January 2, 2024

Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N5655
Office of Office of Exemption Determinations
U.S. Department of Labor,
200 Constitution Ave. NW
Washington, DC 20210

RE: Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210–AC02), Proposed Amendment to Prohibited Transaction Exemption 2020–02, Application No. D-12057; Proposed Amendment to Prohibited Transaction Exemption 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

To Whom It May Concern:

The Small Business Investor Alliance (SBIA) submits these comments to the Employee Benefits Security Administration (EBSA) at the Department of Labor (DOL) regarding EBSA's recently proposed regulation to redefine an investment advice fiduciary (Proposal) and associated amendments to certain prohibited transaction exemptions (PTEs) under the Employee Retirement Income Security Act (ERISA).

SBIA is a national association that develops, supports, and advocates on behalf of policies that benefit investment funds that finance small and mid-size businesses in the lower middle market, as well as the investors that provide capital to these funds. Our membership consists of the advisers of traditional 3(c)(1) and 3(c)(7) private funds, small business investment companies ("SBICs"), rural business investment companies ("RBICs"), funds registered as business development companies ("BDCs") under the Investment Company Act of 1940, and the investors that invest in these funds including banks, family offices, and fund of funds.

As a threshold matter, SBIA is concerned about the process used by the DOL to issue the proposal and solicit comments from the public. The DOL appears to be on a wholly unnecessary fast track to finalize a new definition of "fiduciary" that Congress has not mandated and which is not supported by adequate justification. The DOL provided the public with only 60 days to comment on the Proposal and took the unusual step of holding a public hearing *before* the comment period expires. Rushing the rulemaking process to fit arbitrary timelines creates enormous risks for retirement investors and the retirement plans that DOL is charged with overseeing under ERISA.

The Proposal represents the third effort by the DOL since 2010 to redefine the definition of "fiduciary" advice under ERISA, including a 2016 rulemaking that was struck down by the courts.[1] The DOL's ongoing attempts to regulate aspects of the investment advice market absent Congressional authorization have been the focus of bipartisan criticism and legislation that has been considered over the last decade. Notwithstanding these criticisms and the judicial rebuke of the DOL's previous rulemaking, the Proposal bears many similarities to the DOL's ill-fated 2016 rule.

Of particular concern to SBIA and our membership is that Proposal would, in many cases, inappropriately deem sponsors to private funds to be fiduciaries under ERISA. The application of the Proposal to private funds is extremely broad, and it is likely that even basic sales or marketing communications made by private funds would be considered a recommendation and therefore trigger fiduciary status under ERISA. There is no recognition under the Proposal that, in the context of ERISA plans, communications made between a private fund and a potential investor, i.e. a limited partner, are communications made between institutional, sophisticated parties that regularly negotiate terms of investment in such funds.

The distinction between sophisticated investors and retail "mom and pop" investors has long been recognized by Congress, the DOL, and the Securities and Exchange Commission (SEC). Regulations promulgated by the SEC in particular often reflect the fact that certain rules are not warranted for sophisticated parties that regularly engage in analysis and negotiation over potential investments in private funds.

Even the DOL's 2016 rulemaking included an explicit safe harbor if a recommendation was made to "independent fiduciaries [of the plan] with financial expertise." This safe harbor recognized that sophisticated parties with investment expertise may not require the same types of protections of retail investors or ERISA plan participants who are solicited by financial professionals.

Equally concerning, the Proposal departs substantially from the longstanding "five-part test" that the DOL has used to determine fiduciary status under ERISA. A *single* recommendation or marketing communication could cause a private fund to be considered a fiduciary. The Proposal also makes clear that disclosures made by a fund sponsor may not be adequate to disclaim fiduciary status. This consequential re-write of ERISA without Congressional authorization is problematic and will chill potential communications between private investment funds and ERISA plans.

The Proposal does not even attempt to understand or analyze the dynamic landscape of private funds in the United States, in particular the role that smaller funds have in providing capital to businesses and delivering consistent returns for their investors, including ERISA plans. As currently drafted, the Proposal would mandate that these small funds with limited compliance resources navigate the complicated PTE framework to maintain communications or interactions with ERISA plans. The end result would either be higher costs for investors or the withdrawal of many private funds from business relationships with ERISA plans.

[1] Chamber of Commerce v. United States Department of Labor (5th Cir. 2018)

SBIA urges the DOL to reconsider its entire approach towards redefining fiduciary investment advice under ERISA and to withdraw the Proposal if it is unable or unwilling to address the issues outlined in this letter or the legal deficiencies that the courts have already identified with the DOL's previous rulemaking.

Sincerely,

Brett Palmer
President
Small Business Investor Alliance