

Congress of the United States

Washington, DC 20515

April 8, 2024

The Honorable Julie Su
U.S. Department of Labor
200 Constitution Ave. NW, Room N-5655
Washington, DC, 20210

The Honorable Shalanda D. Young
Director
Office of Management and Budget
1650 Pennsylvania Avenue, N.W.
Washington, DC 20006

The Honorable Richard L. Revesz
Administrator of the Office Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Comments on Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02)

Dear Acting Secretary Su, Director Young, and Administrator Revesz:

We write to urge the Office of Management and Budget and the Office of Information and Regulatory Affairs to expeditiously complete the review of the Department of Labor’s Retirement Security Rule. In this letter, we offer our strong support of the Department of Labor (“DOL”)’s October 2023 Retirement Security Rule (the “2023 DOL Rule” or “Rule”), which aims to improve retirement investor protections when it comes the advice financial professionals provide related to employee-sponsored retirement plans.¹ The Rule would fill existing regulatory gaps within the Employee Retirement Income Security Act (“ERISA”), the federal law that sets the minimum standards for most retirement plans that private employers set up for their employees, such as 401(k)s and pension plans.²

I. Background and Brief Description of the Proposal

As you know, ERISA imposes requirements on “investment advice fiduciaries” who provide paid advice about the types of products that should be purchased for employee-

¹ See The White House, [The Retirement Security Rule – Strengthening Protections for Americans Saving for Retirement](#) (Oct. 31, 2023); see also Investopedia, [What Retirement Accounts does ERISA Cover?](#) (Jan. 10, 2021) (“Common types of employer-sponsored retirement accounts that fall under ERISA include 401(k) plans, pensions, deferred-compensation plans, and profit-sharing plans [...]. In addition, ERISA laws don’t apply to [...] IRAs [which are set up by the individual rather than the employer; nor...] does it cover retirement plans set up by government entities [...] such as many 403(b) plans [and state-administered pension plans].”)

² Department of Labor, [ERISA](#) (accessed Jan. 2024).

sponsored retirement plans.³ If a person qualifies as an investment advice fiduciary under ERISA, they are legally held to the highest ethical standard and must always act in their client’s *best interest* by avoiding recommendations that put their own financial interests ahead of their clients’.⁴ For example, this means that they cannot recommend or sell a financial product to a client that is not in the best interest of the client and instead is designed to provide the adviser with a higher commission or fee.⁵ At a high level, the 2023 DOL Rule would *revise* the definition of an investment advice fiduciary under ERISA to encompass certain types of advice that are currently *not* covered by the law—a revision which we applaud. This includes, among other things:

1. one-time advice about whether to roll-over a 401(k) (a plan set up by an employer) into a new retirement account like an IRA (a plan set up by the individual retiree) or an annuity;
2. advice about purchasing non-securities like fixed-indexed annuities; and
3. advice given to plan sponsors and employers (rather than just plan participants) about the types of products to include in their plan line-ups.⁶

The Rule also rightly limits the ability of financial professionals to include fine-print disclaimers in their advice that absolve them of their fiduciary obligations under ERISA. In addition to revising the above definition, the Rule also makes modest clarifying changes to the requirements that investment advice fiduciaries must follow in order to legally receive compensation for their recommendations that would otherwise be prohibited under ERISA.⁷ These include:

- following policies and procedures designed to ensure that they give advice that is in retirement investors’ best interest, which entails:
 - meeting a professional standard of care when making investment recommendations (giving prudent advice), and
 - never putting their financial interests ahead of retirement investors’ when making recommendations (giving loyal advice);
- avoiding misleading statements about conflicts of interest, fees, and investments;
- charging no more than is reasonable for their services and complying with Federal securities laws regarding “best execution” of investment transactions; and
- giving retirement investors basic information about conflicts of interest.⁸

II. Comments

³ Department of Labor, [Fact Sheet: Retirement Security Proposed Rule and Proposed Amendments to Class Prohibited Transaction Exemptions for Investment Advice Fiduciaries](#) (Oct. 31, 2023).

⁴ Department of Labor, [Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary](#) (accessed Jan. 3, 2024).

⁵ Department of Labor, [Fact Sheet: Retirement Security Proposed Rule and Proposed Amendments to Class Prohibited Transaction Exemptions for Investment Advice Fiduciaries](#) (Oct. 31, 2023). For example, in choosing between two investments offered and available to the retirement investor from a retirement professional or their affiliated financial institution, it would not be permissible for the retirement professional to advise investing in the one that is worse for the retirement investor but better or more profitable for the retirement profession or their affiliated institution.

⁶ The White House, [The Retirement Security Rule – Strengthening Protections for Americans Saving for Retirement](#) (Oct. 31, 2023).

⁷ *Id.* at 2.

⁸ *Id.* at 18, which lists the rule’s amendments to prohibited transaction exemption (or “PTE”) 2020-02.

Overall, we commend the Department for aiming to close long-standing loopholes that allow a large swath of advice to retirement savers to escape the fiduciary standards established when ERISA was passed in 1974.⁹ As you also know, however, this is not the first time DOL has put forth a rule addressing ERISA’s definitional loopholes. In 2016, DOL finalized a rule that sought to close existing gaps in the types of advice covered by the investment advice fiduciary definition.¹⁰ The 2016 rule was motivated in part by an extensive public record showing that retirement savers were incurring enormous losses due to the conflicted advice being given by financial professionals.¹¹ However in 2018, the DOL’s rule was vacated two years after its enactment by the Fifth Circuit Court, which stated in its decision that the DOL had exceeded its authority when it dispensed with the prior definition of investment advice fiduciary and supplanted with a new and contractual “best interest” standard.¹² We commend the Department for keeping this precedent in mind and crafting the 2023 Rule to comport with the Fifth Circuit’s ruling in order to protect against future legal challenges.¹³ We agree with the Department that the Rule is “responsive to the Fifth Circuit’s emphasis on trust and confidence,” which the court called the “touchstone of common law fiduciary status.”^{14,15} For example, the Fifth Circuit’s decision had been based in part on the fact that the 2016 DOL rule extended to relationships that lacked “trust and confidence;” we agree that the proposed Rule is tailored in a way that only touches on those relationships falling within the common law fiduciary standard.¹⁶ As such, we do not believe attempts to challenge the legality of the Rule would have a firm ground to stand on as did challenges to the 2016 rule, which is a testament to DOL’s thoughtfulness in drafting the Rule.

Below we outline several arguments in favor of the Rule, and dive more in depth into the loopholes the Rule is intended to close as well as the impact they have on everyday investors.

By closing certain loopholes for investment advice fiduciaries, this Rule is estimated to save retirees tens of billions of dollars that they are currently losing *every year* due to conflicted advice.

According to the Council of Economic Advisers, conflicted advice costs retirement savers at least \$17 billion per year.¹⁷ Another study conducted by DOL to accompany its 2016 version of the Rule estimated those costs would be between \$95 billion and \$189 billion over the following decade.¹⁸ According to Better Markets, these costs are particularly acute when retirees roll over their employer 401(k) plan to an individual retirement account (“IRA”) because advice related to one-time rollovers is exempt from ERISA’s fiduciary obligations; indeed, investors are

⁹ Better Markets, [Comment Letter Submitted Re: DOL Retirement Security Rule](#) (Jan. 2, 2023).

¹⁰ Better Markets, [Comment Letter Submitted Re: DOL Retirement Security Rule](#) (Jan. 2, 2023), at 7.

¹¹ *Id.*

¹² *Id.* at 8.

¹³ *Id.* at 29.

¹⁴ 29 CFR 2510 at 75901 (available at <https://www.federalregister.gov/documents/2023/11/03/2023-23779/retirement-security-rule-definition-of-an-investment-advice-fiduciary>).

¹⁵ *Id.* at 75899 (the “trust and confidence” standard establishing a common law fiduciary relationship is one in which a “retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can [...] place trust and confidence in the recommendation”).

¹⁶ *Id.* at 75895.

¹⁷ Council of Economic Advisors, [Report on the Effects of Conflicted Investment Advice on Retirement Savings](#) (Feb. 2015).

¹⁸ *Id.*

anticipated to move \$4.5 trillion from such plans into IRAs in the next 3-4 years.¹⁹ This problem is compounded by the fact that advice to 401(k) sponsors and advice regarding the sale of fixed-indexed annuities is also not covered by ERISA’s protections.²⁰

In a comment letter filed in response to the proposal, Morningstar identified rollovers to fixed-indexed annuities as an area where the proposed rule was likely to yield large benefits to investors, estimating that “the proposed rule would save retirement investors approximately \$3.25 billion per year, with a low-end estimate of \$1.77 billion and a high-end estimate of \$3.84 billion per year” based on its analysis of the benefits with respect to this single category of investment. Accordingly, it estimated, on an undiscounted basis, that these retirement investors would save over \$32.5 billion in the first 10 years, were the Rule finalized.²¹

The Rule closes four key regulatory loopholes under the ERISA that are harmful to retirees.

Glaring loopholes in ERISA’s investment advice fiduciary standard currently allow for financial professionals to provide retirement advice that is not in investors’ best interests; this leads to investors being recommended products that maximize the advisers’ revenues but come with excessively high costs, unnecessary risks, or illiquidity—to the detriment of the investor.²² Below we list the key gaps in fiduciary coverage that in our reading the Rule would fill.

Loophole #1: The investment advice fiduciary definition under ERISA only applies to advice given on a “regular basis,” which does not include one-time advice—as consequential as they may be—such as advice regarding 401(k) roll-overs into annuities or other complex products.²³ The Rule amends the fiduciary definition to bring one-time advice, including advice regarding 401(k) roll-overs, under the protections of ERISA. This change accounts for changes since the original definition was drafted. Specifically, when ERISA was enacted in 1974, 401(k)s did not even exist; most Americans had defined benefit plans like pensions, which are afforded strong ERISA protections.²⁴ In 1975, 27.2 million people participated in defined benefit plans and 11.2 million in defined contribution plans (the latter being the category 401(k)s fall into); by 2019 those figures had changed to 12.6 million and 85.5 million, respectively.²⁵ The investment advice fiduciary definition was previously drafted to only apply to advice given on a “regular basis,” which does not account for current trends in which many people seek one-time advice to receive guidance on how to roll over a 401(k) into an IRA or annuities.²⁶ As indicated by AARP, which advocates for more than 100 million Americans age 50 and older, financial advice to conduct a 401(k) rollover is not subject to ERISA’s best interest standard, even though that

¹⁹ *Id.* at 11.

²⁰ *Id.* at 3, 11.

²¹ Morningstar, [Letter to DOL Assistant Secretary Gomez re: DOL’s Retirement Security Rule](#) (Jan. 2, 2024).

²² CFP Board, [Letter to DOL Assistant Secretary Gomez re: DOL’s Retirement Security Rule](#) (Jan. 2, 2024), at 4.

²³ AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 6.

²⁴ *Id.* at 3.

²⁵ *Id.*

²⁶ AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 6.

“decision [...] is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings and the fact [is] that these recommendations carry with them an inherent conflict of interest.”²⁷ The 2023 DOL Rule closes this loophole.

Loophole #2: Advice about purchasing non-securities like fixed-indexed annuities is not covered by ERISA’s fiduciary best interest standard. The Rule amends the fiduciary definition to cover non-securities, including fixed-indexed annuities under the protections of ERISA. For example, according to the Consumer Federation of America (“CFA”), fixed-indexed annuities often have complex and opaque features and terms that can be harmful to retirement investors given their complexity and opacity such as surrender charges that lock up the investor’s money for years and the ability of insurance providers to unilaterally change the annuity’s terms and conditions to lower an investor’s effective return with little to no recourse for the investor.²⁸ Moreover, financial professionals receive relatively high commissions (or indirect compensations or non-compensatory perks) for selling fixed-indexed annuities compared to other products, which gives them a significant incentive to recommend such fixed-indexed annuities over other security products.²⁹

Different laws provide some coverage for certain types of annuities. For example, fixed-indexed annuities are not subject to the protections of federal securities laws under Reg BI while variable annuities are.³⁰ Likewise, the National Association of Insurance Commissioners (“NAIC”)’s model annuity rules—which govern the sale of fixed annuities at the state level—impose a lower standard than ERISA’s fiduciary best interest standard.³¹ We agree with CFA that by remedying the fixed-indexed annuity loophole, the Rule “levels the playing field between products, ensuring investment professionals don’t have improper incentives to recommend non-securities over securities.”³² Finally, according to the CFA, “Unlike Reg. BI, which defines “material conflict of interest” broadly to include all forms of compensation and requires firms to mitigate conflicts of interest that create incentives for investment professionals to place their or their firm’s interest ahead of the retail customer’s interest, the NAIC Model Rule excludes cash and non-cash compensation from its definition of “material conflict of interest.” As a result, the NAIC Model Rule does not require investment professionals recommending annuities to mitigate their compensation-related conflicts.”³³

Loophole #3: ERISA’s fiduciary best interest standard does not apply to recommendations made to employers who sponsor 401(k) plans. The Rule amends the fiduciary definition to bring financial advice made to retirement plan sponsors—many of whom heavily rely on the advice and services offered by retirement plan advisers and consultants—under the protections of ERISA’s heightened standard. Currently, ERISA’s fiduciary best interest standard does not apply across the board to recommendations made to employers who sponsor 401(k) plans, only to the retail investors that benefit from the plans.³⁴ Per Better Markets, without such a

²⁷ *Id.*

²⁸ Consumer Federation of America, [Letter to DOL Ass’n. Sec. Gomez re: DOL Fiduciary Rule](#) (Jan. 2, 2023), at 13.

²⁹ *Id.* at 14

³⁰ *Id.* at 5-6.

³¹ *Id.*

³² *Id.* at 19.

³³ Consumer Federation of America, [Letter to DOL Ass’n. Sec. Gomez re: DOL Fiduciary Rule](#) (Jan. 2, 2023), at 18.

³⁴ CFP Board, [Letter to DOL Assistant Secretary Gomez re: DOL’s Retirement Security Rule](#) (Jan. 2, 2024), at 11.

standard, such advice can be corrupted by conflicts of interest, leaving employees with investment choices marked by high costs and low performance, which erode employees' hard-earned savings over time.³⁵ Furthermore, like ERISA, neither Reg BI nor NAIC's model rules apply to advice made to retirement plan sponsors, so those regulatory regimes may not provide adequate coverage.³⁶ According to CFA, lack of protections for retirement plans carries significant risk:

“The cost and quality of investments offered by a plan can have a profound impact on a retirement investor’s ability to grow their nest egg over the course of their career. If the investment options on the menu have high costs or are low quality, workers would be limited to investing in options that are likely to underperform available alternatives, which may mean these workers retire with less money than they otherwise would have if they had access to options that were in their best interest or that they need to work longer to hit their savings goals. Unfortunately, just like their workers, many employers do not have particular expertise in retirement investing. After all, most employers are small business owners whose main job is not setting up and administering retirement plans. Because they are not retirement experts, they often rely on investment recommendations from the investment professionals who provide services to their plan.”³⁷

Loophole #4: Under current rules, financial professionals can easily escape ERISA fiduciary duties with a fine print disclaimer. The Rule’s amended investment advice fiduciary definition makes it harder for financial professionals to provide a binding legal disclaimer within their recommendation that effectively absolves them of any of their ERISA fiduciary duties.³⁸ Under ERISA’s current fiduciary definition, an adviser qualifies as a fiduciary so long as there is a “mutual agreement, arrangement, or understanding” that the advice will serve as the “primary basis” for the investment decision. As a result, many firms have historically evaded this definition by including a fine-print disclaimer stating the investor should not rely on the firm’s advice as the primary basis for their decision despite the implication that the effect of the advice is to induce reliance.³⁹ According to the AARP, the Rule will significantly limit the impact of fine-print disclaimers by preventing them from automatically controlling an investment advice fiduciary’s status where it is inconsistent with the investor’s oral communications or interactions with the financial professional.⁴⁰

III. Conclusion

As outlined above, the 2023 DOL Rule is an important step in strengthening critically needed guardrails and protecting working families and retirees from conflicted financial advice. Today, working families and retirees are often charged junk fees, driven to costly, risky, and illiquid products, steered towards harmful trades, or encouraged to needlessly roll over their

³⁵ Better Markets, [Comment Letter Submitted Re: DOL Retirement Security Rule](#) (Jan. 2, 2023), at 11.

³⁶ *Id.* at 25-26; *see also* AARP, [Testimony of David Certner at DOL Hearing re: Retirement Security Rule](#) (Dec. 12, 2023).

³⁷ Consumer Federation of America, [Letter to DOL Ass’n. Sec. Gomez re: DOL Fiduciary Rule](#) (Jan. 2, 2023), at 3.

³⁸ AARP, [Letter to DOL Assistant Secretary Liza M. Gomez re: Proposed Retirement Security Rule](#) (Jan. 2, 2024), at 7.

³⁹ *Id.*

⁴⁰ *Id.* at 8.

retirement savings. American investors lose billions of dollars annually because of this bad and conflicted financial advice, while licensed professionals maximize their commissions and fatten their year-end bonuses. We have long sounded the alarm on the need for strong regulations to protect our nation's retirees from self-serving financial professionals, and there are major gaps in the regulatory framework that need immediate addressing. With this proposed rule, the DOL closes these loopholes once and for all and ensures that *all* retirement advice provided by financial professionals is made in the best interest of retirement savers. We believe that a strong DOL Rule will have a tremendous impact on moderate-income and working families, who are typically only able to save for retirement in small amounts and need all the help they can get in safeguarding their nest eggs from financial professionals who seek to abuse their trust.

We applaud the DOL for taking this much needed step and urge the OMB and OIRA to expeditiously complete its review of the Rule so that it would become final as close to its proposed form as possible.

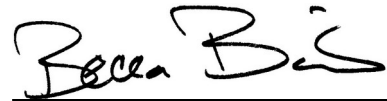
Sincerely,



Maxine Waters
Ranking Member, Committee
on Financial Services



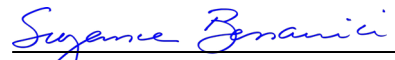
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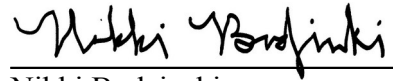
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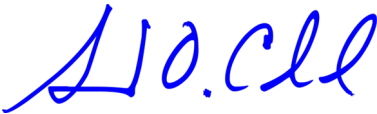
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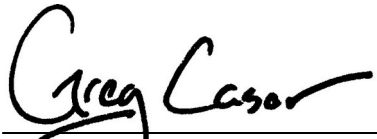
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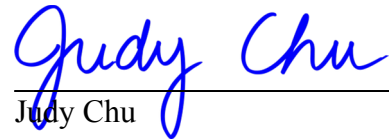
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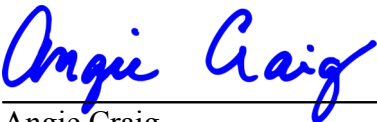
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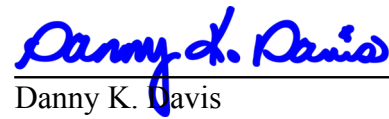
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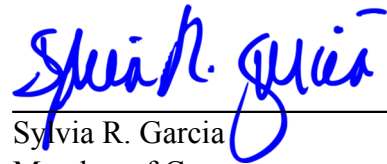
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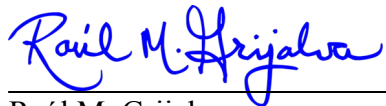
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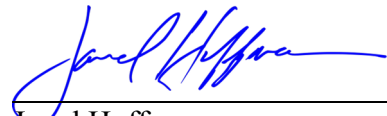
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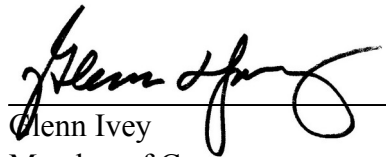
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Scion of the Enslaved
Africans -
Sacrificed to Make America
Great



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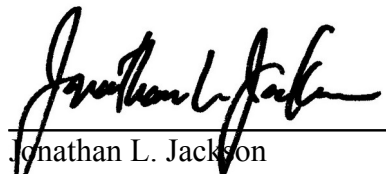
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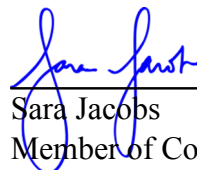
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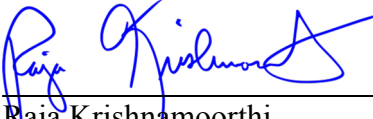
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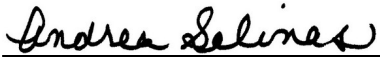
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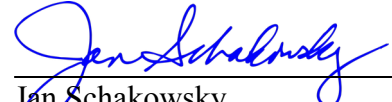
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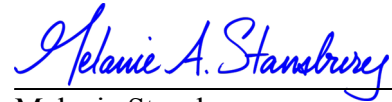
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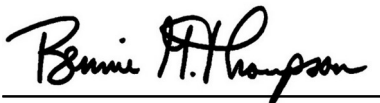
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Shri Thanedar
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Bennie G. Thompson
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Dina Titus
Member of Congress



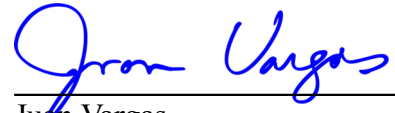
Rashida Tlaib
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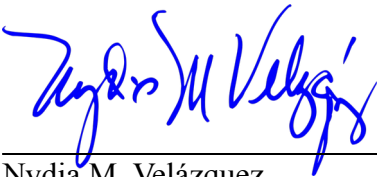
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