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Submitted electronically.

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

RE: RIN 1210-AC02, “Retirement Security Rule: Definition of an Investment Advice Fiduciary,” Notice of Proposed Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1 and 86-128, Notice of Proposed Amendment to Prohibited Transaction Exemption 84-24 and Notice of Proposed Amendment to Class Exemption 2020-02

Dear Acting Secretary Su,

On behalf of LPL Financial (“LPL”), I am writing to share comments in response to the Department of Labor’s (“DOL” or the “Department”) proposal to adopt the “Retirement Security Rule” and amendments to prohibited transaction exemptions (“PTEs”) 75-1, 77-4, 80-83, 83-1, 86-128, 84-24 and 2020-02 (collectively, “the Proposal”). LPL has consistently supported standards requiring firms and financial professionals to provide investment recommendations and advice to retail investors that is in their best interest. We also think it is important for firms and financial professionals[1] to address conflicts of interest and disclose fees and compensation in a meaningful way so that retail investors understand how they are paying for investment services and any conflicts under which such services are provided.

However, we respectfully disagree with the DOL’s approach to this rulemaking. LPL believes that the financial services industry and all retail investors are well-served by existing applicable law, including among other things, the current five-part test, the Securities and Exchange Commission’s (“SEC” or the “Commission”) Regulation Best Interest (“Reg BI”), the fiduciary duties under the Investment Advisers Act of 1940 (“Advisers Act”), and the various state laws applying a best interest standard to advice regarding insurance products. As the prudential regulator for the securities industry, the SEC implemented and now enforces a harmonized, well-calibrated standard of care for all retail investors, including retirement investors, which further negates the need for additional, conflicting rules.

Similar to the previous DOL fiduciary rule adopted in 2016, this Proposal would upend the existing, sound regulatory structure by expanding the ERISA fiduciary standard in a manner that (i) exceeds the DOL’s authority, (ii) is contrary to court decisions, (iii) preferences the advisory model over brokerage, (iv) would likely result in further consolidation of the financial industry generally and (v) will have the effect of increasing costs for all retirement investors while limiting access to certain investment products and advice. For these reasons, we believe that the Department should withdraw the Proposal.

[1] The term “financial professional” is used in this letter to generally refer to individuals who provide financial services including investor education, financial planning, investment recommendations, trade execution and investment advice to retail investors, as registered investment advisers, registered representatives or representatives of an insurance company, bank, or other financial institution.

I. Overview of LPL Financial; Support for Trade Association Comments

LPL is a leading retail investment advisory firm, independent broker-dealer, and registered investment adviser ("RIA") custodian that operates in all 50 states. We are steadfast in our belief that Americans deserve access to personalized guidance from a financial professional, and we serve as a trusted partner to approximately 22,000 financial professionals across the country, including financial professionals at over 1,100 banks and credit unions and approximately 500 RIAs.

We provide our financial professionals with the technology, research, clearing and compliance services and practice management programs they need to serve their clients and create thriving businesses. Our financial professionals offer investment and financial education, financial planning, access to investment products and brokerage services, and personalized investment advice to investors seeking wealth management, retirement planning, financial planning, and asset management solutions. The majority of our affiliated financial professionals are located in rural and suburban areas, and as such are viewed as local providers of independent financial advice.

LPL is a member of and supports the comments submitted by the Securities Industry and Financial Markets Association, and the American Securities Association.

II. Comments on the Proposal

LPL appreciates the opportunity to provide feedback on the Proposal. As noted above, we believe that the current regulatory framework, including Reg BI, appropriately protects retail investors while providing the flexibility necessary for financial professionals to continue to offer a variety of services and products that help their clients save for the future and achieve their financial goals and objectives.

Since becoming effective in June 2020, Reg BI has proven to have enhanced the quality and transparency of retail investors' relationships with financial professionals by requiring firms to act in their clients' best interest. Further, in 2019, the National Association of Insurance Commissioners ("NAIC") updated Model Rule #275, "Suitability in Annuity Transactions," to incorporate Reg BI standards and harmonize state insurance laws governing annuity sales in conjunction with applicable federal securities laws. Together, these regulations (as well as the Advisers Act fiduciary duty requirements) ensure that financial professionals act in the best interest of their clients and that the interactions are consistent despite the products and strategies being discussed. We disagree with the DOL's position that gaps exist in the current established regulatory framework and therefore believe that the Proposal is unnecessary and duplicative.[2]

Preserving Access to Products and Services Helps Investors

LPL believes that imposing an overbroad ERISA fiduciary standard on all interactions with retirement investors, which is effectively what this Proposal does, is unnecessary, costly and creates extraneous risk for financial institutions. ERISA provides a higher standard of care for investors participating in employer-sponsored retirement plans, which have a substantial number of participants and are a group of savers, not individuals. However, saving through employer-sponsored plans may be just one factor in a multi-faceted financial plan that helps an investor build wealth and security. Financial professionals act as an all-important bridge between the various financial services and products available to investors and how they can be used to meet the investors' personal needs. This

[2] While we understand the DOL's view that Reg. BI does not apply to brokerage recommendations to plan fiduciaries regarding plan investments, LPL believes that such advice is already adequately covered by Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and agreements with such plan fiduciaries (who are institutional investors).

helps build holistic financial resiliency, portfolio diversification and the ability for investors to meet savings and investment goals.

It is important to preserve the existing availability of products and services that meet investors' needs at every stage of their savings journey. Often this begins as a relationship with a small saver with the introduction of a variety of products and services. This relationship will then grow as their financial needs, goals, and income change over time. The Proposal would significantly limit the types of products and services available to investors by extending ERISA fiduciary status (or importantly, the potential that the investor will view the interaction as fiduciary) to virtually all interactions between firms and retirement investors, thereby potentially sweeping in a broad array of interactions that have not historically been (and should not be) subject to an ERISA fiduciary standard. We worry that the Proposal's use of a subjective standard viewed through an investor's "reasonable" expectation is too loose and is likely to invite litigation and disagreements. In practice, this could force firms to reduce their service offerings in a way that harms investors by reducing choice.

Proposed Expansion by the DOL to Individual Retirement Accounts is Unauthorized

LPL is concerned that the Proposal expands the DOL's authority and oversight regarding individual retirement accounts ("IRAs") beyond congressional intent and authorization. Specifically, the Fifth Circuit Court of Appeals has highlighted the fact ERISA Titles I and II distinguish between the DOL's authority over ERISA employer-sponsored plans and IRAs and concluded that the DOL "is given no direct statutory authority to regulate them."[3]

LPL is further concerned that DOL's changes to the existing exemptions will require financial services firms to comply with DOL's preferred exemption, PTE 2020-02, which could be viewed as requiring the firms to inadvertently consent to this expansion of DOL authority and oversight. Moreover, such changes would also increase regulatory and litigation risks for firms and financial professionals alike. These risks, combined with the increased costs to service accounts as a fiduciary under PTE 2020-02 will likely lead to a reduction in services offered to low-and-middle income savers[4]. Reducing access to specific services and business models deprives retirement investors of the ability to make an informed choice to invest their retirement savings. Such a result is not mere speculation or conjecture, as we saw this play out in the financial services industry after the DOL issued its definition of the term "Fiduciary" and "Related Proposed Prohibited Transaction Exemptions" in 2016 (the "2016 Rulemaking") that was subsequently vacated by the Fifth Circuit in 2018.[5] Limiting investor choice or preferencing certain operating models over others is not in investors' best interest.

Importantly, the issue of preserving investor choice was something expressly considered by the SEC when adopting Reg BI. The SEC conducted a series of stakeholder meetings to carefully consider the various business models and the implications that a new standard of care would have on the availability of services to investors, ultimately making a conscious decision to protect broker-dealer business models by adopting a best interest standard, rather than a fiduciary standard, to preserve firms' ability to offer a full suite of products and services available to investors (in terms of both choice and cost). This precedent must be considered in this decision-making process and should be afforded appropriate deference as the DOL contemplates this Proposal and its inevitable consequences.

[3] *U.S. Chamber of Commerce v. U.S. Department of Labor,* 885 F.3d 360 (5th Cir. Mar. 15, 2018) at 381.
[4] See *"The DOL Fiduciary Rule: A study on how financial institutions have responded and the resulting impacts on retirement investors"* published by SIFMA and Deloitte (Aug. 9, 2017)
[5] *U.S. Chamber of Commerce*. *See also* *DOL Fiduciary Rule Redux*, The Securities Industry and Financial Markets Association (Dec. 5, 2023).

The Proposed Rule Is Overbroad and in Direct Contravention with Court Decisions

Through the Proposal, the DOL seeks to modify the current five-part test by removing three parts - the "regular basis," "mutual agreement, arrangement, or understanding," and "a primary basis for investment decisions" - in favor of making any person an ERISA fiduciary who provides a recommendation for a fee and either has discretion over any other investments for the retirement investor, or, who makes recommendations to other investors as a regular part of their business, and meets certain other requirements that are virtually always met, as discussed below.[6] The Proposal seeks to broaden the definition of investment advice fiduciary in a manner that Courts have previously rejected. Although the DOL acknowledge that the Fifth Circuit's holding in *U.S. Chamber of Commerce v. Dept. of Labor* vacated its prior 2016 Rulemaking *in toto* on the ground that it conflicted with the statutory definitions in Title I and Title II of ERISA, it fails to adequately address how the new Proposal meets the applicable standard.[7]

Specifically, in *U.S. Chamber of Commerce,* the Fifth Circuit concluded that the 2016 Rulemaking "swept too broadly and extended to relationships that lacked "trust and confidence," which the court stated were hallmarks of the common law fiduciary relationship that Congress intended to incorporate into the statutory definitions."[8] In response, the DOL takes the position that this Proposal is in-line with the Court's emphasis on relationships of trust and confidence and is more narrowly tailored than the 2016 Rulemaking.[9] That does not appear, however, to be the case in practice.

Under the new definition, a financial professional who has a preexisting relationship with an investor, and who also has discretionary authority over other non-retirement assets of the investor (that are completely unrelated to the retirement assets at issue), would be a fiduciary regarding any subsequent recommendations related to the retirement assets at issue, regardless of the parties' underlying intent and understanding of that arrangement. Similarly, an advisor who makes investment recommendations on a regular basis as part of their business would automatically be a fiduciary, as long as the relationship is viewed as a best interest relationship, which, as noted, is always required by Reg BI and the NAIC model rule. These scenarios are entirely irrelevant to the question of whether a relationship of trust and confidence between the parties exists as it pertains to a particular interaction involving retirement assets and should have no bearing or impact on the parties' respective underlying intent and understanding of that particular interaction. As these examples highlight, this Proposal is even more overreaching than the 2016 rulemaking, rendering many types of interactions between an advisor and retirement investor as "fiduciary," regardless of the parties' intent. The Proposal establishes a presumption that everyone connected to the financial services industry, no matter how distant, is always presumed to be a "fiduciary" (i.e., a relationship of trust and confidence). The Proposal makes no reference as to how to rebut such a presumption. This seems inconsistent with the Fifth Circuit's view that fiduciary status is actually special and not standard.

Further, as noted above, the Fifth Circuit highlighted the fact in *U.S. Chamber of Commerce* that ERISA Titles I and II distinguish between the DOL's authority over ERISA employer-sponsored plans and IRAs. In concluding that the 2016 Rulemaking was incompatible with the Administrative Procedure Act ("APA"), the Court concluded that the DOL "is given no direct statutory authority to regulate [IRAs]"[10] and further took issue with the fact that the 2016 Rulemaking expressly included one-time IRA rollover advice as fiduciary.[11]

This issue was once again addressed more recently in *American Securities Ass'n. v. U.S. Dep't of Labor*, where the U.S. District Court for the Middle District of Florida issued an opinion vacating the DOL's position that "one time advice" can result in fiduciary status, as referenced in Frequently Asked Question ("FAQ") guidance that the DOL released in 2021.[12] In that case, like *U.S. Chamber of Commerce*, the Court disagreed with the DOL's view that one-time advice to roll out of a plan or IRA can trigger fiduciary status as there could not be a link between the retirement plan and IRA (such that the advice to roll assets out of the plan could serve as the start of an ongoing

[6] *Retirement Security Rule: Definition of an Investment Advice Fiduciary*, 88 Fed. Reg. 75,890 (Nov. 3, 2023).
[7] *U.S. Chamber of Commerce*, at 388.
[8] 88 Fed. Reg. 75,895.
[9] *Id.* at 75,901.
[10] *U.S. Chamber of Commerce*, at 381.
[11] *Id.* at 380.
[12] *American Securities Ass'n. v. U.S. Dep't of Labor*, No. 8:22-cv-330-VMC-CPT (M.D. Fla. Feb. 13, 2023).

advice relationship regarding the IRA) for purposes of satisfying the regular basis requirement.[13] That decision was not appealed by the DOL. Despite these findings, the DOL nonetheless appears to continue to hold firm to the notion that one-time advice to roll assets out of a Title I Plan to an IRA is fiduciary advice.

In addition, the Proposal arguably goes one step further – presupposing that any investment recommendations with respect to rolled over assets, including those made after a client has decided to roll assets out of a plan, must necessarily involve an implicit recommendation to engage in the prior rollover, transfer, or distribution from the plan.[14] This too appears to be at odds with both *U.S. Chamber of Commerce* and the *American Securities Ass'n.* decisions in that the DOL is seeking to attach fiduciary status to subsequent advice that is wholly separate and apart from the retirement plan, after the retirement investor has already decided to roll assets out of the plan.

Investor Education and Interpretive Bulletin 96-1 Should Be Preserved to the Fullest Extent Possible

Finally, LPL is concerned that this Proposal blurs the line between providing retirement investors with access to general information and education, consistent with the principles of Interpretive Bulletin 96-1, and being deemed an ERISA fiduciary. As discussed above, the view that any conversation about a rollover between a financial professional and retirement investor, regardless of whether that retirement investor makes an independent decision to roll assets out of their plan, is anything other than fiduciary in nature is problematic. This will dissuade financial professionals from educating clients and prospective clients on investment options for fear of inadvertently foot-faulting into fiduciary status that then requires a stringent, individualized cost analysis, this adversely impacts investors and creates the exact opposite experience of the enhanced transparency that Reg BI sought to achieve.

The Proposed Implementation Timeline Is Insufficient

Currently, the Proposal suggests that firms would need to comply with the final rule within 60 days of adoption. If the DOL decides to adopt the final rule, which we believe is unnecessary, goes beyond the DOL's authority and should be withdrawn, then LPL respectfully requests an extended implementation timeline of at least 18 months. The Proposal represents a significant shift from the current practices of retirement firms and financial professionals and will require substantial technology and policy changes to implement. These changes cannot be accomplished within 60 days and require an extended period of time for building, implementation and testing.

III. Conclusion

Thank you for your consideration of this letter. LPL appreciates the opportunity to comment on the Proposal, and we look forward to further discussions that will ensure the continued prosperity and well-being of retirement investors and the financial services industry. Please contact the undersigned with any questions or concerns.

Sincerely,

Althea Brown

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[13] *Id.* at *20.
[14] 88 Fed. Reg. 75,905.