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November 17, 2023

The Honorable Julie A. Su
Acting Secretary
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Acting Secretary Su:

On November 3, 2023, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) published a proposed rule entitled "Retirement Security Rule: Definition of an Investment Advice Fiduciary" and proposed amendments to prohibited transaction exemptions (collectively, the Proposal).¹ Among other provisions, the Proposal attempts to regulate transactions historically outside of DOL's jurisdiction.

Because this far-reaching regulatory change will impact countless retirement plans, retirees, and savers, I am concerned that DOL provided only for a 60-day public comment period. I request that DOL extend the comment period by an additional 60 days to allow for a more considered review of the Proposal and to allow the regulated community to provide robust comments. I also request that EBSA hold its public hearing on the Proposal 30 days after the close of the comment period and open a second 30-day comment period after the conclusion of the hearing.

Demonstrated Need for a Longer Comment Period

The comment period for the Proposal runs from November 3 through January 2, 2024. As aptly pointed out in a November 8 letter from 18 trade associations spanning the market of retirement service providers and plan sponsors, DOL's proposed comment period lasts only 39 working days, as there are multiple federal holidays during this period.² This time is inadequate for the

¹ 88 Fed. Reg. 75,890 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 2020-02, 88 Fed. Reg. 75,979 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemption 84-24, 88 Fed. Reg. 76,004 (proposed Nov. 3, 2023); Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128, 88 Fed. Reg. 76,032 (proposed Nov. 3, 2023).

² Letter from trade associations to Assistant Sec'y Gomez, EBSA (Nov. 8, 2023),

<https://sifma.org/resources/submissions/retirement-security-rule-definition-of-an-investment-advice-fiduciary-and-related-exemptions-joint-trades/>.

retirement community to digest the consequences of the Proposal fully and to provide meaningful feedback.

Demonstrated Need for an Informed Hearing

In its November 14 response to the trade association letter, EBSA noted its plan to hold a public hearing on the Proposal on December 12.³ This hearing falls before the close of the comment period, which is already insufficient for stakeholders to weigh the ramifications of the sweeping Proposal appropriately. As such, I request that any public hearing take place no less than 30 days after the comment period has closed and all comments have been publicly posted. This time is critical to allow the affected community, and the hearing participants in particular, to formulate their comments and to review and consider comments filed by others.

DOL May Be Violating the Administrative Procedures Act

Any regulations that could alter the methods and relationships currently delivering retirement advice to American workers will have far-reaching implications. It is critical that stakeholders are afforded the opportunity to evaluate and provide substantive and informed comments on the Proposal. Courts have examined agency actions under the *Administrative Procedure Act* (APA) to determine whether an agency “structured the analysis and framed the issues to ensure ... an inevitable result of the analysis.”⁴ Such examinations enable courts to determine whether the outcome of the administrative process, such as the notice-and-comment process, is predetermined.

Stakeholders in the retirement community are expressing concerns that EBSA does not intend to consider fully the filed comments and that the agency has already determined a course of action. In its response to the trade association letter, EBSA stated that it does not intend to extend the comment period, which falls over an already truncated period.⁵ It appears that EBSA designed the comment period to prevent fulsome interaction with the community that would be charged with implementing its disastrous proposal. EBSA also stated in its response to the trade association letter that it “believes that its current proposal reflects significant input it has received from public engagement with this project since 2010.”⁶ This is a strong indication that the outcome is predetermined in violation of the APA.

³ Letter from Lisa M. Gomez, Assistant Sec’y., EBSA, to Lisa J. Bleir, SIFMA (Nov. 14, 2023) [hereinafter Gomez Letter], https://www.irionline.org/wp-content/uploads/2023/11/Extension-request-response-letter-SIFMA_111523.pdf; see also News Release, US Department of Labor Announces Online Hearing on Proposed Retirement Security Rule, Related Proposed Exemption Amendments Beginning Dec. 12 (Nov. 15, 2023), <https://www.dol.gov/newsroom/releases/ebsa/ebsa20231115>.

⁴ See, e.g., *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 780-781 (10th Cir. 2006) (citing *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000)).

⁵ Gomez Letter, *supra* note 3.

⁶ *Id.*

The Proposal is a Regurgitation of the Old Rule

On one hand, DOL has framed the Proposal as a new rule. EBSA Assistant Secretary Lisa Gomez has stated the Proposal is “not just a regurgitation of the old rule.”⁷ On the other hand, in response to the trade association letter, Assistant Secretary Gomez states that EBSA has received “significant input ... from public engagement with this project since 2010.”⁸ The latter statement seems to confirm that the public is being served a regurgitation of the same old rule and that EBSA has predetermined the outcome in violation of the APA.

Conclusion

I request that EBSA extend its initial public comment period on the Proposal by 60 days for a total of 120 days, hold its public hearing on the Proposal 30 days following the close of the initial comment period, and open a second 30-day comment period after the hearing.

Please respond with a written notification of your decision on this request no later than November 27, 2023.

Sincerely,



Virginia Foxx
Chairwoman

⁷ Brian Croce, *Fiduciary rule gets new name, won't be 'regurgitation,' EBSA's Gomez says*, PENSION&INV. (Oct. 17, 2023).

⁸ Gomez Letter, *supra* note 3.