. USCIS*, 408 F. Supp. 3d 1057, 1104 (N.D. Cal. 2019).

[57] *DHS*, 140 S.Ct. at 1915.

[58] *Encino Motorcars*, 579 U.S. at 222.

[59] *See, e.g.*, Dkt. 39-3 at 3-5, *ASA v. DOL*, 22-cv-330 (M.D. Fla.); NAIFA, *Impact of the Proposed DOL Fiduciary-Only Rule on NAIFA Members* (Dec. 2023), https://bit.ly/41zLumR (data showing that the proposed rule will likely result in more asset "minimum thresholds" for clients, limiting Americans' access to financial services).

fails to consider the reliance of investment advisors on a fifty-year-old regime that let them provide one-time rollover advice without having to devote significant time and resources to comply with the terms of PTE 2020-02.[60] The Department's proposal also unreasonably imposes enormous costs without any quantifiable benefits.[61] And the fact that it took the Department decades "to 'discover' [this] novel interpretation further highlights [its] unreasonableness."[62]

This unreasonableness "is not salvaged by" the exemption in PTE 2020-02.[63] On the contrary, PTE 2020-02 compounds the proposal's unreasonableness because it "deliberately extends ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements."[64] "The grafting of novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties is unreasonable" and violate the APA.[65]

The Department's proposals to import PTE 2020-20's fiduciary duty standards into PTE-84-24 and to restrict access to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 have similar defects. Right now these exemptions make it possible for financial services firms to offer various services to investors, such as certain brokerage services, insurance and annuity contracts, and investment company securities. But the Department is proposing to require firms that rely on them to adopt the stringent standards of PTE 2020-20 instead.[66] The Department fails to acknowledge or address how these firms may be forced to stop offering these services to avoid fiduciary status or the cost of complying with PTE 2020-20. In the name of helping investors, the proposal would actually harm everday investors by restricting their access to investment services.

The same is true of the Department's proposal to deny financial institutions an exemption if the "Financial Institution, its Affiliate, or Investment Professional" is found guilty of a crime.[67] While accountability is essential, the Department should not wield the power to disallow an exemption or challenge a financial institution's reliance on a PTE based on the actions of a single individual or affiliate, and the Department should not be able to bar a firm from using the exemption for a prolonged period of time (*e.g.*, 10 years). The ultimate losers will be the customers, who may find themselves deprived of access to their chosen financial institution for reasons beyond their control. Maintaining access to preferred financial institutions for IRA custody is

[60] *See, e.g.*, Dkt. 39-4 at 4-5, *id.*

[61] *Michigan*, 576 U.S. at 752 ("[I]t is [not] rational . . . to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits.").

[62] *Chamber of Com.*, 885 F.3d at 380-81.

[63] *Id.* at 383.

[64] *Id.* at 384; *see* 88 Fed. Reg. at 75999-76003.

[65] *Chamber of Com.*, 885 F.3d at 384.

[66] 88 Fed. Reg. 76004, 76005-06, 76009, 76027-29 (Nov. 3, 2023); 88 Fed. Reg. 76032, 76034 (Nov. 3, 2023).

[67] 88 Fed. Reg. at 75989, 76001-02; 88 Fed. Reg. at 76013, 76029-30.

paramount for customer satisfaction and financial stability. The Department's failure to consider an alternative solution that is less burdensome on the public would be procedural error.

III. Acting Secretary Julie Su is not authorized to sign the final rules.

If the Department goes ahead with its proposals, the final rule and authorizations will need to be approved by the Secretary of the Department of Labor.[68] But there currently is no Secretary of the Department Labor. If the proposals are approved by Julie Su, who is purporting to be the Acting Secretary of the Department of Labor, they will be void and unenforceable because Ms. Su was not confirmed by the Senate as required by the Appointments Clause.

On February 28, 2023, President Biden nominated Ms. Su to replace the outgoing Secretary of Labor, Marty Walsh.[69] On March 21, the Administration notified GAO that Ms. Su was serving as "Acting Secretary of Labor" under DOL's succession statute.[70] The Senate held an initial hearing on her nomination in April, but "some key Democrats were unwilling to voice support."[71] It soon became clear that the Administration "[did] not have the votes . . . to confirm Julie Su's nomination."[72] On June 20, 32 Senators wrote a letter to President Biden urging him to withdraw her nomination.[73] But Administration officials responded by announcing that Ms. Su's nomination would not be withdrawn and that she would serve indefinitely in her position.[74]

The Department cannot avoid the appointment requirements of the Constitution. The Appointments Clause prescribes the exclusive process by which the President may appoint "officers of the United States."[75] It provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."[76] "[F]or purposes of appointment," the Clause divides all officers into two classes—"inferior officers" and noninferior officers, which have long been called "principal" officers.[77] Principal officers

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[68] *See, e.g.*, 29 U.S.C. §1135 ("[T]he Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter.").

[69] *See* The White House, *President Biden Nominates Julie Su for Secretary of the Department of Labor* (Feb. 28, 2023), https://bit.ly/4afNEfu.

[70] *See* https://bit.ly/3uW7b4B.

[71] Stephen Groves, *Biden Labor Secretary Nominee Su Faces Doubts in Senate*, Associated Press (Apr. 20, 2023), https://bit.ly/3NmstPd.

[72] https://bit.ly/3uW7b4B.

[73] *See* https://bit.ly/3TjmbU2.

[74] *See* Nandita Bose, *Biden's Labor Secretary Pick Julie Su to Stay in Job Indefinitely, Sources Say*, Reuters (July 20, 2023), https://bit.ly/3v12WV8.

[75] *United States v. Germaine*, 99 U.S. 508, 510 (1879).

[76] U.S. Const. Art. II, §2, cl.2.

[77] *Germaine*, 99 U.S. at 509, 511.

must be appointed by the President by and with the advice and consent of the Senate.[78] The Appointments Clause is "more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme."[79]

There is no question that the Secretary of Labor is a "principal" officer and that Ms. Su has not been confirmed by the Senate as Secretary of the Labor. As such, she has no authority to approve any final rule or order arising out of these rulemaking proceedings.

The Administration has pointed to 29 U.S.C. § 552 and claimed that this statute authorizes Ms. Su to be the "Acting Secretary of Labor" indefinitely. Even assuming that this statute applies (and not the more restrictive Federal Vacancies Reform Act), Ms. Su still would not be properly appointed. That is because Section 552 does not require the Deputy Secretary to be nominated and confirmed by the Senate before she "perform[s] the functions of the vacant office."[80]

To be sure, allowing the Deputy Secretary to automatically become Secretary "might contribute to more efficient Government. But the Appointments Clause is not an empty formality."[81] "That the Senate voluntarily relinquished its advice-and-consent power in [Section 552] does not make this end-run around the Appointments Clause constitutional."[82] The Clause, like all of the Constitution's structural provisions, "is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty."[83] It is therefore irrelevant that "the encroached-upon branch approves the encroachment."[84] "Neither Congress nor the Executive can agree to waive" the structural provisions of the Constitution any more than they could agree to disregard an enumerated right.[85]

Because Ms. Su has not been appointed as Secretary of Labor consistent with the Appointment's Clause, any approval of the final rule will be void and unenforceable.[86]

IV. The Department failed to provide adequate time to comment.

The Department also committed a procedural error by providing only 60 days to comment, which did not give "the public . . . a meaningful opportunity to submit data and written analysis

[78] *See Edmond v. United States*, 520 U.S. 651, 660 (1997)

[79] *Id*. at 659.

[80] *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 312 (2017) (Thomas, J., concurring)

[81] *Id*. at 316-17.

[82] *Id*. at 317.

[83] *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in judgment) (internal quotation marks and bracket omitted).

[84] *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 497 (2010) (quotation marks omitted).

[85] *Freytag v. Commissioner*, 501 U.S. 868, 880 (1991).

[86] *Lucia v. SEC*, 138 S.Ct. 2044, 2055 (2018).

regarding a proposed rulemaking."[87] "While there is no bright-line test for the minimum amount of time allotted for the comment period . . . 90 days is the 'usual' amount of time allotted for a comment period."[88] More than 60 days was needed for this "multi-faceted" proposal that "implement[s] extensive changes" and will "alte[r] long-established policy and practice."[89]

As ASA and other commenters explained to the Department in multiple extension requests, a 60-day comment period for a rule of this magnitude "is unprecedented."[90] The Department gave the public over 100 days to comment on the 2010 and 2016 proposals, which were 16 and 33 pages long in the Federal Register, respectively.[91] But for this proposal, which spans 90 pages of the Federal Register, the Department gave only half the time. Worse, the proposal was released on October 24, so the comment period spanned "multiple federally recognized holidays."[92] This left only "39 workdays" to review and comment.[93] On top of that, the Department scheduled a public hearing 45 days into the comment period, "effectively shorten[ing] the 60-day comment period for those who request[ed] to testify at the hearing because they . . . need[ed] to prepare their comments in time for the hearing."[94] The Department failed to acknowledge and respond to these concerns in its letters rejecting these extension requests.[95]

If the Department had given the public more time, ASA and others could have more closely reviewed the Department's lengthy proposal, considered the impact that its changes will have on American investors, and analyzed the Department's assertions about the purported costs and benefits of the rule.[96] That would have allowed ASA to submit more detailed feedback that the Department might have incorporated into its final determination. The Department thus prejudiced

[87] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011).

[88] *Cal. ex rel. Becerra v. DOI*, 381 F. Supp. 3d 1153, 1176 (N.D. Cal. 2019) (citation omitted).

[89] *Centro Legal de la Raza v. EOIR*, 524 F. Supp. 3d 919, 955 (N.D. Cal. 2021).

[90] Associations Letter to Lisa M. Gomez, Assistant Secretary for EBSA (Nov. 8, 2023), https://bit.ly/47I07qt; *see, e.g.*, ASA Letter to Lisa M. Gomez, Assistant Secretary for EBSA (Nov. 14, 2023), https://bit.ly/3trVbax; *see also* Democratic Senators' Letter to Acting Secretary Julie Su (Dec. 20, 2023).

[91] *See id.*

[92] Associations Letter, https://bit.ly/47I07qt; *see* Democratic Senators' Letter.

[93] Associations Letter, https://bit.ly/47I07qt.

[94] *Id.*; *see* ASA Letter, https://bit.ly/3trVbax; Democratic Senators' Letter.

[95] *See* Letter from Lisa M. Gomez, Assistant Secretary for EBSA, to Jessica Giroux, General Counsel for ASA (Nov. 15, 2023); Letter from Lisa M. Gomez, Assistant Secretary for EBSA, to Lisa J. Bleier, Head of Wealth Management, Retirement and State Government Relations for SIFMA (Nov. 14, 2023), https://bit.ly/3uJYI4i.

[96] *See, e.g.*, ASA Letter, https://bit.ly/3trVbax.

ASA and the public and violated the purposes of notice and comment, which are to test regulations and give affected parties an opportunity to develop a record for their objections.[97]

CONCLUSION

For these reasons, ASA urges the Department to leave in place its longstanding definition of investment advice fiduciary and withdraw its proposals.

Sincerely,

/s/ *Christopher A. Iacovella*

Christopher A. Iacovella
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[97] *See, e.g.*, *Prometheus Radio Project*, 652 F.3d at 449.