Congressional Letters Regarding Concerns About 2023 DOL Fiduciary Proposal

President Biden's announcement of the DOL's proposed Retirement Security Rule package at the White House sparked a significant response from Congress. Ten letters, each carrying the weight of the concerns of members of the Senate and House of Representatives, were sent to Acting Secretary Julie Su and Assistant Secretary Lisa Gomez. Eight letters, signed by a total of 99 House members and two letters, signed by 21 Senators (were sent, reflecting a bipartisan concern about the DOL's proposed Retirement Security Rule package. All the letters either expressly opposed the rule or voiced concerns about various aspects of the rule.

The concerns expressed by members of Congress were not superficial, but rather, they delved into various aspects of the rule. These include: the short comment period, the impact on low- and middle-income retirement savers, the right of parties to determine the nature of their relationship, interference with call center activities, the need to distinguish sales and education from fiduciary advice, exception for advice to sophisticated fiduciaries, preservation of commissions and annuities, PTE 84-24 limitation to commissions and/or co-fiduciary liability under 2020-02, the prohibition on inviting top producers to educational seminars, and workable implementation date.

Congressional Letters

Below, summaries are provided of the key points made in the congressional letters and links to the letters.

1. *Letter from House Committee on Financial Services Capital Markets Subcommittee Chair Ann Wagner (R-MO) – November 2, 2023*

   Signer: Representative Ann Wagner (R-MO)

   Summary of Key Points: Chairwoman Wagner was one of the first members of Congress to send a letter to DOL criticizing the proposal. She focused her criticism on DOL's attempt to promulgate a rule that had drawn significant investors and bipartisan Congressional concern in three previous attempts to advance a similar rule. She noted that the courts rejected the last iteration of the rule in 2016 because it threatened access to affordable and reliable retirement investment advice for millions of low- and middle-income Americans, disrupted the market, and created retirement insecurity and fewer product choices for America's workers and retirees. She concluded her letter by requesting that DOL respond to five questions about the rule.

2. *Letter from House Committee on Education & the Workforce Chair Virginia Foxx (R-NC) – November 17, 2023*

   Signer: Representative Virginia Foxx (R-NC).

   Summary of Key Points: Chairwoman Foxx sent this letter to DOL soon after the proposed rule was released. In her letter, the Chairwoman was critical of the proposal. Her criticisms focused on the proposal's overreach of jurisdiction to regulate transactions historically outside of DOL's jurisdiction. She expressed concern about violations of the *Administrative Procedures Act* (APA) because this proposal is a far-reaching regulatory change that would impact countless retirement plans, retirees, and savers and only a very short period, 60 days, was allowed for public comment. She called for an extension of an additional 60 days to permit a more considered review. She also expressed concerns about the DOL scheduling a hearing before the comment period closes. Because of that, interested parties would not be allowed to review the comments submitted, which, if they had the chance to review them, could help provide better-informed comments to be made at the hearing. She asserted that this rushed rulemaking timeline strongly indicated that the process's outcome is predetermined and violates the *APA.* The letter concluded by calling out DOL's hypocrisy in framing the proposal as a new rule that was not a regurgitation of the old rule but also justifying its denial of calls for a longer comment period because it had already received significant input from stakeholders since there has been ongoing engagement with the public since DOL first proposed the rule in 2010. DOL's response, Chairwoman Foxx, confirmed her assertions that this is the same old rule and that there is a predetermined outcome.

3. *Letter from Members of the House Committee on Small Business December 7, 2023*

   Signers: Representatives Roger Williams (R-TX), Dan Meuser (R-PA), Marc Alford (R-MO) and Aaron Bean (R-FL).

   Summary of Key Points: The letter questioned whether the DOL had properly considered the rulemaking's impact on small business entities. Specifically, the letter asked DOL for responses about how it had determined that the costs of compliance to be incurred by small businesses would only be incremental; what resources will DOL be making available to help small businesses understand the impact the rule will have on their operations; whether DOL considered how to make the burden of compliance with this rule lighter on small entities; why DOL believes this new rule is needed given the existing federal and state best-interest standard regulatory framework that was already in place to protect consumers; and whether DOL had considered extending the comment period to 90 days to give impacted small businesses sufficient time to respond. The letter set a December 21, 2023, deadline for response from DOL.

4. *Letter from Eleven Senators – December 18, 2023*

   Signers: Senators Roger Marshall (R-KS), John Barrasso (R-WY), Mike Braun (R-IN), Susan Collins (R-ME), John Cornyn (R-TX), Joni Ernst (R-IA), Chuck Grassley (R-IA), Bill Haggerty (R-TN), Cindy Hyde-Smith (R-MS), Michael Rounds (R-SD) and John Thune (R-SD).

   Summary of Key Points: The letter challenged DOL's authority to adopt this proposal because it is deliberately acting against the 5th Circuit's previous decision by not recognizing the difference between investment advisers paid fees for advice, who have long been considered fiduciaries; and brokers and insurance agents, who did not assume fiduciary status in selling products to their clients. The letter also criticized the proposal for its failure to acknowledge the existing federal and state regulatory framework that is already in place to ensure advisors and brokers are investing properly for their clients and that adding more onerous regulations will hamper the industry and add unnecessary costs that could otherwise be used to serve clients and generate wealth. The letter noted that the proposal misunderstands the purpose of choices in the advisor market and would inhibit investors' choice as to whether they want to pay for financial advice through fees for service planning, assets under management fees, and/or commissions.

5. *<u>Letter from Eight Senators – December 20, 2023</u>*

   <u>Signers</u>: Senators Jon Tester (D-MT), Gary Peters (D-MI), Joe Manchin (D-WV), Christopher Coons (D-DE), Benjamin Cardin (D-MD), Maggie Hassan (D-NH), Kyrsten Sinema (I-AZ) and John Hickenlooper (D-CO).

   <u>Summary of Key Points</u>: The letter sought a significant extension of time for the comment period to ensure that all stakeholders can provide feedback on the proposal because the rulemaking will significantly affect how Americans access advice and services for retirement savings. The letter expressed the Senator's concerns, which they heard from constituents struggling to understand how to comply with such a sweeping rule when many Americans are concerned about their economic security and ability to prepare for retirement. The letter highlighted that this proposal has been through various iterations over the past decade and stressed that each rulemaking should be taken on its own and previous public debate, hearings, comments, and meetings should not be considered sufficient engagement for this current process. The Senators said this proposal should reflect considerable changes resulting from a prior judicial order vacating an earlier version of the rule. The letter noted that a meaningful comment period was critical because of the history of failed DOL rulemaking on this subject and the concerns expressed during those processes by retirement savings providers, stakeholders, Members of Congress, and ultimately, our court system. The Senators further expressed concern that DOL was rushing this process which could hurt the people the rulemaking purports to be trying to help the most.

6. *<u>Letter from Members of the House Committee on Education and the Workforce – December 21, 2023</u>*

   <u>Signers</u>: Representatives Virginia Foxx (R-NC), Bob Good (R-VA), Tim Walberg (R-MI), Glenn Grothman (R-WI), Elise Stefanik (R-NY), Rick Allen (R-GA), Jim Banks (R-IN), Lloyd Smucker (R-PA), Lisa McClain (R-MI), Aaron Bean (R-FL) and Erin Houchin (R-IN).

   <u>Summary of Key Points</u>: The letter called for DOL to reconsider and withdraw the proposed rule. The letter expressed concerns about the broadness of retirement advice that would now be subject to the new standard and the consequences that would disproportionately impact lower- and middle-income Americans, which can jeopardize their retirement savings. The letter also pointed out the confusion the proposal will cause in the marketplace because each time DOL shifts its position, significant and expensive burdens are imposed on retirement service providers as they adapt to comply. Lastly, the letter objected to the proposal because it seeks to extend DOLs jurisdiction into the jurisdiction of other regulators (SEC and state insurance regulators) who have direct jurisdiction and have promulgated best interest standards based on the deep knowledge of the industry and their distribution chains they possess without citing any evidence that these other rules and regulations are falling short of protecting retirement savers.

7. *<u>Letter from Fifty Members of the House of Representatives – January 8, 2024</u>*

   <u>Signers</u>: Representatives French Hill (R-AR), David Scott (D-GA), Ann Wagner (R-MO), Henry Cuellar (D-TX), Bill Huizenga (R-MI), Jake Auchincloss (D-MA), Barry Loudermilk (R-GA), Juan Vargas (D-CA), Bryan Steil (R-WI), Donald Davis (D-NC), Young Kim (R-CA), Erin Houchin (R-IN), Scott Fitzgerald (R-WI), Bill Posey (R-FL), Chuck Edwards (R-NC), Alex Mooney (R-WV), Mike Flood (R-NE), Mike Lawler

(R-NY), William Timmons (R-SC), Rudy Yakym (R-IN), Andy Barr (R-TN), Adrian Smith (R-NE), Monica De La Cruz (R-TX), Darin LaHood (R-IL), David Kustoff (R-TN), Tim Walberg (R-MI), Mariannette Miller-Meeks (R-IA), Zach Nunn (R-IA), John Rutherford (R-FL), Brian Fitzpatrick (R-PA), Elisa Stefanik (R-NY), Blaine Luetkemeyer (R-MO), Roger Williams (R-TX), Mike Gallagher (R-WI), Michael Guest (R-MS), Carol Miller (R-WV), Daniel Meuser (R-PA), Michelle Steel (R-CA), Glenn Thompson (R-PA), Kevin Hern (R-OK), Rick Allen (R-GA), Ralph Norman (R-SC), John Rose (R-TN), Claudia Tenney (R-NY), Mike Kelly (R-PA), Julia Letlow (R-LA), Andrew Garbarino (R-NY), Don Bacon (R-NE), John Moolenaar (R-MI), and Lisa McClain (R-MI)

Summary of Key Points: This letter is the only bipartisan letter sent to DOL and calls for DOL to withdraw the rule. The letter expressed concerns about the harm it will cause to lower- and middle-income workers. It cited the findings of research that found 10.2 million account holders lost access to advice due to the 2016 rule and that if a similar rule such as the one DOL had proposed is put in place, it would result in a 20 percent increase in the wealth gap for Blacks and Latinos. It further highlighted the proposal's redundancy of existing federal and state laws and rules that address conflicts of interest and the proposal's non-compliance with previous court decisions on DOL's authority to promulgate a similar rule. The letter also called upon DOL to focus on the implementation of the *SECURE Act* and S*ECURE 2.0 Act* rather than "pursuing this problematic and counterproductive rulemaking effort as these bipartisan legislative measures provide clear and appropriate opportunities for DOL to help America's workers and retirees have opportunities to build their retirement nest eggs and enjoy a financially secure retirement.

8. *Letter from Representative Jimmy Panetta (D-CA) – January 30, 2024*

   Signer: Representative Jimmy Panetta (D-CA).

   Summary of Key Points: In his letter to DOL, Representative Panetta raised concerns about a one-size-fits-all policy that will make it impossible for insurance agents selling annuities to be determined as fiduciary under the current rules. In the letter, he called upon DOL to further examine the proposed rule's impact on the insurance marketplace, recognize the unique structure of the products being offered, and preserve access to those financial products. He also said that in seeking to achieve the proposal's goal, he does not believe it requires undermining the insurance marketplace, banning commissions, or creating conflicts of interest. The letter further noted that insurance products and annuities are not investments, per se, as the purchaser knows the return in advance. Instead, they function as risk mitigation or protection products.

9. *Letter from House Committee on Ways & Means Ranking Member Richard Neal (D-MA) – February 2024*

   Signer: Representative Richard Neal (D-MA)

   Summary of Key Points: Ranking Member Richard Neal (D-MA) sent a letter to DOL, but he did not make the letter public or share it with anyone other than DOL. While IRI has not seen the letter, Representative Neal's staff shared that it addresses many critical issues the industry had raised during the comment process. If you would like to find out more about the views and concerns expressed by Rep. Neal to DOL, you could obtain the letter from DOL as part of your review process.

10. *Letter from 30 Members of the House of Representatives – March 1, 2024*

Signers: Representatives Gwen Moore (D-WI), Jimmy Panetta (D-CA), Haley Stevens (D-MI), Suzan DelBene (D-WA), Joseph Morelle (D-NY), Linda Sanchez (D-CA), Dwight Evans (D-PA), Wiley Nickel (D-NC), John Larson (D-CT), Stacey Plaskett (D-USVI), Troy Carter (D-LA), Danny Davis (D-IL), Brad Schneider (D-IL), Terri Sewell (D-AL), Jonathan Jackson (D-IL), Emanuel Cleaver (D-MO), Dan Kildee (D-MI), Adriano Espaillat (D-NY), Bill Pascrell (D-NJ), Donald Davis (D-NC), Marilyn Strickland (D-WA), Steve Cohen (D-TN), Andrea Salinas (D-OR), Sheila Cherfilus-McCormick (D-FL), Nikema Williams (D-GA), Brad Sherman (D-CA), Gregory Meeks (D-NY), Gabe Amo (D-RI), Nydia Velazquez (D-NY), and Jesus Garcia (D-IL).

Summary of Key Points: Representative Gwen Moore (D-WI) led 29 other House Democrats, including many members who serve on the House Committees on Financial Services and Ways and Means on a letter to DOL, raising and seeking clarity on various concerns about the retirement investment advice fiduciary proposed rule, while also indicating their general support for the proposal. In the letter, the Democrats ask a series of questions about the proposal's differentiation between investment education and sales; cases where firms provide brokerage services while also managing investors' assets on a discretionary basis; and principal transaction exemptions. The letter also suggested a need for a longer delay before the rule takes effect once finalized.

Hearings

Following the conclusion of the comment period and Congress' return after its winter holiday recess in January, the House of Representatives has been active in examining various aspects of DOL's proposed retirement security rule in the three committees that have jurisdiction covering retirement security issues under the tax code, federal securities laws, and ERISA.

a. House Committee on Financial Services Capital Markets Subcommittee – January 10, 2024

Hearing: Examining the DOL Fiduciary Rule: Implications for Retirement Savings and Access

IRI's testimony, and press release can be found by clicking on the words with embedded links.

b. *House Committee on Education & the Workforce Health, Employment, Labor and Pensions Subcommittee Hearing – February 15, 2024*

Hearing: Protecting American Savers and Retirees from DOL's Regulatory Overreach.

IRI's testimony and press release can be found by clicking on the words with embedded links.

c. House Committee on Ways and Means – Democrat Members Roundtable – March 21, 2024

Roundtable: Representatives Mike Thompson (D-CA), Dwight Evans (D-PA), Linda Sanchez (D-CA), Brad Schneider (D-IL) and Danny Davis (D-IL).

Summary: Representative Mike Thompson (D-CA) convened the roundtable to serve as a forum for the Democratic committee members to learn more about the issues and concerns raised by proponents and opponents of the DOL Retirement Security Rule.

IRI's opening statement at the Roundtable can be found by clicking on the words with embedded links.

Legislation

FY 2024 Appropriations Policy Rider in Labor HHS Appropriations Legislation

In November 2023, the House of Representatives adopted three appropriations riders that said “no funds” can be used by DOL to finalize, implement, or enforce the proposal. The riders, introduced by Representatives Ann Wagner (R-MO), Rick Allen (R-GA), and Ralph Norman (R-SC), were included in the Labor, Health and Human Services and Education Appropriations bill by a voice vote. The House did not pass the overall funding bill and in the final appropriations legislation no policy riders were included.

On March 21, 2024, the House released the text of the consolidated appropriations bill including the DOL and neither the “no funds” or the alternative “no funds until” policy riders were included in the final bill. As a result, DOL will not be prohibited from spending its allocated funds during the remainder of this fiscal year to finalize, implement and enforce its proposed Retirement Security Rule.