January 2, 2024

Submitted Electronically

The Honorable Lisa Gomez
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Definition of Fiduciary (RIN 1210–AC02)

Dear Assistant Secretary Gomez:

The American Investment Council (the "AIC" or "we") appreciates the opportunity to comment on the Department of Labor's (the "Department") proposed rulemaking, Retirement Security Rule: Definition of an Investment Advice Fiduciary (the "Proposed Rule").[1] For the reasons described herein, the AIC respectfully requests the Department to withdraw the Proposed Rule. If, however, the Department does not withdraw the Proposed Rule, we urge the Department to modify the content of the Proposed Rule in any final regulation, as described below.

I. Executive Summary

- The Proposed Rule would materially interfere with the efficient operation of the private capital markets in the United States due to the risk that communications during and after the fund's fundraising between a private fund sponsor and sophisticated limited partners (e.g., public and private employee benefit plans, sovereign wealth funds, foundations and endowments) – including customary sales discussions and bespoke information – could, despite being made on an arm's length basis, be treated as fiduciary "investment advice" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[2] This will likely result in sponsors avoiding communications that would aid the investors' due diligence efforts, potentially resulting in ERISA plans having fewer opportunities to invest in the private capital markets, which may ultimately diminish the plans' investment returns and diversification. We do not believe that the Department's cost-benefit analysis

[1] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023).

[2] For purposes of this letter, we generally use the terms "private funds" and "private equity funds" to encompass private equity funds, private credit funds, and other permanent capital vehicles. We refer to their investment advisers as private fund advisers, private equity fund advisers, and fund sponsors. Moreover, we generally use the term "sophisticated limited partner" and "sophisticated investor" to mean a "qualified purchaser," within the meaning of the federal securities laws.

adequately considered the reduced investment returns and diminished diversification efforts of ERISA plans, given the foregoing.

- Both the Securities and Exchange Commission ("SEC"), which has the authority and expertise to regulate the capital markets in the United States, and Congress clearly view "qualified purchasers" and certain other highly sophisticated investors as being fundamentally different than the "mom and pop" retail investors who may be susceptible to misunderstanding when investment communications are made in a fiduciary versus an arm's length capacity. We urge the Department to harmonize the Proposed Rule with Congress' and the SEC's positions by including a safe harbor for customary communications between fund sponsors and highly sophisticated investors, as described herein.

- Absent a safe harbor for these types of communications, and other changes, a final regulation would chill communications by fund sponsors and potentially limit sophisticated retirement investors' access to many private funds, as well as disrupt the efficient operation of the private capital markets in the United States. This will result in fewer private equity funds being made available to ERISA plans, which would likely result in the plans' lower investment returns and less diversification. Moreover, the lack of a safe harbor will give rise to various costs, including compliance costs imposed on fund sponsors. These costs were not considered by the Department in its cost-benefit analysis, and the Department points to no data or a satisfactory explanation as to why such costs should be imposed on ERISA plans and fund sponsors.

- The Proposed Rule is overly broad, ambiguous, and inconsistent with the Fifth Circuit Court of Appeal's decision in *Chamber of Commerce of the United States v. United States DOL ("Chamber").*[3] Significant changes to the Proposed Rule would be required to comply with that decision.

- The Department is not providing interested parties adequate time to review the Proposed Rule and is, therefore, depriving stakeholders of the basic procedural requirements of a thoughtful, deliberative administrative rulemaking process.

II. Background on the AIC and Sophisticated Retirement Investors' Participation in Private Equity

The AIC is an advocacy and resource organization established to develop and provide information about the private investment industry and its contributions to the long-term growth of the U.S. economy and retirement security of American workers. Member firms of the AIC consist of the country's leading private equity and growth capital firms united by their successful partnerships with limited partners and American businesses.[4]

[3] *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018), *judgment entered sub nom. Chamber of Com. of Am. v. United States Dep't of Lab.*, No. 17-10238 (5th Cir. June 21, 2018).

[4] For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

As of 2021, 89 percent of public pension funds invest at least part of their portfolio in private equity. Many ERISA plans also have allocations to private equity by acquiring limited partner interests in funds. Private equity delivers strong returns and represents one of the most stable and secure long-term investments for plans. As public markets grow more volatile, private equity serves as an increasingly important tool for diversified pension funds looking for reliable investments that can weather these abrupt shifts in market sentiment. Private equity has provided pension plans with strong investment returns over many years.[5] It is of little wonder that fiduciaries of pension plans – public and private – view private equity as a net positive for a plan's investment performance.[6]

Moreover, the private equity market benefits investors, companies, workers, and communities alike. First, as noted above, ERISA plans and other investors gain from higher returns and less volatility than the public markets. Second, companies receiving private equity investment benefit from access to capital, as well as business mentorship and expertise. Third, workers benefit from stronger companies that are committed to growth. And finally, communities across the country are bolstered by private equity investment that helps build sustainable companies and jobs.

In 2021 alone, private equity invested over $1 trillion in communities across America. Private equity has consistently invested in businesses of all sizes across the country. Despite rippling challenges posed by the COVID-19 pandemic, private equity invested in 5,205 small businesses in 2021, representing 74% of total investments. These investments are strengthening the economy, growing businesses, and improving the lives of millions of Americans.

Advisers of private equity funds are typically regulated by the SEC under the Investment Advisers Act of 1940, as amended (the "Advisers Act"). The SEC has stated that the obligations and application of the fiduciary duty of an investment adviser to a private fund differs significantly from, and will typically be less prescriptive than, the obligations and application of the fiduciary duty of an investment adviser to a retail fund.[7] The SEC has promulgated tailored rules, under Section 206(4) of the Advisers Act, that prohibit registered investment advisers from engaging in certain targeted fraudulent practices. These rules require or prohibit certain conduct by registered investment advisers with respect to their clients (here, the private equity funds). Certain of these rules also are directed at protecting investors in private funds (such as Rule 206(4)-8 which prohibits fraudulent statements or conduct directed at current or prospective fund investors), and/or impose less extensive regulations on registered investment advisers with respect to private funds than they do with respect to other types of clients.

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[5] *See Private Equity Delivers the Strongest Returns for Retirees Across America*, 2022 Public Pension Study, American Investment Council, https://www.investmentcouncil.org/wp-content/uploads/2022/07/22AIC002_2022-Report_SA-2226.pdf.

[6] *See Public Servants Depend on Private Equity Returns*, American Investment Council, https://strongerpensions.com/watch-and-learn/.

[7] *See Commission Interpretation Regarding Standard of Conduct for Investment Advisers*, Release No. IA-5248, pp. 15, 34 n.87, and 39 (June 5, 2019); 17 C.F.R. Section 276.

III. The Proposed Rule Will Materially Interfere With the Efficient Operation of the Private Equity Markets

A. The Proposed Rule offers no safe harbor for communications with "qualified purchasers" and other sophisticated investors, a significant shortcoming.

In amending the decades-old investment advice regulation, the Department is squarely focused on retail investors who may be vulnerable to financial exploitation. From the Department's perspective, these "mom and pop" investors may receive and rely on investment recommendations thinking they are in a relationship of trust and confidence with the advice provider, when in fact fiduciary status may have been disclaimed away in fine print. Whatever the merits of this concern in the retail context, the factual premise does not translate to the private capital markets with highly sophisticated investors operating at arm's length in heavily negotiated transactions.

We are concerned that the Proposed Rule would convert customary sales communications and bespoke discussions (that aid an investor's due diligence of a fund) into fiduciary investment advice under ERISA. As described below, such a result would have a significant impact on the private equity markets and ERISA plans that invest in private equity funds. Moreover, we are unaware of ERISA ever being applied in such a manner, and the Department has offered no basis for such a dramatic departure. Quite simply, there is no nexus between a fund sponsor-limited partner arm's length relationship and a relationship of trust and confidence.

We note at the outset that the federal securities laws generally prohibit ordinary retail investors (e.g., "mom and pop" investors) from investing in the U.S. private capital markets, including private equity funds. Instead, private equity funds are reserved for well-capitalized pension plans, sovereign wealth funds, endowments, foundations, and certain high net worth individuals who meet the "qualified purchaser" standard or other SEC tests for sophistication. Thus, both Congress and the SEC have determined that qualified purchasers are in fact fundamentally different than "mom and pop" retail investors, and that these eligibility requirements are proxies for investor sophistication. Similarly, the Department has treated wealth and income as proxies for financial sophistication in multiple contexts.[8] Because only sophisticated

[8] *See, e.g.*, 80 Fed. Reg. 21928, n. 20 (Apr. 20, 2015) ("The proposed thresholds of 100 or more participants and assets of $100 million are consistent with thresholds used for similar purposes under existing rules and practices. For example, administrators of plans with 100 or more participants, unlike smaller plans, generally are required to report to the Department details on the identity, function, and compensation of their services providers; file a schedule of assets held for investments; and submit audit reports to the Department. Smaller plans are not subject to these same filing requirements that are imposed on large plans. The vast majority of plans with fewer than 100 participants have 10 or less participants. They are much more similar to individual retail investors than to large financially sophisticated institutional investors, who employ lawyers and have the time and expertise to scrutinize advice they receive for bias. Similarly, Congress established a $100 million asset threshold in enacting the PPA statutory cross-trading exemption under ERISA section 408(b)(19). In the transactions covered by 408(b)(19), an investment manager has discretion with respect to separate client accounts that are on opposite sides of the trade. The cross trade can create efficiencies for both clients, but it also gives rise to a prohibited transaction under ERISA §406(b)(2) because the adviser or manager is "representing" both sides of the transaction and, therefore, has a conflict of interest. The exemption generally allows an investment manager to effect cash purchases and sales of securities for which market quotations are readily available between large sophisticated plans with at least $100 million in assets and another account under management by the investment manager, subject to certain conditions. In this context, the $100 million threshold serves as a proxy for identifying institutional fiduciaries that can be expected to have the expertise to protect their own interests in the conflicted transaction.").

investors are eligible to invest in private funds, we urge the Department to harmonize this rulemaking with Congress' and the SEC's long held position on the sophistication of qualified purchasers and similar investors.

We also stress the importance of the free flow of information between a prospective or current limited partner, such as a sovereign wealth fund or an ERISA plan, and the fund sponsor in the context of a private equity fund. This flow of information includes customary sales communications, where the sponsor may discuss and pitch one or more of its funds, as well as bespoke communications between sponsor and investor, which are necessary to aid the investor's due diligence of the fund.[9] Negotiations over side letter provisions between the parties are also common. It has been widely understood for decades that all of these communications are made on an arm's length basis.

More specifically, governmental plans, ERISA plans, endowments and other highly sophisticated parties customarily engage in an assortment of communications with fund sponsors. These communications range from sales communications, including where the sponsor identifies specific funds for the prospective investor, to highly detailed and sophisticated matters, including specific critical fund characteristics, such as: (i) capital requirements; (ii) liquidity restrictions; (iii) fees; (iv) tax structuring (e.g., whether investing through a feeder fund minimizes the risk of unrelated business taxable income ("UBTI")); (v) portfolio investments and strategies; and (vi) the benefits of investing in the fund or the strategy. Existing limited partners typically have further discussions with the fund sponsor in connection with initial or subsequent capital calls once they have already invested in the fund. Prospective limited partners may also pose questions to the fund sponsor regarding the terms and conditions of the subscription materials, as well as enter into detailed side letter negotiations with the fund sponsor.

Given the sophistication of the parties involved, and the nature of the communications, we do not believe a relationship of trust and confidence could reasonably be considered to arise here. As drafted, the Proposed Rule – absent a safe harbor – is likely to result in fiduciary relationships that fall outside the "well-settled meaning" of "fiduciary."[10]

Subscription agreements, which are carefully reviewed, negotiated and approved by the investor (and often legal counsel), include multiple conspicuous representations and acknowledgments that the fund sponsor is not providing investment advice, or otherwise acting in a fiduciary capacity, with respect to an investor's decision to invest in the fund. These are longstanding and customary representations and acknowledgments. We are not aware of any prospective limited partner asserting that a fund sponsor did in fact provide investment advice to

[9] Certain private equity fund investors may be legally compelled to undertake a thorough due diligence review of the fund prior to investing. *See, e.g.*, DOL Letter to Jon W. Breyfogle, Esq., dated June 3, 2020, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/information-letters/06-03-2020 (expressing, in part, a fiduciary's need to carefully consider a private equity investment option for a participant-directed plan in light of the complexity associated with private equity.).

[10] *Chamber at* 371 (5th Cir. 2018) (In any event, "absent other indication, 'Congress intend[ed] to incorporate [into ERISA] the well-settled meaning'" of "fiduciary"—the very essence of which is a relationship of trust and confidence").

them by reason of the aforementioned communications.[11] Market practice in this space bears little resemblance to the Department's concerns over advice providers hiding behind fine print that a "mom and pop" retail investor may not even read or understand.

Thus, the Proposed Rule, which includes no safe harbor for customary communications with qualified purchasers and other highly sophisticated investors in connection with investments in the private markets, risks interfering with the efficient operation of the U.S. private capital markets. By potentially treating customary arm's length communications as fiduciary investment advice under ERISA – which have never been considered investment advice under ERISA – sponsors may become overly legalistic and pro forma in their communications, avoiding certain communications that would benefit the prospective limited partner's due diligence of the fund, potentially resulting in fewer opportunities for ERISA plans to invest in private equity funds. Such an outcome is likely to diminish plans' investment returns and diversification, as noted above. Furthermore, the Proposed Rule does not take into account the additional compliance costs that would be imposed on sponsors, should customary arm's length communications be treated as fiduciary investment advice under ERISA, as we believe may happen under the Proposed Rule.

To account for this deficiency and risk, and if the Department is determined to go forward with this rulemaking rather than withdrawing it, we propose a specific safe harbor for the Department's consideration (the "Proposed Safe Harbor"), as detailed below.

B. Proposed Safe Harbor

> "*Communications with sophisticated and independent parties*. The provision of any advice, within the meaning of Section 3(21)(A)(ii) of the Act, by a person to a sophisticated and independent party in connection with an arm's length purchase, sale, loan, exchange or other transaction related to the investment of securities or other investment property, if the sophisticated and independent party has expressly acknowledged, in a clear and conspicuous manner, that such person is not acting as a "fiduciary," within the meaning of Section 3(21)(A)(ii) of the Act or Section 4975(e)(3)(B) of the Code, to the sophisticated and independent party with respect to such transaction, and such person does not (i) receive a fee or other compensation directly from the sophisticated and independent party solely for the provision of such advice or (ii) expressly acknowledge or represent that it acts as a "fiduciary," within the meaning Section 3(21)(A) of the Act or Section 4975(e)(3) of the Code, to such sophisticated and independent party with respect to the transaction.
>
> A party is "sophisticated" if such person (or such person's representative) (i) is a "bank," as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by

[11] We believe there is a serious risk, which is not acknowledged by the Department, that some fund sponsors may curtail communications with prospective limited partners that are ERISA plans, even if appropriate or necessary to the ERISA plan fiduciary's due diligence efforts, if such communications may be re-characterized as fiduciary investment advice under ERISA. This may result in ERISA plans having fewer opportunities to invest in these funds, which may ultimately diminish the plans' investment returns and diversification efforts. Additionally, we are concerned about the Proposed Rule's impact on pension risk transfers, which have proven to be beneficial to both participants and plan sponsors.

> a State or Federal agency, (ii) is an insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan, (iii) is an investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, (iv) is a broker-dealer registered under the Securities Exchange Act of 1934, (v) has total assets or assets under management of at least $25 million, or (vi) meets the requirements of a "qualified purchaser" under the federal securities laws.
>
> A party is "independent" of another person if the person were not, and were not affiliated with, the other person. For these purposes, an "affiliate" of a person is one who controls, is controlled by, or is under common control with, the other person."
>
> A communication is "clear and conspicuous" if it is reasonably understandable and noticeable to a typical sophisticated and independent party.

The Proposed Safe Harbor is narrowly tailored to communications with sophisticated and independent parties ("SIPs") in connection with an arm's length purchase, sale, loan, exchange or other transaction related to the investment of securities or other investment property. The definition of a SIP is a "retirement investor" (as defined in the Proposed Rule) who is, *inter alia*, a registered investment adviser, bank and other sophisticated fiduciary, as well as an IRA owner who meets the "qualifier purchaser" standard. The "independence" requirement ensures that the investor is not subject to the undue influence of the fund sponsor.

The Proposed Safe Harbor is subject to several safeguards. First, the SIP must expressly acknowledge, in a clear and conspicuous manner, that the fund sponsor is not acting as an "investment advice fiduciary." The "clear and conspicuous" acknowledgment requirement should assure the Department that hidden fine print disclaimers will not be used – rather, the SIP's acknowledgment would be among the other representations and acknowledgments that are clearly and prominently delineated in the subscription agreement, which is carefully reviewed and approved by the SIP.

Second, the fund sponsor may not receive a fee or other compensation directly from the SIP solely for the provision of such advice; however, the fund sponsor (and its affiliates) could still receive performance, incentive, carry or management fees received once the SIP is admitted as a limited partner in the fund or for the provision of other services.

Third, the fund sponsor may not expressly acknowledge or represent to the SIP that it acts as a "fiduciary," within the meaning Section 3(21)(A) of ERISA or Section 4975(e)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), to the SIP with respect to the transaction. This means that the Proposed Safe Harbor is not available where the fund sponsor expressly acknowledges that it is providing investment advice to the SIP, or acting as the investment manager for the SIP, *with respect to the purchase and sale of interests in the fund (and related transactions, such as making capital contributions)*, irrespective of whether the fund is deemed to hold "plan assets."

In our view, the Proposed Safe Harbor is appropriate and efficient. It provides necessary predictability for market participants who can satisfy the Proposed Safe Harbor's stringent requirements, thereby reducing the potential imposition of needless compliance costs or legal uncertainty. This predictability will, in turn, preserve the free flow of necessary information provided to ERISA plan fiduciaries that they use as part of their own independent due diligence when evaluating potential investment in a private investment fund. A safe harbor is far preferable to the Proposed Rule's "facts and circumstances" analysis, which, by its very nature, offers no predictability or legal certainty, much less compliance cost efficiencies. Moreover, any "examples" the Department may wish to offer will similarly be context specific, thereby failing to offer the predictability, legal certainty and compliance cost efficiencies that market participants need in the context of the aforementioned customary communications among highly sophisticated parties.

C. The Department should confirm that the "hire me" exception is available with respect to certain discussions between limited partners (prospective and current) and fund sponsors.

The Department acknowledges that the proposed "hire me" exception, which carves out marketing communications from the definition of a "recommendation," should encompass, and is indeed intended to encompass, something beyond mere puffery.[12] Otherwise the exception's purpose and benefit is more theoretical than realistic or practical. In the preamble to the Proposed Rule, for example, the Department confirmed that a sponsor's normal activity of marketing itself would not be treated as investment advice, so long as the sponsor does not make any investment recommendations along with the "hire me" pitch. However, under the Proposed Rule's broad definition of investment advice, the "hire me" pitch by a fund sponsor to a prospective limited partner nearly always involves the recommendation of a specific security – the limited partner interest in the fund – which would arguably prevent the sponsor from *ever* being able to rely on the "hire me" exception with respect to its fundraising and marketing activities. Accordingly, it would be helpful for the Department to clarify that the "hire me" exception would be available in such circumstances.

In particular, we respectfully ask the Department to confirm that the "hire me" exception is available with respect to communications between limited partners (prospective and current) and fund sponsors, including sales communications regarding the fund sponsor and its funds, and, particularly, those communications regarding (i) the names, characteristics and terms of one or more funds offered by the sponsor or its affiliates, (ii) fund capital requirements, (iii) fund liquidity restrictions, (iv) fund fees, (v) fund tax structuring considerations (*e.g.*, whether investing through a feeder fund minimizes the risk of UBTI), (vi) portfolio companies and fund strategy, (vii) the benefits of investing in the fund or the strategy, (viii) capital calls, (ix) terms and conditions of the subscription materials, and (x) side letter negotiations. We believe clarifying the scope of the "hire

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[12] *See* 88 Fed. Reg. at 75906 ("Under this proposal, the Department does not intend to suggest . . . that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other property.").

me" exception is appropriate because a relationship of trust and confidence could not reasonably be expected to arise from these types of communications.

D. The Department should clarify the scope of proposed paragraph (c)(1)(i) as it applies to investment vehicles.

The Department's current regulation defining "fiduciary" provides that one becomes an investment advice fiduciary if a recommendation were made and the provider, in pertinent part, "has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan." The Department now proposes to broaden this concept so that, among other things, it is no longer limited to discretion over "plan assets."

We urge the Department not to adopt this change. Alternatively, we urge the Department to clarify that fiduciary status would *not* apply in the following (and similar) circumstances:

- A fund sponsor makes a recommendation to a retirement investor in connection with an investment in a fund (that the sponsor or its affiliate manages), regardless of whether the fund holds "plan assets."
- A fund sponsor makes a recommendation to a retirement investor in connection with an investment in a fund that does not hold "plan assets," even if the same retirement investor holds an interest in a separate "plan assets" fund or account sponsored or managed by the fund sponsor (or any of its affiliates).
- Discretion by a fund sponsor over the assets of a retirement investor that is managed by a registered investment adviser, bank or other intermediary (*e.g.*, there has been a delegation of investment management), when the underlying asset owners are numerous or diffuse, regardless of whether those assets are "plan assets."

The foregoing highlights some of the circumstances where the Proposed Rule deems a person to be in an advice relationship even though there is no reasonable basis to conclude that there is a relationship of trust and confidence. We urge the Department to eliminate or, at the very least, constrain the application of this overly broad provision, as described above.

E. The Department should clarify that proposed (c)(1)(ii) does not apply to recommendations that relate to classes of investors.

Proposed (c)(1)(ii) provides that one becomes a fiduciary under the Proposed Rule if, when making a recommendation to a particular retirement investor, (1) the person, through or together with any affiliate, makes investment recommendations to investors on a regular basis as part of their business and (2) the recommendation to the retirement investor is provided under circumstances indicating that it is based on such retirement investor's particular needs or individual circumstances and may be relied upon by the retirement investor as a basis for investment decisions that are in such retirement investor's best interest.

As discussed above, private equity fund sponsors frequently engage with prospective limited partners on a wide range of important issues, including tax structuring. For example, a

prospective limited partner may ask the sponsor whether the types of investments made by the fund are likely to generate UBTI. Because UBTI only applies to a subset of prospective limited partners, we are concerned that the communication could be deemed by the Department to be based on the particular needs or individual circumstances of the retirement investor.

We urge the Department to clarify that communications that are necessarily tailored to the needs of a class of investors is not sufficient to be covered under proposed (c)(1)(ii) of the Proposed Rule (*i.e.*, that statements applicable to classes of investors (*e.g.*, qualified plans) are not "individualized" and do not constitute advice).

F. The Department should clarify that proposed (c)(1)(iii) does not apply if the provider does not represent or acknowledge that it is a fiduciary to the retirement investor for purposes of the investment recommendation.

Proposed (c)(1)(iii) provides that one becomes a fiduciary under the Proposed Rule if, when making a recommendation, "the person…represents or acknowledges that they are acting as a fiduciary when making investment recommendations."

Fund sponsors may owe fiduciary duties to their *funds* under applicable law, such as local law and/or the Advisers Act by reason of their status as a general partner or investment adviser to the fund. These fiduciary duties, however, do not usually flow through to the underlying investors in the fund. We are concerned that this generalized status as a fiduciary under applicable law could result in the general partner or other fund party being considered an investment advice fiduciary under the Proposed Rule, if a recommendation were deemed to be made to a plan.

We urge the Department to modify proposed (c)(1)(iii) so that it would not apply to a fund sponsor or other fund party, even if such sponsor or other party has general fiduciary status under local law in its capacity as general partner or manager of the fund. Instead, we ask the Department to narrow this provision to instances when the provider has acknowledged fiduciary status under ERISA or the Code for the purpose of providing the investment recommendation.

IV. The Proposed Rule is Arbitrary and Capricious, and an Abuse of the Department's Discretion

As discussed above, we believe the Proposed Rule risks upending years of market practice by converting customary arm's length communications between private equity fund sponsors and highly sophisticated investors, such as sovereign wealth funds, governmental plans and ERISA plans, into fiduciary investment advice under ERISA. We are unaware of ERISA ever being interpreted in such a manner. We find no data or satisfactory explanation in the Proposed Rule for this sweeping change. Moreover, we see no consideration by the Department of the costs that would result therefrom, specifically: (i) the new and additional compliance costs that would be imposed on private fund sponsors to navigate the amorphous facts and circumstances test under the Proposed Rule, as well as compliance related to ERISA and Section 4975 of the Code; and (ii) the likelihood that ERISA plans will have fewer opportunities to invest in private equity funds (because of the risk that the sponsor may be deemed an investment advice fiduciary under ERISA), thereby reducing the plans' overall investment returns and diversification efforts.

For these reasons, we believe the Proposed Rule violates the Administrative Procedure Act ("APA").

V. The Proposed Rule is Overly Broad, Ambiguous and Inconsistent with *Chamber*

In 1975, the Department recognized the importance of creating a clear line between non-fiduciary communications and fiduciary advice when it issued a regulation defining investment advice under ERISA.[13] The regulation established a five-part test that was intended to ensure that there is in fact a relationship of trust and confidence before imposing fiduciary obligations. The 1975 rule has provided certainty to the investment community for nearly five decades, and it has been described by *Chamber* as having "captured the essence" of ERISA's fiduciary relationship because, in part, it maintains the critical distinction between "[s]tockbrokers and insurance agents [who] are compensated only for completed sales" and investment advisers who are "paid fees because they 'render advice.'"[14]

In 2016, the Department issued a new definition of investment advice that would have greatly expanded the types of communications deemed fiduciary advice.[15] *Chamber* vacated the 2016 rule in its entirety. There, the Court explained that fiduciary status should only apply in the context of an established relationship of trust and confidence and concluded that the rule was inconsistent with the regulatory framework established by Congress. The Court noted that investment advice fiduciary status implies a "special relationship beyond that of an ordinary buyer and seller" and that –

> *"[h]ad Congress intended to abrogate both the cornerstone of fiduciary status—the relationship of trust and confidence—and the widely shared understanding that financial salespeople are not fiduciaries absent that special relationship, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that 'are undeniably significant.'"*[16]

The Proposed Rule suffers from the same flaws as the 2016 rule and is plainly inconsistent with *Chamber*. The Proposed Rule includes such a broad definition of investment advice that it covers situations where no relationship of trust and confidence exists or has traditionally ever existed, as described in this letter.

VI. The Department's Review and Comment Process is Fundamentally Flawed

The Proposed Rule is a sweeping regulatory overhaul that would drastically change how the capital markets interact with retirement plans and IRA owners. It seeks to convert many non-fiduciary communications into fiduciary "investment advice" subject to the rules and restrictions under Title I of ERISA and Section 4975 of the Code.

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[13] 29 C.F.R. Section 2510.3-21.

[14] *Chamber at* 365 and 373.

[15] Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 20946 (Apr. 8, 2016).

[16] *Chamber at* 365 and 373.

If finalized, the Proposed Rule would have a major impact on the retirement system and the financial markets. As such, there is a material risk of unintended consequences. Despite this, the Department has provided a mere 60-day comment period. Not only is this comment period significantly shorter than the comment periods for related proposals in 2010 and 2015, it also occurs during a time when many Americans have significant familial and religious obligations. This is not a sufficient amount of time for interested parties to meaningfully comment on the Proposed Rule, and it fails to provide a true "opportunity" for impacted market participants to review the Proposed Rule, given the Proposed Rule's length, complexity, costs, and potential consequences on the American retirement system and markets.[17]

The Department also made the unprecedented decision to hold a hearing three weeks before the close of the comment period. We are not aware of any instance when the Employee Benefits Security Administration has held a hearing on a rulemaking before the close of the comment period. At the very least, the Department should have released the numerous comments it received reasonably in advance of the hearing.

The Department is neglecting the protections afforded the public under applicable administrative law. A number of stakeholders raised concerns with the process and asked for the comment period to be extended and for the hearing to be postponed so that stakeholders can engage in a thoughtful and deliberative process, yet the Department rejected all of those requests. This decision is perplexing as there is no statutory or other deadline for this regulatory project. We are concerned the Department is significantly underestimating the potential consequences and costs of the Proposed Rule on the American capital markets.

This accelerated administrative process puts the Department at risk of regulating without the benefit of thoughtful and considered stakeholder feedback, including in areas where it has acknowledged limitations to its own understanding and its need for information from commenters. Equally important, the flawed process contributes to the depressed engagement of, and a deepening skepticism within, the regulated community about the Department's commitment to objectively considering comments and concerns over the Proposed Rule. Given this rushed process, this letter represents AIC's preliminary comments.

VII. Conclusion

We urge the Department to withdraw the Proposed Rule, or, at a minimum, narrow its scope, as described herein. We are concerned that if the Proposed Rule is adopted, it will materially interfere with the efficient operation of the private markets. Specifically, customary sales and marketing practices will be upended and sophisticated parties will be deprived of the ability to set the contours of their own business relationships. The Proposed Rule, if adopted, would make it more difficult for retirement plan fiduciaries to perform due diligence on private funds potentially resulting in ERISA plans having fewer opportunities to invest in the private capital markets, which may ultimately diminish the plans' investment returns and diversification, a cost the Department did not adequately consider in violation of the APA. We reiterate our concerns over the

[17] 5 U.S.C. § 553.

Department's rushed process and the fact that the Proposed Rule seems clearly at odds with *Chamber*.

Sincerely,

/s/ Rebekah Goshorn Jurata

Rebekah Goshorn Jurata
General Counsel