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January 2, 2024

VIA ELECTRONIC SUBMISSION

Office of Regulations and Interpretations Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW Washington, DC 20210

***RE:* RIN 1210-AC02 Retirement Security Rule: Definition of an Investment Advice Fiduciary; and related exemptions.**

Dear Assistant Secretary Gomez,

I write on behalf of the Financial Planning Association (FPA®) in response to the Department of Labor's ("Department") request for comments in connection with the proposed Retirement Security Rule and the amendments to several related Prohibited Transaction Exemptions (collectively referred to herein as the "Proposed Rule").

FPA® is a 501(c)(6) trade association and the leading Membership organization for CERTIFIED FINANCIAL PLANNER™ professionals and the largest organization representing those individuals engaged in the financial planning process. FPA® represents and supports over 17,000 Members and 79 state and local chapters nationwide. FPA's core Members are CERTIFIED FINANCIAL PLANNER™ professionals, who pride themselves on being held to high standards of professional competence, ethical conduct, and clear, complete disclosure when serving their clients.

Notably, our Core Members, as CFP® professionals, are required to act in the best interest of their clients at all times when providing *financial advice* as defined by CFP Board. Indeed, the majority of FPA's members, by virtue of holding the CFP® professional designation, ***voluntarily*** commit to act in the best interest of their clients under CFP Board's fiduciary standard — *albeit a fiduciary standard that is defined differently and has different requirements than the Department's Proposed Rule*.

Most importantly, FPA® believes all consumers deserve objective, personalized financial advice that is in their best interest, and we share the Department's concern that many consumers lack understanding of how the financial industry is regulated and therefore may be challenged to discern among professionals who are legally required to act in their best interest – putting themselves at risk of being taken advantage of by individuals who may not adhere to the high standards to which our FPA® CFP® professional members comport and appreciate the opportunity to provide preliminary comments on the Proposed Rule.

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As a preliminary matter, the Proposed Rule makes a number of changes to the current regulatory framework that will require significantly more time for meaningful analysis and comment, and to understand how this proposal would impact financial planners and retirement savers, alike.

Crucially, inasmuch as the Proposed Rule seeks to change the *Definition of an Investment Advice Fiduciary* while simultaneously, amending six (6) Prohibited Transaction Exemptions without which the Department requests significant amounts of information from the public that require testing and an analysis of dozens of cost and time estimates in connection with compliance with the Proposed Rule, it is noteworthy that such feedback requires clarification from the Department and a better understanding by those who will be impacted by the latest proposal prior to conducting such analyses.

To this end, as noted during our testimony at the public hearing in December, we continue to harbor concerns that the Proposed Rule may increase the cost of compliance for our Members. Notably, many of the estimates provided by the Department acknowledge that "Legal Professionals" will be required. Many financial planners are not employed by large firms or wirehouses who customarily have in-house legal counsel and dedicated compliance departments staffed by experienced compliance/legal professionals. We have significant concerns regarding how those Legal Professional costs alone may negatively impact some of our members, particular those that are small businesses and that lack in-house counsel or full-time compliance professionals.

Additionally, considering the expansion of liability to which those impacted will be subjected under the Proposed Rule, we have concerns over the rise in, and affordability of, insurance premiums from E&O and similar coverages to which our members subscribe. Data relative to this concern could not be obtained in the limited time allowed for this comment letter but continues to be sought. Similarly, and as was raised in others' testimony, the Department's former proposal led to firms and individuals exiting the industry and consolidation occurred as a result of cost of compliance concerns, among others. Considering the Department has reiterated that investment-related advice is ripe for advisers to favor investments that provide them greater compensation rather than those that may be most appropriate for the retirement investors, and the Department has also stated it found that "consolidation of the financial services industry and developments in compensation arrangements multiplied the opportunities for self-dealing and reduced the transparency of fees",[1] we have concerns that any cost of compliance that forces even more consolidation may be counterproductive to helping Americans and the Department's intent and would appreciate the Department's response to this concern to help reconcile these positions.

Importantly, FPA® understands and shares the Department's concern regarding the lack of financial literacy among the average consumer in our country, which is why financial literacy remains one of FPA's

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[1] 88 FR 75890 (2023).

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core advocacy issues.[2] Notwithstanding FPA's strong belief that consumers would benefit from objective advice in their best interest, we would be remiss to turn a blind eye to the competing conclusions made by the Department that conflict with the industry's studies – all of which appear to pre-date the current Proposed Rule. As a result, we are concerned with the Department's assumptions in this regard and that the current Proposed Rule may increase costs so as to inadvertently decrease Americans' access to much needed advice — which would only create a new problem for Americans to the extent that higher compliance costs may impact consumer access to advice that our Members recognize consumers so desperately need and want.

What is missing from the proposal's current timeline is adequate time to determine if such concerns remain valid. Indeed, as the Department recognized, the regulatory landscape – for both the securities and insurance industry – has drastically changed since the Department's former proposals. As a result, it is axiomatic that the Department and the industry would benefit from re-examining the impact analyses that pre-dated the new best interest standards we now have in force as we sit here today and be provided with the necessary time to study this issue carefully so Americans seeking advice are not left behind and without needed retirement advice.

Although we certainly don't disagree that increasing the number of financial planners and advisors held to a best interest / fiduciary standard may actually increase the number of Americans seeking financial planning services due to increasing perceptions of trust and confidence in our industry, this is a separate issue from cost of compliance and how that may also impact financial planners. This includes those professionals who are already subjected to SEC's Regulation Best Interest ("Reg BI") and similar more recent adopted laws, rules and regulations imposing new obligations to which the Department has recognized in the Proposed Rule – *even after three years since Reg BI was adopted* – the industry is still adjusting and seeking to fully understand in order to come into compliance.

Notwithstanding FPA's efforts to reach out to its members and various vendors to begin gathering relevant data to provide that information to the Department, the timing of the Rule Proposal that fell over the most major federal holidays that is also known to be an incredibly hectic time for financial professionals who are working hard to assisting retirees with tax matters, RMDs, etc., all before considering these professionals who have year-end client, licensing, registration and other regulatory obligations, was simply insufficient to be able to respond to the Department's requests in such a short period of time.

As a result, additional time is needed to examine the Department's impact analysis considering our current regulatory framework and financial landscape in place today following clarification received from the Department as more particularly described below.

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[2] Learn more about FPA's Advocacy Policies and access our Financial Literacy and other Fact Sheets at https://www.financialplanningassociation.org/sites/default/files/2023-05/FPA%20Fact%20Sheet%20-%20About%20FPA%20-%20051823.pdf (as of October 2023).

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For all of the above these reasons, the FPA® respectfully continues to urge the Department to consider an additional comment period longer than 60 days prior to issuing any potential final rule after clarification requested is received and to continue accepting questions and feedback beyond the January 2, 2024 current deadline as organizations receive valuable information and input from members that was not possible to obtain during the Department's original timeframe for all the reasons raised by the FPA® and other organizations.

We also have several requests of the Department that we believe will ensure our members and all financial professionals have the most clarity and the potential to make the Proposed Rule's compliance and implementation burdens more reasonable following the passage of any potential final rule as follows.

1. **FPA® Requests the Department Release Implementation Guidance Prior to and/or with the Publication of any Final Rule**

To provide greater clarity for our members and the industry as a whole as well as to aid in any potential implementation most efficiently from both a time and financial perspective, we respectfully request that the Department provide clear implementation guidance and several compliance tools and necessary resources for those individual professionals who will be impacted, including, but not limited to:

- A succinct list of all potential documentation requirements required under the Proposed Rule (with references & hyperlinks to the rule sections for users to better understand the same).
- A succinct list of all disclosure obligations (both verbal and written) under the Proposed Rule (with references & hyperlinks to the relevant rule sections).
- A succinct list of all account types, annuities, etc. applicable to the Proposed Rule.[3]
- Additional "Model Language" like the Department had previously provided to assist financial professionals with any aforementioned documentation requirements as well as any and all disclosure requirements under the Proposed Rule.[4]

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[3] For example, and to ensure understanding by financial professionals who are not legal professionals, a consolidated list from the Department that includes all asset/account types under the Proposed Rule's purview, as opposed to stating "Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code" would be helpful to both consumers and industry professionals.

[4] *See*, for example, New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (Apr. 2021), available at, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.

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- Turn-key forms and templates as options for financial professionals to use in efforts to comply with the Proposed Rule; and, wherever possible, *Safe Harbors* in connection with such forms and/or model language.
    - *By way of example, the Securities and Exchange Commission ("SEC") together with seven other federal agencies, published in the Federal Register amendments to the rules implementing certain privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act") and adopting a **model privacy form** that has proven most helpful to financial professionals and industry firms.[5] To this end, entities who choose to use such model privacy form consistent with the instructions to the form will satisfy the disclosure requirements for privacy notices and obtain a "safe harbor", which has eased the implementation burden and bolstered compliance.*

- Interpretive Guidance type documents and Frequently Asked Question ("FAQ") documents addressing confusion areas addressed during the public hearings as well those raised in comment letters to be reviewed by the Department.
    - *To this end, we recommend both such categories of documents be living, working documents that are added to over time as new FAQs arise during and after implementation steps occur.*

- Additional hypotheticals and real-life scenarios and/or case studies that examine multiple professional roles rather than just those who are currently only regulated or licensed by the insurance industry.

- Visual aids, flow charts and similar documents to better help individual practitioners determine if and when the proposed fiduciary standard applies for purposes of Title 1 and Title II of the Employee Retirement Income Security Act ("ERISA").

- A chart of the overlapping and conflicting obligations under the Proposed Rule when compared to other fiduciary- and best interest-related laws, rules & regulations already in place[6] to help financial professionals understand the overlap among them and areas ripe for dual compliance purposes.

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[5] See ***Model Privacy Form*** available at https://www.sec.gov/divisions/marketreg/tmcompliance/modelprivacyform-secg.htm.

[6] *See*, for example, Eversheds Sutherland. "Getting the Full Picture: The Emerging Best Interest and Fiduciary Duty Patchwork." (August 2020), https://www.jdsupra.com/legalnews/the-emerging-patchwork-of-fiduciary-54761/.

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  - *We respectfully request that this guidance identify where compliance with existing regulatory requirements will satisfy the obligation under the Proposed Rule, and, more importantly, where financial professionals are going to need to take steps beyond seeking to comply with their existing regulatory obligations.*

- A side-by-side comparison chart reflecting the existing Prohibited Transaction Exemption ("PTE") 2020-02 (Improving Investment Advice for Workers & Retirees) and the Department's proposed amendments and the same for all other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA the Department proposes to revise.[7] Similarly, to the extent any proposed changes to any PTEs are adopted, a like side-by-side comparison chart reflecting the final adopted changes to help those impacted understand the differences and be made aware of their new obligations once finalized (or where any former obligations have been truncated or entirely removed).

With respect to the above, we request such items in advance of, or along with, any potential final proposed rule so any additional clarification that may be needed by the industry can be sought and obtained prior to any potential final rule proposal's effective date and/or compliance date that would include any punitive enforcement action.

2. FPA® Requests Clarification (and/or Definitions) of Certain Inconclusive Language and Undefined Terms.

Notably, the Proposed Rule's preamble includes many undefined terms to describe the consumers the Proposed Rule intends to protect as well as their potential assets, which has created confusion among our members as to the Department's intent and potential future interpretation of the actual text of the Proposed Rule under §2510.3-21 Definition of "Fiduciary".

Accordingly, we respectfully ask for clarification regarding the following terms/phrases as used in the Proposed Rule and/or that the following terms be defined:

- *"Investment component"*

[7] As of the date of this letter, known and related proposed amendments to PTEs include PTE 2020-02 (88 FR 75979), proposed amendment to PTE 84-24 (88 FR 76004), and proposed amendment to PTEs 75-1, 80-83, 83-1, and 86-128 (88 FR 76032).

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- *"Investment property"*[8]

- The Proposed Rule states, in part:

> "Further, like the 1975 provision, the proposal would extend to circumstances in which the person making the recommendation "indirectly (*e.g.*, through or together with any affiliate)" has discretionary authority or control over securities or other investment property; in this context, the use of 'indirectly' ***generally*** refers to an arrangement in which an affiliate has discretionary authority or control."[9]

The term "***generally***" implies there are other arrangements contemplated by the Department; however, the Proposed Rule appears silent in this regard. As such, we respectfully request clarification as to what else the Department may believe could apply in this context.

- Under the Definitions section of the Proposed Rule, it states, in part:

> "(ii) As to the management of securities or other investment property, including, ***among other things***, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.*, account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and…"[10]

Inasmuch as there appears to be no list appended to this section, we respectfully request clarification as to what "***other things"*** the Department may be referring in this context.

- With respect to the "**for a fee or other compensation, direct or indirect**" prong of the Proposed Rule, the Proposed Rule states, in part:

> "A fee or compensation is paid 'in connection with or as a result of' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended

[8] The Department states with resect to "Investment property" that it "does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component." However, the Department does not provide a finite list of what "Investment property" is.

[9] Emphasis added.

[10] Emphasis added.

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> transaction or the provision of advice. This proposed definition is consistent with the preamble of the 1975 regulation, which states that 'a fee or other compensation, direct or indirect' includes all fees or other compensation '**incident to the transaction** in which the investment advice to the plan has been rendered or will be rendered,' including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions." [11]

While the Department clearly states in the preamble that the "fiduciary status is determined on a ***transactional*** basis",[12] the Department implies that any remuneration must be able to be identified as in connection with a particular transaction (as opposed to in connection with a job function, such as the role of providing investment advice (or the "provision of advice"), which could be compensated on a salary basis).

Inasmuch as the Proposed Rule appears silent on non-transaction-based compensation models, such as salary or hourly paid positions, we respectfully request clarification as to how the Proposed Rule would apply to those who would meet all the conditions under the new proposed "Fiduciary" definition and, for example, are licensed in an investment adviser representative capacity but only compensated by an annual salary.

- The Proposed Rule states, in part:

> "Depending on the facts and circumstances, whether a service provider is an investment advice fiduciary under the proposal may require an inquiry into whether that service provider has held itself out as a fiduciary…"

Inasmuch as the context of holding out is not defined or described, we respectfully request examples of the Department's view on what conduct (intentional and passive, if applicable) would constitute one has "held itself out as a fiduciary". We also seek clarification on whether or not simply using the term "fiduciary" versus any particular "fiduciary" standard (ERISA fiduciary vs. other fiduciary standards) would impact the Department's determination in finding that a "service provider has held itself out as a fiduciary". Likewise, we respectfully request confirmation from the Department as to whether holding out certain licenses, credentials, certifications, or titles (such as investment adviser representative, CFP® professional certification, financial planner, etc.), wherein such licenses/credentials/certifications/titles inherently have some variation of their own "fiduciary" standard associated, would be deemed

[11] Emphasis added.

[12] Emphasis added.

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to mean that that "service provider has held itself out as a fiduciary" for purposes of this section of the Department's Proposed Rule.

- Under the Proposed Rule's Need for Regulatory Action section, we noted the Department states, in part:

> "the Department has reviewed recent regulatory and legislative actions concerning investment advice, market developments in industries providing investment advice, and research literature weighing in on investment advice. From this review, the Department believes there is compelling evidence that retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive. Given this evidence, and the Department's mission to ensure the security of retirement benefits of America's workers and their families, the Department is proposing to amend the definition of fiduciary and certain exemption relief."

We respectfully request and recommend the Department provide more details regarding the "regulatory and legislative actions" it reviewed to help both the consumers and industry professionals understand the conduct the Department finds problematic, which should also aid in necessary education regarding relevant conduct at issue and be informative for future implementation stages.

3. **FPA® Requests the Department Extend the Effective Date (Implementation Period) and a Phase-in Approach for Enforcement with an Emphasis on Education-Oriented Enforcement for at least the First Year.**

We noted the Department proposes to make the rule effective 60 days after publication of a final rule in the Federal Register, which is not only at severe odds with the Department's former proposals but incredibly short. This is even more true absent sufficient laymen's compliance tools and guidance like those listed above being available in advance, or at the outset, of any potential final rule being published.

Importantly, for the regulated community to be successful in complying with any new requirements and changes to their regulatory obligations and see the Department's goal for retirement savers come to fruition, there must first be clarity and mutual industry wide understanding of the Proposed Rule. There must also be sufficient time to implement any necessary changes. To this end, a two-month implementation period following any final Proposed Rule is simply not enough time for those who might, for example, need to review and re-write policies and procedures or update their disclosure documents and client agreements – especially if they are small businesses or single-planner operations who lack in-house counsel and have significantly fewer resources to help them understand new requirements and come into compliance.

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Notwithstanding the Department providing clear implementation and compliance tools like those requested and discussed above — *released prior to and/or in tandem with any potential final rule* — we request an extension of the 60-day implementation period to a minimum 1-year implementation phase-in period.[13] More specifically, with respect to a phase-in approach, we request the Department's commitment to using education-focused enforcement during the implementation period, rather than punitive enforcement. By way of example, we envision this phase-in approach to include non-punitive notices of noncompliance accompanied by written guidance for a regulated entity or individual about what specific provision of the new rule to which the Department believes the regulated entity or individual is not complying with an offer of a sufficient "opportunity to cure" time period and written recommendations for coming into compliance. Recommendations to the regulated entity or individual could be in the form of hypotheticals or generalized FAQs; however, it is most helpful to those regulated to have confirmation that their corrective actions achieve compliance wherever possible.

Additionally, any notice of noncompliance during the non-punitive, education-oriented enforcement actions, would ideally also include the ability to work directly with Department enforcement staff to review existing policies and procedures so that the regulated entity or individual receives and understands the information and guidance needed to come into compliance prior to any punitive action being taken.

4. FPA Agrees Titles Can and Do Mean Something to Consumers.

Finally, we wish to further address DOL's request for input related to use of various titles and how the use of a title may impact a consumers' assumption of a trusted relationship and retirement advice that is in their best interest. Many of our Members view their role as financial planners as a vocation to which they are called to serve their fellow citizens. Accordingly, FPA does agree titles can and do mean something and can often be misleading to consumers, which is why we applaud the Department for recognizing this issue.

Conclusion

Although we are using this opportunity to raise certain specific concerns around implementation timeframes and the need for clear guidance and compliance tools, the FPA® certainly supports measures that enhance retirement investor protection – provided they are understandable by our members, workable, and will not impede consumer access to products and services that are consistent with retirement savers' best interests.

[13] Inasmuch as much clarity is still needed at the time of this comment letter, this request timeframe may be modified (longer or shorter) following mutual understanding in the industry as to the Proposed Rule's consequential impact and clarity is provided around new/modified compliance burdens.

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We appreciate the opportunity to provide preliminary comments and look forward to, and welcome, any opportunity to provide additional feedback and work together with the Department throughout the rest of this process.

Sincerely,

Patrick D. Mahoney
Chief Executive Officer
Financial Planning Association