Department of Labor Responses
to Questions for the Record
for June 7, 2023 Hearing

Chairwoman Virginia Foxx (R-NC)

Wage and Hour Division

Independent Contractors

1. You have stated that the U.S. Department of Labor (DOL) lacks the legal authority to impose a standard such as the California ABC Test to determine whether an individual is an employee or an independent contractor. However, DOL's proposed rule includes three factors that mirror the A, B, and C factors in the California standard. The proposed rule also states that no one factor is "dispositive, and the weight to give each factor may depend on the facts and circumstances of the case." Essentially, this means DOL can consider any facts it wants and give those facts whatever weight it wants. Can you guarantee that DOL will not enforce or interpret the rule to consider the three ABC test factors only or weigh them so heavily that no other factor matters?

   ***Response**: Under the proposed rule, DOL would rely on the long-standing, multi-factor "economic reality" test used by courts to determine whether a worker is an employee or independent contractor, which examines the totality of the circumstances. The proposed rule does not contain an ABC test as found in California state law. The "economic reality" standard was established by the Supreme Court, and the proposed rule is consistent with longstanding judicial precedent that courts have relied on to classify workers as employees or independent contractors under the Fair Labor Standards Act (FLSA).*

2. In April, you testified before the Senate that misclassification of employees as independent contractors "is a problem in our economy that needs to be addressed." The House Subcommittee on Workforce Protections heard testimony in April from self-employed Americans who said DOL's proposed independent contractor rule would misclassify them as employees, costing them income and, in some cases, their entire careers.

   a) Do you believe that the misclassification of legitimate independent contractors could also be a problem in our economy?
   b) How do you plan to ensure that DOL protects legitimate independent contractors against being misclassified as employees?

   ***Response:** Bona fide independent businesses, including independent contractors (those people who are in business for themselves), have always had a place in our economy and always will. DOL's proposed independent contractor rule relies on the long-standing, multi-factor "economic reality" test used by courts to determine whether a worker is an employee or independent contractor, considering the totality of the circumstances, under the FLSA. Our proposed rule reflects long-standing Department guidance and judicial precedent on this issue. It does not propose industry-wide reclassification. DOL's proposed rule would, if*

finalized, align DOL's standard for determining employee or independent contractor status under the FLSA with the standard that courts have applied for decades and continue to apply today.

3. As part of its rulemaking process on independent contractors, DOL held private, invitation-only meetings. According to the Office of Information and Regulatory Affairs, DOL scheduled a private meeting exclusively for representatives of the National Employment Law Project, a union-backed think tank. It also scheduled a private meeting with union organizers targeting app-based independent contractors such as Uber and Lyft drivers. And it held private meetings with a handful of individuals from organizations representing the construction, retail, and financial services industries. Changes to the independent contractor rule would affect Americans in hundreds of professions. Why did DOL fail to schedule a single meeting with legitimate independent contractors in most of these affected professions, depriving it of valuable input, and instead focus so much time on what union organizers want?

   Response: *I believe in working with people representing diverse viewpoints to accomplish the mission of the Department of Labor. We make the best policy when we hear from all stakeholders, and I think constructive engagement is incredibly helpful to sharpening our viewpoints and policy ideas. We received more than 55,400 comments on our proposed rule from businesses, workers, and independent contractors, representing a wide variety of views. In addition, we held widely advertised public forums on misclassification for both businesses and workers, including independent contractors, in June 2022 prior to the release of the proposed rule. The Department will continue to solicit views from a wide array of stakeholders under my leadership.*

   This question is referring to E.O. 12866 meetings held by Office of Information and Regulatory Affairs (OIRA), which OIRA schedules in response to requests from any and all outside stakeholders while draft rules are under OIRA review. The Department of Labor plays no role in scheduling these E.O. 12866 meetings.

4. When DOL issued its proposal for how it plans to redefine independent contractors, the Department wrote that each independent contractor would need just 15 minutes to review the proposal—which was 184 pages long. Please explain how DOL estimated the amount of time it will take most independent contractors and their clients to read, understand, and figure out how to comply with the proposed rule?

   Response: *In the proposed rule, DOL assumed each independent contractor would spend an average of 15 minutes to review the regulation, in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, as well as advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings. Moreover, DOL's proposed independent contractor rule relies on the long-standing, multi-factor "economic reality" test used by courts to determine whether a worker is an employee or independent contractor under the FLSA—a standard that many independent contractors would find familiar and consistent with their current work arrangements. Once the rule is finalized, DOL will provide compliance assistance to the regulated community to help*

stakeholders, including independent contractors, understand and comply with the rule.

5. As Deputy Secretary of Labor, you approved the independent contractor proposed rule. What was your specific involvement in the proposed rule on independent contractor status that was published on October 13, 2022?

   Response: *Secretary Walsh and I established an agenda for DOL's component agencies to propose rules that implement the Department's mission and the President's agenda. We work closely with our agency heads, staff in the Department's Office of the Assistant Secretary for Policy (OASP), and attorneys in the Department's Office of the Solicitor (SOL), to ensure that they are taking into account the breadth of comments that we receive from stakeholders and ensuring that any final rule considers those comments while advancing our mission.*

6. DOL's independent contractor proposed rule moves from the current two-factor test to seven equally balanced factors—one of which is a catch-all of anything that comes up in the specific case. This is the opposite of the so-called clarity claimed in the proposed rule. If the proposed rule goes into effect, it will inevitably clog our judicial system and increase litigation costs for every American business that has a relationship with independent contractors.

   a) With seven equal-weight factors, won't every case have to go to trial?
   b) How will such a broad test provide any clarity for businesses, independent contractors, or judges?

   Response: *The 2021 Independent Contractor (IC) Rule examines five factors in every case and, like the recent proposed rule, includes a provision allowing for the consideration of "additional factors."* See *86 FR 1247 (§ 795.105(d)(2)(iv)). Although the 2021 Rule designated two factors—the nature and degree of control over work and the worker's opportunity for profit or loss— as "core factors" given greater weight in the analysis, the 2021 IC Rule explicitly rejected commenter requests to "state that if the two core factors point towards the same classification, there is no need to consider any other factors."* See *86 FR 1202. The proposed rule would provide clarity for the regulated community by returning to the long-standing analysis used by courts to determine whether a worker is an employee or independent contractor.*

7. How does DOL intend to keep pace with the modern economy as well as empower workers and businesses to remain competitive and economically sound, particularly in this time of inflationary pressures? Do you acknowledge that technology has created new economic pathways for millions of people—whether via app-based platforms, online retail marketplaces, or other new market networks?

   Response: *Bona fide independent businesses, including independent contractors (those people who are in business for themselves), have always had a place in our economy and always will. At the same time, when employees are misclassified as independent contractors and denied minimum wage and overtime protections they are entitled to under the FLSA, the Department has a responsibility to address this problem. Addressing*

misclassification is also important for employers that comply with the law and are placed at a competitive disadvantage when competing against employers that cut corners by misclassifying employees.

8. The laws governing employment and employee benefits are structured so that workers have the benefits and protections of employment or the autonomy of independent work—but not both. This dichotomy means that the law views a worker as less and less independent any time he or she receives benefits from a company. The positions you have espoused suggest you believe independent workers should simply be forced into the traditional employment regime, even if it means they lose their flexibility and choice. Why not recognize that our current laws are outdated, that work has evolved, and that policymakers should look at alternatives like portable benefits that preserve the ability of individuals to work independently?

   ***Response**: Bona fide independent businesses, including independent contractors (those people who are in business for themselves), have always had a place in our economy and always will. The Department of Labor's role is to faithfully enforce the laws enacted by Congress and implement the President's agenda consistent with those laws.*

9. DOL is proposing to remove language from its 2021 independent contractor final rule stating that supervision for compliance with outside legal requirements—including such as insurance, registration, and licensing—shall not be used as evidence of an employment relationship. Given that DOL's proposed rule explicitly removes this language from the current final rule, how does DOL plan to keep the resulting confusion from occurring as result of this ambiguity?

   ***Response:** Like the 2021 Independent Contractor Rule, the proposed rule's preamble discussion acknowledged that caselaw about the relevance of control exercised for legal and safety reasons is not uniform. The Department is continuing to consider whether and how to address this issue in any final rule.*

Overtime Rulemaking

10. DOL is preparing a proposed rule on overtime regulations. As it engages in this rulemaking, do you believe that it has the legal authority to include an inflation adjustment in any pending overtime rule? If so, please explain.

    ***Response**: To ensure overtime laws reflect the realities of today's workplace and that federal law provides meaningful protections for workers and their families, the Department has published a proposed rule to update its regulations governing the exemption of executive, administrative, and professional employees (EAPs) under the Fair Labor Standards Act. The proposed rule was published in the Federal Register on September 8, 2023, and interested stakeholders now have the opportunity to submit written comments on the proposal. When the Department last updated the EAP regulations in September 2019, it reaffirmed the Department's intent to update the operative earnings thresholds more regularly in the future. As that rule explained, "regular updates promote greater stability, avoid the disruptive*

salary level increases that can result from lengthy gaps between updates, and provide appropriate wage protection for those under the threshold." 84 FR 51235.

Joint Employer Rulemaking

11. During the Obama administration, then-Wage and Hour Administrator David Weil issued an Administrative Interpretation on the standards DOL should apply in evaluating whether a joint employment situation exists. Is issuance of an administrative interpretations a proper discretionary step DOL can take instead of engaging in notice-and-comment rulemaking?

    Response: *The Department will undertake all rulemaking in compliance with the requirements of the Administrative Procedure Act. The Department does not have a joint-employer rule on its regulatory agenda.*

Prevailing Wages

12. In March 2022, the Wage and Hour Division (WHD) issued a proposed rule to update the Davis-Bacon and Related Acts regulations. The Small Business Administration's Office of Advocacy criticized the proposed rule for its deficient regulatory analysis and harmful impact on small businesses. For example, WHD absurdly estimates a cost per firm of $78.97 annually. This includes one hour to read the regulation and 30 minutes to implement the regulation, even though the rule is 100 pages, including more than 50 regulatory provisions, and is one of the most sweeping overhauls to the Davis-Bacon program in decades by DOL's own admission. What assurances can you give that DOL will take the voice of small businesses seriously and that it will comply with the *Regulatory Flexibility Act*?

    Response: *On August 23, 2023, the Department published in the Federal Register the final rule, "Updating the Davis-Bacon and Related Acts Regulations."* See *88 FR 57526. As the first comprehensive update to these regulations in nearly 40 years, this final rule will promote compliance, provide appropriate and updated guidance, and enhance their effectiveness in the modern economy. As with every rulemaking, the Department carefully considered all of the comments received in response to its proposed rule, including from the SBA's Office of Advocacy and other stakeholders. For example, in response to commenter feedback, the Department changed its assumption that firms would spend an average of one hour to review the rule to four hours, which increased the direct cost estimate for small business entities to $224.73 in Year 1.* See *88 FR 57719. As explained in the final rule, this is an average cost estimate which accounts for firms that will spend little or no time reviewing the rule. The Department's Wage and Hour Division will continue to provide robust education and outreach to workers, contractors, and contracting agencies about rights and responsibilities arising under the Davis Bacon and Related Acts, and will hold a series of public webinars to inform stakeholders of changes resulting from this final rule.*

13. The Davis-Bacon Act requires most contractors and subcontractors that perform work on federally funded or assisted construction contracts to pay government-determined prevailing wage and benefit rates. Unfortunately, regulations implementing these requirements are inherently flawed and often fail to produce accurate, prevailing, or timely rates. DOL is close

to completing a final rule updating Davis-Bacon regulations, but the proposed rule fails to address these problems. Instead, it will undo prior reforms, add red tape, and expand prevailing wage requirements to new industries and workers. Shouldn't DOL advance policies to make infrastructure less expensive and provide opportunities for more businesses to contract with the government to improve our roads, bridges, affordable housing, and utilities?

Response*: The Department has updated the regulations that implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA) to reflect the significant changes in federal contracting and the construction industry over the past several decades. Given the recent investment in our nation's infrastructure, updating the regulations is necessary as the Department anticipates significant activity in the federal and federally assisted construction contracts. Many of the provisions of the final rule help the Department and contracting agencies better administer and enforce the Davis-Bacon labor standards, which in turn ensure contractors and subcontractors can compete on equal footing by eliminating the advantages of contractors who pay their workers substandard wages in violation of the DBRA.*

14. The *Inflation Reduction Act of 2022* (IRA) provides more than $270 billion in tax credits for the construction of clean energy projects. Unfortunately, this law also represents an unprecedented expansion of prevailing-wage and government-registered apprenticeship requirements into the private sector, as taxpayers must ensure contractors comply with prevailing-wage rates and apprenticeship work-hour requirements to receive the full tax credit. There is uncertainty among developers and contractors regarding how to ensure compliance with these unclear and complex new regulatory requirements. How will you ensure that DOL meets its statutory requirements to work closely with the Department of the Treasury to provide effective, clear guidance on prevailing-wage and apprenticeship requirements under the IRA?

Response: *The IRA is our nation's largest investment in clean energy solutions to date. By pairing climate investment with the creation of good paying jobs, the IRA's unparalleled investments will help improve job quality in clean energy industries and incentivize the expansion of workforce training pathways into these jobs. The Department is committed to supporting the Department of the Treasury in the effective implementation of the IRA's clean energy tax credits by providing Treasury with technical assistance on related prevailing wage and registered apprenticeship provisions. To that end, the Department has been working closely and continuously with our colleagues at Treasury since the enactment of the IRA to develop effective and clear guidance for taxpayers and eligible contractors. On August 29, 2023, the Department of the Treasury and the Internal Revenue Service released a Notice of Proposed Rulemaking (NPRM) on the prevailing wage and apprenticeship provisions of the IRA. The Department collaborated with Treasury on that guidance and is continuing to engage in stakeholder education. To support this NPRM and implementation, the Department of Labor has created a website (https://www.dol.gov/general/inflation-reduction-act-tax-credit) explaining its role in supporting the IRA.*

Child Labor

15. The Department of Health and Human Services (HHS) Office of Inspector General recently reported that HHS chilled reporting of whistleblowers when these individuals raised concerns that HHS was placing children in harm's way, including placing them with human traffickers.

    a) Are there avenues for these whistleblowers to report trafficking concerns to DOL?
    b) Has DOL received any HHS whistleblower complaints related to migrant child labor, and, if so, what were the complaints?

    Response: *The Fair Labor Standards Act prohibits exploitative child labor as well as retaliation for reporting violations of the FLSA's provisions on minimum wage, overtime pay, recordkeeping, youth employment, and other requirements. Individuals are encouraged to report child labor violations or retaliation against employees who report child labor violations to the Department's Wage and Hour Division.*

    The Department maintains a website that details protections available to whistleblowers under the FLSA and other statutes (https://www.dol.gov/general/topics/whistleblower). The Wage and Hour Division accepts third party complaints. Complaints received by the Wage and Hour Division are confidential; the name of the worker and the nature of the complaint are not disclosable and whether a complaint exists may not be disclosed.

16. There is an apparent lack of coordination between DOL, HHS, and the Department of Homeland Security (DHS) when it comes to protecting the health and safety of unaccompanied migrant children after they have entered the United States. It is the responsibility of HHS to ensure that these children are placed with responsible caregivers after they leave HHS. Yet, it appears as though many of these children were placed with human traffickers and were forced to work in dangerous jobs. This was so prevalent that HHS stopped placing children with sponsors in certain zip codes.

    a) What steps is DOL taking to assist HHS in taking actions to prevent human trafficking?
    b) Is HHS accepting this assistance?

    Response: *The Department of Labor's Wage and Hour Division (WHD) and the Department of Health and Human Services' Administration for Children and Families (ACF) are working closely together, both bilaterally and as part of the Interagency Taskforce to Combat Child Labor Exploitation. An initial product of that work was the March 23, 2023, Memorandum of Agreement between WHD and ACF to formalize information sharing, cross training of staff, and joint outreach and education programs related to child labor. The partnership announced in March has resulted in ongoing collaboration and cross department updates and educational efforts on public resources.*

17. On June 1, I wrote to you about the Biden administration's open-border policies—which have now led to a surge of illegal migrant child labor in the United States. Several reports

have documented that despite the *Fair Labor Standards Act* (FLSA) barring minors from working in occupations deemed hazardous by the Secretary of Labor, many are able to secure employment by obtaining false identification to establish their ages as 18 or older. These documents, often provided by criminal trafficking networks, pass the DHS E-Verify process.

a) What guidance would you give employers, including federal contractors, to assess and determine the age of applicants if applicants are approved by the E-Verify system?
b) How does DOL implement the age certification process found at Title 29, Part 570, of the Code of Federal Regulations, which specifically authorizes a "Federal certificate of age issued by a person authorized by the Administrator of the Wage and Hour Division"?
c) Does WHD have any additional plans to implement a federal age certification process, or engage the certification process described at Title 29, Part 570 of the Code of Federal Regulations which employers could rely on to assess the true age of applicants?

Response: *Providing guidance to employers is a major component of the Department's work, and WHD maintains a range of tools to help employers understand their legal obligations. This includes an "elaws Advisor" on child labor rules under the FLSA and a database of state child labor laws that, among other things, discusses requirements in some states that employers receive work permits from the state in order to employ minors. WHD also engages in thousands of outreach events and programs annually. Further, the Department has a "YouthRules!" initiative that includes employer self-assessment tools, best practices, and resources and materials for employers who employ young workers. WHD also partners with business associations, schools, and other government entities to provide guidance on federal child labor standards to parents, educators, employers, and young people seeking employment.*

The child labor provisions of the FLSA state that "oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age." 29 U.S.C. 203(l)(2). Department regulations state that employers may request a certificate from a state agency. 29 CFR 570.5(b)(2). A number of state child labor laws further require that employers obtain work permits from the state before employing a minor.

H-2A

18. An official at WHD recently made several disturbing statements that were published in an article. Among other things, he was quoted as saying, "You can see the H-2A program literally is the purchase of humans to perform difficult work under terrible conditions, sometimes including subhuman living conditions." He is also quoted as saying, "You can throw a rock and hit a violation in the agricultural industry." He further said wage theft is "baked into" how the H-2A program operates. These quotes were puzzling because the Department enforces the laws that prohibit these unlawful actions. The H-2A visa program allows employers to bring in temporary agricultural workers lawfully when there are no U.S.

workers available.

a) Do you agree with what this DOL official said about farmers and agriculture employers?
b) Have you spoken with him about what he said?

Response: *The views and statements attributed to that Department employee do not reflect those of the Department and do not represent Departmental policy. We are committed to a fair and unbiased enforcement of the law.*

H-2B

19. H-2B employers are facing long delays in DOL's processing of H-2B applications. Regulations require DOL to issue a first action (Notice of Acceptance or Notice of Deficiency) on every application within seven business days of receipt. This year, DOL has taken more than 90 days to issue a first action on a high number of applications. For many employers to receive their workers on time, they must receive a first action from DOL on or before the middle of February. But this year, more than half of spring applications did not receive a first action until after mid-February. Many employers who first filed with DOL between January 1 and January 3 with a requested worker start date of April 1 did not receive a first action from DOL until as late as the third week of April, with labor certifications issued as late as the second week of May. These DOL delays result in much-needed workers arriving weeks and even months after the intended employment start date.

a) What steps is the Department taking to address these delays?
b) How are you ensuring DOL is meeting its regulatory obligations to issue a first action within seven business days of receipt?
c) What percentage of DOL employees who are processing H-2B labor certification applications working remotely? If so, is working remotely negatively affecting their performance, thereby delaying the processing of H-2B labor certification applications?

Response: *The Department's Employment and Training Administration (ETA) is working diligently to meet the unprecedented demand for H-2B visas, which the agency first encounters in the extraordinary, still-growing number of foreign labor certification applications employers and their representatives file with the Department every filing season. The agency has worked strategically and creatively to leverage available dollars to their fullest, making a variety of management and technological improvements. Specifically, ETA is (1) temporarily re-assigning Federal staff from other foreign labor programs that it administers; (2) hiring temporary contract staff during the fall time-period (e.g., Fiscal Year 2023) to help Federal staff review applications, and (3) offering overtime to help boost staff productivity in anticipation of this peak filing season. ETA is also addressing demand through efficiencies available in its electronic Foreign Labor Application Gateway (FLAG) processing system, to which the agency has made well-placed enhancements in recent years. In all, these actions have helped ETA successfully manage its rising workloads to date. However, year over year, demand continues to grow, and the agency cannot absorb these annual increases indefinitely and still achieve its regulatory adjudication time requirements without additional resources. To adequately resource the agency*

to meet employer demand for these programs annually and in the long term, the Fiscal Year (FY) 2024 Budget again asks the Congress for permanent fee authority. As in past years, the Department's proposal is for a narrowly tailored fee, scaled to demand, and focused specifically on employers who use the Department's foreign labor programs.

ETA's Office of Foreign Labor Certification (OFLC) receives and processes all H-2B applications electronically, and staff engaged in the review and processing of those applications are afforded full-time telework opportunities. OFLC has received an unprecedented number of H-2B applications this fiscal year and is processing them as quickly as possible. For the H-2B cap applicable to the second half of the fiscal year, the peak filing season starts on January 1-3 of each year, which is the earliest employers may file applications for work beginning in the second half. As in previous years, in January 2023 OFLC received more than enough applications in that three-day period to fill the statutory H-2B cap, in particular, 8,693 H-2B applications requesting 142,796 worker positions with April 1, 2023 start dates, which is more than four times greater than the 33,000 statutory visa cap for the second half of FY 2023. The H-2B applications received during FY 2023 represented a 7 percent increase over FY 2022 and a 60 percent increase from FY 2019. This historic increase in submissions caused some delays in issuing first actions and resulted in an unusually high number of pending applications at the time when the annual H-2B peak filing season began.

OFLC has processed this unprecedented level of applications as quickly as possible, and for applications filed on January 1-3, OFLC issued enough certifications to fill the statutory H-2B cap by the middle of February 2023, which is about six weeks prior to employers' start date of need. This means, for the vast majority of these employers, while there were initial delays given unprecedented demand and lack of resources, they were still in a position to seek visas for requested workers available under the cap in a timely way based on their stated dates of need. As they do every filing season, OFLC staff have worked diligently to process this unprecedented volume of applications. OFLC has seen consistent increases in the total number of H-2B applications processed for employers since 2021, including a 4.7 percent increase in 2021 and a 47 percent increase in 2022. OFLC is currently on pace to exceed production compared to last year.

To help address this issue, as mentioned above, the President's FY 2024 Budget includes a legislative proposal that would provide the Department with authority to charge cost-based filing fees to employers filing foreign labor certification applications. A fee-based structure would better align the supply of funding to the demand for certifications, reduce reliance on annual appropriations, and impose the costs of administering certification programs on the group of employers that uses and most benefits from these programs.

Occupational Safety and Health Administration (OSHA)

Heat Illness Prevention

20. OSHA Assistant Secretary Doug Parker recently said that issuing a heat injury and illness prevention standard for both indoor and outdoor workplaces is the agency's top rulemaking priority. I have heard from many stakeholders who are concerned about a one-size-fits-all heat regulation that is not workable in a nation as vast as the United States with different

climates throughout the country. What assurances can you give that DOL does not intend to appease climate activists by rushing the rulemaking process, and that it will seriously consider feedback from stakeholders?

Response: *OSHA is currently working diligently on a proposed standard to protect workers from heat stress. The agency reviewed comments from the ANPRM and recently initiated the SBREFA process. During rulemaking, I would instruct OSHA to take into account the views of all stakeholders. This would be done through the notice-and-comment rulemaking process, which has not yet occurred as no proposal has yet been issued. DOL would consider all stakeholder input received through the notice-and-comment rulemaking process.*

Union Walk-Around Rule

21. I am concerned about reports that OSHA plans to issue a proposed rule to allow unions and community organizers to take part in OSHA inspections of non-union workplaces, even if they are not employees of the employer and may have no safety expertise. The intent of this policy change seems to be less about keeping workplaces safe and more about giving unions the opportunity to use an OSHA inspection as an organizing tool. How will you ensure that individuals who may not have safety experience do not undermine OSHA inspections and the credibility of its findings?

Response: *Employee participation and representation in the inspection process is critical to a thorough and effective inspection. Section 8(e) of the OSH Act gives employees in all workplaces the right to have a representative authorized by them accompany OSHA during a workplace inspection, for purposes of aiding the inspection, whether they are represented by a union or not.*

OSHA plans to clarify the right of workers and certified bargaining units to specify a worker or union representative to accompany an OSHA inspector during the inspection process/facility walkaround, regardless of whether the representative is an employee of the employer, if, in the judgment of the Compliance Safety and Health Officer, such person is reasonably necessary to an effective and thorough physical inspection.

Under OSHA's existing regulations, the compliance officer may deny any person the right to participate in the inspection if their conduct interferes with a fair and orderly inspection and ultimately has authority to resolve any disputes about who may serve as the employer and employee representatives.

Tree Care Operations Rule

22. The tree care industry and its high-skilled workforce operate across the United States, safeguarding homeowners, businesses, and communities from hazards that threaten critical infrastructure, such as powerlines and roadways. The industry's workforce are essential first responders to natural disasters—hurricanes, winter storms, tornados—that impact communities and play a pivotal role in preserving the beauty and health of the natural environment. While this work is critically important to the nation, it is also dangerous, placing the industry among the most hazardous occupations in the country.

However, despite the hazards facing tree care workers, OSHA currently regulates the tree care industry through a patchwork of policies and standards that are not specifically calibrated to industry practices and put workers in the industry at increased risk of injury and death. For that reason, the industry has been asking OSHA to address the problem for more than two decades. Some states have acted and have issued tree care specific standards, but OSHA has been slow to do so as it pursues other priorities, most of which do not enjoy the same level of support. While DOL's FY 2024 Congressional budget justification lists the tree care standard as a priority, OSHA recently missed the Fall 2022 regulatory agenda's May target date for issuance of a proposed rule, and the Spring 2023 regulatory agenda lists a possible December publication date. OSHA has missed its self-imposed deadline for the fourth time under this administration.

a) Why does OSHA continued to miss its own deadlines on this rulemaking?
b) Will you ensure tree care operations rulemaking remains a priority of OSHA?

Response: *The Tree Care Operations rulemaking continues to be a priority for OSHA. As you note, the Spring 2023 Regulatory agenda projects that the agency will issue a Notice of Proposed Rulemaking in December 2023 https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1218-AD04. As you know, the agency maintains a robust regulatory agenda and is working concurrently on multiple priority rules with limited resources. OSHA will continue to make Tree Care rulemaking a priority.*

Mine Safety and Health Administration (MSHA)

Crystalline Silica Rulemaking

23. MSHA's forthcoming proposed crystalline silica rule for metal/nonmetal and coal mines is widely anticipated to reduce the existing silica exposure limit by half to meet the OSHA standard. OSHA allows for the use of administrative controls to meet the standard, but MSHA has limited the use of administrative controls to meet emission limits. Given the significant technical and economic compliance issues for meeting the anticipated new silica standard, is MSHA considering adopting OSHA's approach to allow for the use of administrative controls, such as personal protective equipment?

Response: *The Department is focused on furthering the Mine Act's clear instruction to prioritize protecting miners' health. The Department's Mine Safety and Health Administration announced a proposal on June 30 to amend current federal standards to better protect the nation's miners from health hazards related to exposure to respirable crystalline silica, and the proposed rule was published in the Federal Register on July 13, 2023. MSHA welcomes public comments and held public hearings in Arlington, Virginia, on August 3, 2023; Beckley, West Virginia, on August 10, 2023; and Denver, Colorado, on August 21, 2023. The hearings were open for in-person or online participation. MSHA will review and consider all comments and feedback as the Agency will continue to work to better protect the nation's miners from the potential health hazards associated with exposure to respirable crystalline silica.*

The proposed rule, as explained in the preamble, would require mine operators to install, use, and

maintain feasible engineering and administrative controls to keep each miner's exposure to respirable crystalline silica at or below the proposed permissible exposure limit of 50 micrograms per cubic meter of air for a full-shift exposure, calculated as an 8-hour time-weighted average. This proposed approach to controlling miners' exposures is consistent with MSHA's existing standards, NIOSH's recommendations, and generally accepted industrial hygiene principles.

Miner Fatalities

24. One of the top missions of DOL is to ensure the nation's miners go home safe and healthy to their families every night. Unfortunately, there has been an alarming increase in mining fatalities in the first half of 2023.

    a) What do you believe is causing this troubling increase?
    b) What is DOL doing to educate miners and eliminate preventable mining fatalities?

Response: *In 2022, the mining industry experienced 30 fatalities, 7 fewer than the previous year. Specifically, the focus that mine operators and MSHA placed on powered haulage safety resulted in fatal powered haulage accidents decreasing by 71 percent (from 17 in 2021 to 5 in 2022). As of July 16, the mining industry has experienced 24 fatalities in 2023—a troubling increase with accidents ranging from machinery and powered haulage—which encompasses a lot of the equipment found at surface and underground mines—to electrocutions and drowning. Each fatal accident is a tragedy for family members and local communities, and one miner death is always one too many. The majority of fatalities this year have occurred at metal/nonmetal surface mines (16 as of July 16), compared to four at surface coal mines. Twenty of the fatalities occurred on the surface, with four underground (two each at coal and metal/nonmetal).*

MSHA investigates and analyzes each fatality, identifies and shares trends and leading indicators with the mining community, and targets enforcement, education, outreach, and compliance assistance efforts to protect miners' safety and health. MSHA has determined that many of the fatalities that have occurred this year could have been prevented if operators had adhered to safe procedures, conducted effective examinations, and ensured miners were properly trained.

Assistant Secretary Williamson also sent an open letter to the mining community in April 2023 asking the mining community to join the agency in focusing on identifying and eliminating safety and health hazards that can cost miners their lives. In that letter he announced the inaugural "Stand Down to Save Lives" event which was held on May 17. The day included visits by MSHA leadership, inspectors, and compliance assistance staff to mines across the country to share information on fatality trends and best practices to prevent accidents, injuries, illnesses and fatalities with miners and operators. Those visits reached 1,074 mines, 17,701 miners and 3,155 supervisors.

MSHA issued Stand Down materials available in English and Spanish, and this year has made it a priority to issue timely safety and health alerts in both English and Spanish to the mining community to share best practices to eliminate hazards. Earlier this year, three fatalities resulted from two accidents that involved electrocution when touching powerlines. MSHA quickly issued a

safety alert on this topic—in English and Spanish—and widely circulated them to industry, labor, state grantees, and other members of the mining community to raise awareness and prevent future electrocution accidents. MSHA continues to widely disseminate safety and health hazard alerts with a focus on educating miners and the mining community about potential hazards that put miners at risk and best practices to prevent accidents and keep miners safe and healthy.

Last year, MSHA released the Miner Health and Safety App, the most downloaded app for an initial release in DOL's history. Available on IOS and Android, the app reaches miners and the mining community directly—providing safety and health best practices, a phone number to report hazardous work environments, information on miners' rights, and push notifications to alert miners and other members of the mining community when a fatality occurs. The app became available in Spanish in January 2023.

In addition, MSHA is working to complete a rule that would require mine operators to develop a written safety program for mobile and powered haulage equipment at surface mines and surface areas of underground mines. Under the terms of the proposed rule, operators would have flexibility to develop and implement a safety program that would work best for their mining conditions and operations. MSHA will continue to enhance its enforcement efforts of violations that contribute to fatalities and serious accidents with emphasis on areas such as inexperienced miners, falls from equipment, and machinery and powered-haulage accidents.

Union Transparency and Accountability

Persuader Enforcement

25. The Office of Labor-Management Standards (OLMS) has begun requiring businesses to file persuader reports whenever they send a company officer to a company facility to discuss issues related to collective bargaining. However, the *Labor-Management Reporting and Disclosure Act* has never been interpreted to require persuader reports for company officers at company facilities. This requirement also seems to contradict the OLMS interpretive manual.

    a) Can you explain why OLMS is targeting businesses in this way?
    b) Has OLMS published a written explanation to justify this novel approach?

Response: *Under longstanding policy, OLMS cannot confirm or deny the existence of an investigation. The LMRDA identifies those expenditures that labor organizations, employers, and consultants must report, subject to certain exemptions. With respect to employer reporting obligations, expenditures that must be reported are described in Section 203(a) of the LMRDA. OLMS works to ensure that all expenditures identified by the Act are being fully reported and determines on a case-by-case basis whether particular expenditures fall within the reporting requirements of the Act.*

Health Care

Association Health Plans

26. This Committee has a longstanding interest in allowing associations and businesses to band together to purchase affordable health insurance coverage through association health plans. In 2018, DOL issued a final rule to expand access to Association Health Plans (AHPs). Before a court invalidated the rule, 35 new AHPs were formed. Is DOL planning on rescinding the 2018 Trump administration rule or making changes to the rules that govern AHPs? If so, what changes is DOL planning to make?

***Response**: We share the mutual goal of expanding access to health coverage. DOL has worked closely with HHS and Treasury to promulgate tri-agency regulations and guidance for many years so that both employers and individuals understand the health coverage options available to them. In its Fall 2022 semiannual regulatory agenda, the Department announced a new rulemaking project to explore whether to formally withdraw, or withdraw and replace, the Association Health Plan rule from the Code of Federal Regulations. The next targeted action is a notice of proposed rulemaking soliciting feedback from interested members of the public.*

Short-Term Limited-Duration Insurance

27. A proposed rule to amend regulations governing short-term, limited-duration insurance (STLDI) may be issued soon.

    a) How do you anticipate the changes to STLDI to affect the rate of uninsured individuals?
    b) Is STLDI a useful tool for individuals to use if their coverage is interrupted by Medicaid redeterminations? Why or why not?

***Response**: The proposed rule, which was issued by the Departments of Labor, Health and Human Services, and the Treasury on July 12, 2023, would encourage enrollment in comprehensive coverage and lower the risk that STLDI and fixed indemnity excepted benefits coverage are viewed or marketed as a substitute for comprehensive health coverage. In the long term, we anticipate the rule will lead to increased enrollment in comprehensive health coverage. While STLDI can provide temporary health insurance coverage for individuals who are experiencing brief periods without comprehensive health coverage, consumers who enroll in STLDI as a substitute for comprehensive coverage are at risk of being exposed to significant financial liability in the event of a costly or unexpected health event, often without knowledge of the risks and limitations associated with STLDI coverage. STLDI that is not offered as an employer sponsored plan is not subject to the same consumer protections and requirements as comprehensive coverage, including the prohibition on preexisting condition exclusions or other discrimination based on health status, the prohibition on lifetime and annual dollar limits on essential health benefits, nondiscrimination in health care, prohibitions on rescission of coverage, and the requirement to cover certain preventive services without cost sharing.*

ERISA Preemption

28. DOL submitted an amicus brief with the U.S. Court of Appeals for the 10th Circuit in *Pharmaceutical Care Management Association v. Mulready*. The brief suggests that the *Employee Retirement Income Security Act* (ERISA)—the linchpin of multistate group health plans—does not preempt state regulation of health plan administration. Why did DOL take this position?

Response: *The United States submitted a brief in Pharmaceutical Care Management Association v. Mulready, No. 22-6074 (10th Cir.), in response to the invitation of the 10th Circuit. In our brief, we argued that ERISA does preempt certain provisions of Oklahoma's law regulating pharmacy benefit managers to the extent those laws apply to ERISA plans. As that brief demonstrates, there is no "one size fits all" ERISA preemption analysis. Each case is different, and the analysis is highly dependent on its particular facts and circumstances. With respect to state regulation of health plan administration, the statute itself contains an insurance savings clause, see ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), which recognizes that not all state regulation is preempted by ERISA because it expressly exempts state insurance laws from the scope of ERISA preemption. See ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). The Supreme Court decisions in this area also acknowledge that ERISA's preemptive reach is not unlimited.*

Mental Health Parity

29. I have serious concerns about DOL's handling of mental health parity requirements and the guidance provided to employers. Despite the importance of ensuring equitable access to mental health services, it appears that the current guidance is insufficient, leaving employers confused and ill-equipped to demonstrate their compliance with the law. DOL's compliance standards for non-quantitative treatment limitations (NQTL) have been subjective and inconsistent, and no plans have been able to meet DOL's reporting expectations. Will you commit to DOL promulgating objective standards, an illustrative template, and good faith or safe harbors for NQTL reporting compliance?

Response: *The Biden-Harris Administration has made the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) a top priority. DOL worked with the Departments of the Treasury and Health and Human Services (HHS) to issue proposed rules that provide additional guidance for group health plans (as well as for employers and other sponsors of such plans) and health insurance issuers on MHPAEA's requirements for NQTLs. These proposed rules, published on August 3, 2023, include new rules regarding provisions added to MHPAEA by the Consolidated Appropriations Act, 2021 (CAA), which specify how group health plans and health insurance issuers to whom MHPAEA applies must perform and document comparative analyses of the NQTLs they impose on mental health and substance use disorders (MH/SUD) benefits to demonstrate parity, and provide those analyses to the Secretaries of Labor, HHS, and the Treasury or applicable state authorities upon request. The Departments also issued a request for comment on the application of the proposed data collection and evaluation requirements to NQTLs related to network composition and a related potential time-limited enforcement safe harbor for group health plans and health insurance issuers*

that include specified data in their comparative analyses that demonstrates they meet or exceed all of the thresholds identified in future guidance with respect to NQTLs related to network composition. The Departments recently issued their 2023 MHPAEA Comparative Analysis Report to Congress. Additionally, DOL is considering other resources that would be helpful to assist the regulated community in complying with MHPAEA's requirements. DOL has conducted and will continue to conduct robust outreach initiatives and work extensively to improve the understanding of MHPAEA among plans, plan sponsors, issuers, consumer groups, participants and beneficiaries, health care providers, and state regulators. These initiatives include webcasts, in-person seminars, and nationwide compliance outreach events for the regulated community.

30. In 2022, DOL alleged that 100 percent of plans and issuers were out of compliance with mental health parity reporting requirements upon initial receipt of their submissions.

    a) What percentage of comparative analyses from plans and issuers contained sufficient information this year?
    b) Do you agree that additional guidance from DOL would provide more clarity for employers struggling to understand reporting expectations?
    c) When does DOL expect to release new guidance?

    Response: *Detailed information on whether comparative analyses contained sufficient information is included in each Report to Congress and will continue to be provided in future Reports to Congress. The most recent Report to Congress was issued in July 2023 and includes a discussion of common deficiencies in more recent NQTL comparative analyses submitted by plans. To date, the Departments have published a significant amount of guidance for the regulated community, in the form of FAQs, a MHPAEA Self-Compliance Tool, Enforcement Fact Sheets, and webcasts, in order to educate employers and plan sponsors about the MHPAEA requirements and to provide compliance assistance. Together with the Departments of the Treasury and HHS, we released a proposed rule and expect to issue additional guidance to provide further clarity and compliance assistance to plans and issuers. DOL remains committed to developing and issuing resources to assist employers and plan sponsors as quickly as possible, and the Biden-Harris Administration has made the MHPAEA a top priority.*

Telehealth

31. During the declared COVID-19 public health emergency, employers were allowed to offer stand-alone telehealth benefits to employees ineligible for full benefits, including seasonal and part-time workers. How did this flexibility help workers?

    Response: *The Departments of HHS, Labor, and the Treasury recognize that telehealth and other remote care services can be an important tool in the delivery of healthcare. The COVID-19 pandemic posed critical challenges to the delivery of healthcare services as jurisdictions issued stay-at-home orders and providers limited their operations in order to minimize the risk of exposure to and the community spread of COVID-19. The Departments generally encouraged use of these services during the COVID-19 pandemic to help ensure that employers and other plan sponsors were able to provide a robust variety of treatment, including for mental health and substance use disorder services, and to ensure that employees were able to access the healthcare services they needed. In providing this*

temporary relief during the public health emergency, the Departments recognized the need for additional flexibility to ensure patients who sought treatment for COVID-19 and other health issues could access healthcare, while protecting other individuals from potential exposure and community spread of COVID-19.

Pharmacy Benefit Managers

32. Congress included a broad state law preemption provision in ERISA to ensure that multistate employers can have uniform benefit plan design and administration, free from varying state law requirements. Without this protection from state regulation, many employers would forego offering coverage for cost and administrative reasons. Unfortunately, some states have interpreted the Supreme Court ruling in *Rutledge v. Pharmaceutical Care Management Association* to mean that preemption does not extend to health plan administrators acting on behalf of self-funded plans. What are your views on ERISA preemption, and do you believe that it protects health plan administrators from state regulators when acting on behalf of self-funded health plans?

Response: *The Department's views on preemption are contained in the various briefs we have filed over the years analyzing the specific facts and circumstances of those cases. ERISA does contain a broad preemption prevision, but, as the Supreme Court and many Circuit Courts have instructed, there are limits to the scope of ERISA preemption. There are instances where state regulation of health plan administration is preempted and instances where it is not. Whether a particular state law is preempted inherently depends on the specific parameters of the state law in question.*

Medicare-For-All

33. Protecting employee health and welfare benefits are one of the main responsibilities charged to DOL.

    a) Do you support protecting and strengthening the current employer-sponsored health insurance system?
    b) Do you support efforts to transition the health care system to Medicare-for-all, in which all individuals currently enrolled in employer-sponsored plans would lose their coverage and be forced onto Medicare?
    c) Do you support the creation of a single-payer system, in which all individuals currently enrolled in employer-sponsored plans would lose their coverage and be forced onto a government-run plan?
    d) Do you support the creation of a public option, in which employer-sponsored plans would have to compete with a one-size-fits-all, government-funded plan?

Response: *The Department of Labor's role is to faithfully enforce the laws enacted by Congress and implement the President's agenda consistent with those laws. The Department does not have the authority to transition the healthcare system to Medicare- for-all, create a single-payer system, or a public option.*

Affordable Care Act Marketplace

34. There is currently a firewall that keeps employees from moving to the *Affordable Care Act*'s exchanges if their employer offers affordable health coverage.

    a) Do you support removing this firewall?
    b) How would removing the firewall affect the health and premiums of the small-group fully insured risk pool?

Response: *The "firewall" does not prevent an employee who has an offer of affordable employer-provided coverage from enrolling in marketplace coverage; however, the "firewall" may make the employee ineligible for the premium tax credit. Removal or modification of the "firewall" would require a legislative change. The laws regarding the premium tax credit are within the purview of the Department of the Treasury and the Internal Revenue Service. You may wish to consider contacting them for additional information on this issue.*

Retirement Security

Investment Duties Regulations

35. In November 2022, DOL released a final rule on environmental, social, and governance (ESG) investing for retirement plans.

    a) What can fiduciaries do under the November 2022 ESG rule that they could not do under the November 13, 2020, final rule titled "Financial Factors in Selecting Plan Investments"?
    b) What investments can an ERISA plan fiduciary make under DOL's November 2022 ESG regulation that a fiduciary cannot make under the November 2020 financial-factors rule?

Response: *Last November, the Employee Benefits Security Administration (EBSA) released a Final Rule under the Employee Retirement Income Security Act (ERISA) to empower plan fiduciaries to safeguard the savings of America's workers by making it clear that, when appropriate, fiduciaries may consider environmental, social, and governance (ESG) factors when they make investment decisions and when they exercise shareholder rights, including voting on shareholder resolutions and board nominations. The final rule also made clear, as discussed further below, that fiduciaries can never sacrifice financial returns in order to pursue an ESG goal.*

The Final Rule addresses the Department's concern that two 2020 final rules issued by the prior Administration created uncertainty and had the undesirable effect of discouraging ERISA fiduciaries' consideration of ESG factors in investment decisions, even in cases when it is in the financial interest of plans and their participants and beneficiaries to take such considerations into account. This uncertainty may have deterred fiduciaries from taking steps that other marketplace investors take to maximize their risk-adjusted returns by enhancing investment value and performance or improving investment portfolio resilience against the potential financial risks and

impacts associated with an ESG factor.

EBSA's Final Rule continues the Department's focus on the core statutory principle that the duties of prudence and loyalty require ERISA plan fiduciaries to focus on risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan. See 29 CFR 2550.404a-1(a), (b), (c) and (d). As the Final Rule itself states: "A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan."

Cryptocurrency

36. In March 2022, DOL issued compliance assistance which states that the "Department cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu." Why did DOL issue its position through a "compliance assistance release" instead of through public notice and comment?

Response: *The President's 2022 Executive Order on Ensuring Responsible Development of Digital Assets reinforces the importance of American leadership across the financial and technology sectors. It also highlights the need to establish a framework that protects consumers. That lack of a framework is why DOL's 2022 guidance cautioning plan fiduciaries about investments in cryptocurrencies is important.*

The Department has various ways that it can communicate with plan fiduciaries and other private sector stakeholders, including through compliance assistance releases, which alert plan fiduciaries to enforcement positions the Department is taking on issues of concern, facilitate voluntary compliance efforts by plan fiduciaries, and ensure consistent investigative processes and practices among the Employee Benefits Security Administration's Regional Offices conducting audits. Unlike a new regulation, a compliance assistance release does not create new law, have independent legal effect, or give the Department new enforcement rights. It simply gives the regulated community advance notice of the Department's views on important issues. As such, a compliance assistance release is not a rule or regulation subject to the public notice and comment requirements of the Administrative Procedure Act.

37. DOL's March 2022 "compliance assistance release" on cryptocurrency included language—for the first time since ERISA was enacted—that implied DOL investigations would extend to brokerage windows, perhaps to investments available through brokerage windows and to participant self-directed trades inside a brokerage window. This created tremendous public concern.
    a) Does DOL intend to use enforcement resources to investigate plan sponsors in connection with brokerage window offerings?
    b) If not, does the Department intend to publish a clarification?

Response: *It is important to note that EBSA has not increased its investigative efforts with respect to brokerage windows after issuance of Compliance Assistance Release No. 2022-01. In the context of participant-directed retirement plans, EBSA continues to focus primarily on fiduciaries' oversight and selection of designated investment alternatives, as opposed to the individual actions of plan participants within brokerage windows, which typically constitute a small proportion of plan investments. As described in Field Assistance Bulletin 2012-02 R, however, "fiduciaries of ... brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement."*

Additionally, plan fiduciaries must maintain records regarding investments made through self-directed brokerage accounts or similar arrangements in order to comply with annual financial reporting and related recordkeeping obligations under ERISA. These remain potential issues in any EBSA investigation when the plan has a brokerage window option for participants.

38. With regard to investigations conducted by the Employee Benefits Security Administration (EBSA):

    a) Does DOL estimate an employer's cost to respond to an investigation conducted by the EBSA?
    b) Does DOL appropriately limit the scope and length of time of EBSA investigations to be mindful of the cost to employers?
    c) Why do these investigations drag on for years?
    d) Does DOL consider that the money an employer spends on EBSA investigations that extend for years might be reducing the money available to pay workers?
    e) Does DOL track the amount of waste (specifically wasted employer dollars and wasted taxpayer funds) that EBSA creates as a result of multiple voluminous document requests, requesting documents irrelevant to the purpose of an investigation, duplicative requests, changing investigators assigned to an investigation, and dragging out investigations for years without any timeframe for progress or closure?

Response: *EBSA strives to minimize burdens on employers while protecting the interests of plan participants and beneficiaries. The agency works hard to ensure that its scarce resources are efficiently and effectively deployed to maximize the positive impact on plans and plan participants and beneficiaries. EBSA employs performance measures and indicators that help determine if the enforcement program is effective and efficient. For example, EBSA's goal is to reduce its inventory of older cases by closing or referring for litigation 86 percent of civil non-Major cases within 30 months of case opening, except for a specified category of civil cases. The excepted civil cases should progress more quickly as the issues involved are generally less complex, and EBSA seeks to close or refer for litigation 76 percent of those cases within 18 months of case opening.*

The length of investigations may vary due to a variety of factors, some of which are not in EBSA's

control. These include difficulty in obtaining the documents and other information necessary to complete the investigation, as well as difficulty in obtaining correction of identified violations of ERISA. EBSA conducts investigations to determine if ERISA violations occurred and to obtain redress for violations, such as monetary recoveries for losses suffered by employee benefit plans. When violations are detected, EBSA first seeks to obtain voluntary compliance to correct violations and restore losses to employee benefit plans. If voluntary compliance efforts are unsuccessful or not possible, EBSA may make a referral to the Solicitor of Labor (SOL) recommending litigation.

On Missing Participants and Investigations of Employee Benefit Plan Sponsors

39. In 2021, DOL issued guidance on missing participants. When an employer provides for retirement savings of employees, it is good policy to make sure those savings get to the employee. However, despite the 2021 guidance, DOL is conducting ongoing missing participant investigations. Many of these missing participant investigations last for years.

    a) What is DOL doing to address ongoing investigations that are extending for years?
    b) Has DOL established time frame expectations for investigations of this type and other plan sponsor investigations?
    c) How is DOL monitoring the timeliness of closing investigations?

    Response: *As stated above, EBSA employs performance measures and indicators that help determine if the enforcement program is effective and efficient. For example, EBSA's goal is to reduce its inventory of older cases by closing or referring for litigation 86 percent of civil non-Major cases within 30 months of case opening, except for a specified category of civil cases. The excepted civil cases should progress more quickly as the issues involved are generally less complex, and EBSA seeks to close or refer for litigation 76 percent of those cases within 18 months of case opening. EBSA has performance metrics that measure the efficiency of investigations.*

    For Major Cases, including Terminated Vested Participant Project (TVPP) investigations, EBSA has separate performance metrics that measure the efficiency and effectiveness of the Major Case priority. These metrics for TVPP investigations measure the time spent on the investigations in relation to the dollar amount recovered.

    In fiscal year 2021, EBSA implemented changes to the Major Case program that revised the Major Case milestones to generally provide for a 30-month Major Case lifecycle for non-TVPP investigations and a 24-month lifecycle for TVPP investigations. The national office may review cases that do not fall within these general timeframes.

    The Department is also working to establish the Retirement Savings Lost and Found, in consultation with the Treasury Department, as required by section 303 of the SECURE 2.0 Act. The Lost and Found will be an online searchable database that allows retirement savers who might have lost track of their retirement plan to search for the contact information of their plan administrator to make a claim for benefits. That database can serve as a tool for employees to find their retirement savings themselves.

EBSA Investigation Backlog

40. The Committee is concerned that EBSA is experiencing a significant investigation backlog and is keeping employers up in the air.

    a) How many EBSA investigations—of any type—are open?
    b) Of open investigations, what is the average time since the investigation was opened?
    c) What are EBSA's plans to eliminate the backlog?
    d) How many of these investigations are missing participant investigations?

Response: *As of June 30, 2023, EBSA had 2,364 civil and criminal investigations open. The average time a civil investigation has been open is 24 months. The average time a criminal investigation has been open is 36 months. As of June 30, EBSA had 183 TVPP cases open, with an average age of 30 months. Starting in FY 2021, EBSA made a policy choice to deemphasize TVPP cases and assign resources more broadly to the many other areas within EBSA's enforcement jurisdiction. That choice was informed, in part, by EBSA's publication in January of 2021 of public guidance relating to missing participants to more broadly address the problem that was the focus of the TVPP. As a result, it is anticipated that the number of open TVPP investigations will decrease. When considering the number of investigations and the time it takes to do those investigations, it is important to keep in mind EBSA's small size relative to the universe it regulates. In total, EBSA currently employs about 325 investigators. These investigators are responsible for overseeing a plan universe of more than 3.9 million benefit plans covering 152 million workers, retirees, and their dependents. EBSA does extraordinary work with extraordinarily limited resources, but the resource limitations impose large constraints on EBSA's ability to implement a comprehensive and timely investigative program.*

Pension Risk Transfer Review

41. SECURE 2.0 requires DOL to conduct a review of its Interpretive Bulletin governing pension risk transfers—a tool that plan sponsors use to manage their pension obligations responsibly.

    a) Please provide a detailed explanation of the status of that review.
    b) Does DOL intend to propose changes?
    c) Will you commit to seeking public comment before proposing changes?

Response: *SECURE 2.0 included a significant number of provisions for the Department. Since the law was passed, we have been focused on developing an implementation strategy, informed by our priorities and the timelines associated with different provisions. With respect to the review of the Department's fiduciary guidance on pension risk transfer transactions, in 1995 the Department published an interpretive bulletin (IB) relating to the fiduciary standards under ERISA when selecting an annuity provider for the purpose of benefit distributions from a defined benefit pension plan (IB 95-1, codified at 29 CFR 2509.95-1, published at 60 FR 12329, and amended at 73 FR 58445). Section 321 of the SECURE 2.0 Act of 2022 directed the Secretary of Labor, not later than one year after the date of enactment, to review IB 95-1, determine whether amendments to the IB are warranted, and report to Congress on the findings of such review,*

including an assessment of any risk to participants. Section 321 requires that the Department consult with the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council), established under ERISA section 512, as part of this review.

The Department has been engaged with a broad cross section of stakeholders on this issue as part of our review since March. We intend to continue these meetings. We also have started the consultation process with the ERISA Advisory Council. There was a public meeting with the Council in July. One day of the public meeting (July 18th) was dedicated to DOL consulting with the ERISA Advisory Council on IB 95–1 as required by Section 321 of the SECURE 2.0 Act. See public meeting notice at 88 FR 37101. On July 5, 2023, the Department provided the Council with a consultation paper on its research and stakeholder meetings to help prepare the Council for the meeting on July 18, 2023. The Department also provided the Council with varied background materials and a list of the stakeholders that the Department met with as part of its review. On July 18, the Department provided testimony and consulted with the Council. After the Department's testimony, the Council also heard public comment on IB 95-1 from a wide variety of organizations. The Department asked the Advisory Council to provide thoughts or recommendations by the end of August. The Advisory Council met to further discuss the issue on August 29, and the Department expects to receive input from the Advisory Council following that meeting.

The Department's focus is on completing the review and report to Congress required under the SECURE 2.0 Act. Decisions have not yet been made on whether, and if so, how to amend the IB.

Fiduciary Rulemaking

42. In April 2021, DOL issued a set of frequently asked questions (FAQs) on the fiduciary rule. DOL then lost a lawsuit in February 2023 regarding those FAQs. DOL appealed, but within three months it withdrew its appeal. On May 15, you stated a new fiduciary rule is a top priority.

    a) What impact is DOL's shifting positions having on investors and retirees?
    b) How will you provide the retirement community certainty when it comes to who is an investment advice fiduciary?

43. The Securities and Exchange Commission and the National Association of Insurance Commissioners have issued rules that are certain and stable covering investment advice by broker-dealers and annuity sales by insurance agents. Why does DOL persist in creating a separate regulatory scheme that has been unstable and unpredictable?

44. DOL's 2016 final rule on investment advice fiduciary was effective prior to the issuance of the 2019 Securities and Exchange Commission's (SEC) Regulation Best Interest. How will the potential new fiduciary rule reflect the changes that the financial services industry has made to comply with the SEC's Regulation Best Interest?

45. Why did DOL decide not to appeal its recent loss in *American Securities Association v. DOL*, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023)?

Response to Questions 42 - 45: *When retirement savers receive advice on how best to meet their particular financial needs, they should be able to trust that advice is in their best interest, and not motivated by the adviser's own financial interests. Our concern consistently has been and continues to be with financial arrangements that can present conflicts of interest and the unlevel playing field that exists for different kinds of companies that give investment advice. These companies have different regulatory obligations, even though they are all providing retirement investment advice. This unlevel playing field creates problems for both workers and companies.*

The Department has a rulemaking project on its semi-annual regulatory agenda that is focused on amending the regulatory definition of the term fiduciary set forth at 29 CFR 2510.3-21(c) to more appropriately define when persons who render investment advice for a fee to employee benefit plans and IRAs are fiduciaries within the meaning of section 3(21) of ERISA and section 4975(e)(3) of the Internal Revenue Code. The Department sent a regulatory package, titled "Retirement Security" to OIRA on September 8, 2023, to begin the process of intragovernmental review. We intend that the amendment will take into account practices of investment advisers, and the expectations of plan officials and participants, and IRA owners who receive investment advice, as well as developments in the investment marketplace, including in the ways advisers are compensated that can subject advisers to harmful conflicts of interest. In conjunction with this rulemaking, EBSA also will evaluate available prohibited transaction class exemptions and propose amendments or new exemptions to ensure consistent protection of employee benefit plan and IRA investors. The Department is coordinating with the Treasury Department/IRS and separately working with the SEC to ensure that any new fiduciary rule appropriately reflects the changes that the financial services industry has made to comply with the SEC's Regulation Best Interest.

The Department undertakes rulemaking in a deliberative way. We are looking forward to engaging with the public on this issue and aim to balance the interests of the regulated community and those they serve. It is important that we ensure the security of the retirement, health and other workplace-related benefits of America's workers, retirees, and their families. This continues to be a priority for the Department.

Although we are not appealing the decision in American Securities Association v. United States Department of Labor, we are continuing to evaluate our options to help ensure the security of the retirement benefits of America's workers, retirees and their families.

Climate Change Request for Information

46. In February 2022, DOL issued a Request for Information (RFI) on "Possible Agency Action to Protect Life Savings and Pensions from Threats Related to Climate Risk." What actions are you planning to take because of the RFI?

Response: *The Department published a Request for Information on February 11, 2022 seeking public comment on what actions, if any, the Department should take under federal law to protect retirement savings and pensions from risks associated with changes in climate. The RFI was issued consistent with Executive Order 14030, which directs the Department to identify actions it can take under ERISA, FERSA, and other relevant laws to protect the life savings and pensions*

from climate-related financial risk. The Department received over 130 comments on the RFI and continues to closely review them.

Qualified Professional Asset Managers

47. I have heard many concerns from stakeholders that DOL's amendments to the long-standing exemption for qualified professional asset managers (QPAM) will have negative impacts on workers, retirees, plan sponsors, unions, and financial institutions. Although DOL has proposed a unilateral, sweeping rewrite of a 40-year policy, it has failed to address the potential unintended consequences of the amendments, including the harmful impact on retirement security. Will you commit to meeting with all stakeholders on this topic in the next three months with a view to reframing the QPAM proposal so that workable amendments can be proposed?

Response: *The Department is committed to soliciting public feedback on its proposed rules consistent with the requirements of the Administrative Procedure Act. The Department published a proposed amendment to prohibited transaction class exemption 84-14 on July 27, 2022. The initial comment period on the proposal was set to expire on September 26, 2022. The Department subsequently extended that comment period by 15 days at the request of commenters. The Department also announced that it would hold a virtual public hearing on the proposal on November 17, 2022. The comment period was re-opened in connection with the public hearing and the Department accepted comments until January 6, 2023. Upon hearing that at least one interested party had additional comments, the Department again re-opened the comment period on March 13, 2023 and accepted comments until April 6, 2023. Through this process, the Department received over 200 public comments, and heard a full day's worth of public testimony from a wide swath of stakeholders. The Department is in the process of reviewing those comments.*

48. DOL's recently proposed amendments to the long-standing exemption for QPAM would impose significant new costs on our retirement system and, by extension, American workers and retirees. Has DOL done—or will you commit to doing—a detailed and realistic cost-benefit analysis of these proposed amendments that reflects input from stakeholders?

Response: *The Department is committed to conducting its rulemaking consistent with the requirements of the Administrative Procedure Act and related statutes. The Department is in the process of reviewing the comments it received in response to its July 27, 2022 proposed amendment. If a final amendment is published, it will contain a regulatory impact analysis as required by Executive Orders 12866, 13563, and other laws related to the administrative process.*

49. Under the recent SECURE 2.0 Act, Congress has entrusted DOL with implementation of numerous improvements to the U.S. retirement system. Will you prioritize the work needed to achieve the benefits of this important retirement-savings legislation ahead of making changes to existing rules?

Response: *The Department is committed to protecting the retirement savings of America's workers and their families. It will continue to prioritize that mission, and is mindful of its*

obligations and deadlines under SECURE 2.0.

50. On April 6, I wrote to you in reaction to DOL reopening the comment period regarding a proposed exemption for QPAM because one private-sector party wanted to submit comments after the original comment deadline. Can you assure me that DOL will provide similar deference to congressional requests to reopen comment periods to voice constituents' concerns?

Response: *The Department is committed to soliciting public feedback on its proposed rules consistent with the requirements of the Administrative Procedure Act and related statutes and rules. It will consider all requests for comment period extensions consistent with those requirements.*

Office of Federal Contract Compliance Programs (OFCCP)

51. I am concerned that OFCCP is acquiring the demographic data of employees from employers without taking steps to keep it confidential. OFCCP is either acquiescing to *Freedom of Information Act* (FOIA) requests or failing to defend in court its obligation to keep this data confidential.

    a) What will DOL do to protect EEO-1 data from being made public?
    b) Will DOL appeal any lower court decisions ordering disclosure of EEO-1 data pursuant to a FOIA request? If not, why not?

Response: *The Department released certain Type 2 Consolidated EEO-1 Reports for multi-establishment contractors for the EEO-1 filing years 2016-2020 pursuant to an order from a federal court that was issued as part of a Freedom of Information Act request and subsequent lawsuit. As detailed in the Department's March 8, 2023 letter to the Committee, OFCCP took numerous steps to notify federal contractors of the request and allow them the opportunity to object to the disclosure.*

52. Under the Biden administration, OFCCP is completing a very low number of audits and actions, largely because the agency has been taking an extraordinary amount of time on each audit, and it is subjecting federal contractors to far-flung and burdensome data and document requests. Conducting extended, ineffective audits was one of the central criticisms of the September 2016 GAO report titled "Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance." Why has the Biden administration reintroduced these ineffective practices that overly burden federal contractors?

Response: *OFCCP's practices for conducting compliance reviews remain consistent. As in the last Administration, when OFCCP schedules a federal contractor for a compliance review, it makes a standardized request for information that is authorized by the Office of Management and Budget via Scheduling Letter and Itemized Listing, OMB No. 1250-0003. OFCCP has used this standardized letter, that was authorized in April 2020, for the past 3 years. If the agency has a reasonable basis to request additional records, it follows procedures set forth in the Federal Contract Compliance Manual, which had its last major update in 2019 and is available to the*

public at www.dol.gov/agencies/ofccp/manual/fccm. The manual, at Chapter 1C04, provides that OFCCP will reasonably tailor the request to areas of concern and allow federal contractors a reasonable amount of time to respond.

53. OFCCP in the Biden administration has rescinded or discontinued programs implemented by the Trump administration that were effective, such as early resolution of compensation claims; clear standards and transparency governing audits and alleged violations; and more expedited, consistent audit procedures. What is you justification for rescinding or discontinuing these effective policies and programs that produced much better results than OFCCP in the Biden administration is achieving?

Response: *OFCCP still utilizes early resolution procedures. This policy was introduced and codified in the previous Administration, and it has continued under the current Administration. The expedited conciliation option permits employers to voluntarily bypass the pre-enforcement notice procedures and enter into a conciliation agreement. This option is available, and OFCCP has not proposed to rescind the regulation.*

With respect to other policies, OFCCP issued Directive 2022-02, Effective Compliance Evaluations and Enforcement, which rescinded and replaced prior directives that were either outdated or caused misunderstanding and delay in case resolutions. For example, Directive 2022-02 provides transparency on the agency's approach for selecting federal contractors for compliance evaluations, sets expectations for timely submission of information from federal contractors during evaluations, and articulates the agency's policy on requests for additional information and data from contractors, among other things. Although some directives have been rescinded or revised, OFCCP has several other directives in place that provide transparency about the agency's policies and procedures, such as Directive 2019-02, Early Resolution Procedures, which sets forth expedited procedures the agency can use to resolve issues found during compliance evaluations.

Office of Workers' Compensation Programs (OWCP)

Black Lung Benefits Act

54. OWCP recently published a notice of proposed rulemaking requiring that all self-insured coal mine operators post security equal to 120 percent of their projected black lung liabilities. However, the proposed rule provides no quantitative evidence or analysis in support of this requirement. I am concerned that this one-size-fits-all approach will inflict harm on companies with demonstrated financial capacity to meet their obligations to fund the Black Lung Disability Trust Fund. How did DOL arrive at the 120 percent security requirement and what evidence supports this requirement?

Response: *The Department has preliminarily determined that a 120 percent security level for all companies would better protect the Trust Fund in the event of an operator's default than percentages that vary based on a company's continuously-changing financial status. Requiring a 120 percent liability security deposit transfers the risk of insufficient securities to commercial security bond underwriters and banks that specialize in financial risk*

assessments and are better equipped than OWCP to assess the financial stability of coal mine operators (and who are compensated for assuming that risk via operators' purchase of surety bonds or other forms of security). As noted in the proposed rule, the Department considered alterative options such as a 100 percent security requirement and a 140 percent requirement. The Department accepted comments on the proposal, including the security requirement, from January 19, 2023 to April 19, 2023. The Department received 20 comments on the proposed rule and is currently in the process of reviewing them.

55. OWCP recently published a notice of proposed rulemaking requiring that all self-insured coal mine operators post security equal to 120 percent of their projected black lung liabilities, including all present and future liabilities. However, under the *Black Lung Benefits Act*, a coal mine operator "shall secure the payment of benefits for which he *is* liable." I am concerned that the proposed rule violates these statutory limitations. How is the security requirement in the proposed rule within the scope of DOL's authority granted by Congress?

Response: *The proposed rule is consistent with longstanding OWCP regulations and policy to project operators' liabilities. Because of the uncertainty inherent in estimating future liability, OWCP has proposed requiring 120 percent of projected liabilities to ensure that operators are fulfilling the statutory obligation to secure their full liability. Generally, OWCP will continue to determine an operator's projected liabilities based on the operator's actuarial report and supporting information, including the information submitted with an operator's annual renewal application.*

56. OWCP recently published a notice of proposed rulemaking requiring that all self-insured coal mine operators post security equal to 120 percent of their projected black lung liabilities. The proposed increase in the security amount will place a tremendous financial strain on the working capital of self-insured operators, as sureties will typically require the operator to post collateral equal to 100 percent of the bond penalty. Have you considered the impact these onerous requirements will have on the operations of coal mine operators and their ability to pay critical benefits to their employees?

Response: *The Department is committed to conducting its rulemaking consistent with the requirements of the Administrative Procedure Act and related statutes. The Department is in the process of reviewing the comments it received to the proposed rule. If a final rule is published, it will contain a regulatory impact analysis as required by Executive Orders 12866, 13563, and other laws related to the administrative process.*

War Hazards Compensation Act (WHCA)

57. The backlog of claims under the WHCA has increased five-fold over the past five years, and DOL may be facing yet another significant increase in these claims over the next two years. Insurance carriers who support the WHCA program are waiting to be reimbursed hundreds of millions of dollars in claims—some of which date back to 2017. I am concerned that if DOL continues to process claims at the present rate, the backlog will become completely unsustainable and could make it untenable for carriers to continue providing WHCA claims coverage. This would be detrimental to the contractors who are injured supporting U.S. military operations overseas.

a) Is DOL projecting a further significant increase in claims under the WHCA?
b) If so, what steps is DOL taking to prepare for this increase?
c) Is there an amount of unreimbursed claims that DOL is targeting as an acceptable level for carriers to hold while DOL continues to process claims?
d) Does DOL plan to make any improvements to make claims processing more efficient and speed up the payment of claims?

Response: *The Department is appreciative of the increase in appropriations for the Office of Workers' Compensation Programs (OWCP). OWCP plans to continue processing War Hazard Act Claims under a special claims handling unit. For FY 2024, OWCP has requested an increase from $250 million to $700 million in the Special Benefits appropriation, from which WHCA and other claims are paid. This increase is reflected in the President's FY 2024 budget. The FY 2024 President's Budget also includes an increase of $23,273,000 and 149 full-time equivalents (FTE) for the Division of Federal Employees', Longshore and Harbor Workers' Compensation (DFELHWC) staffing in General Salaries & Expenses funding. The increased funding is consistent with the continued trend of escalating requests for reimbursement.*

58. Insurance carriers who pay beneficiaries under the WHCA must burn claim information onto a CD-ROM and then FedEx that CD-ROM to an intake center in Florida. In addition to being an antiquated way to transmit data, any requirement to burn data onto a CD-ROM may also slow down a claim's processing time. Other claims handled by OWCP are processed through an online portal. Has DOL considered eliminating the CD-ROM requirement altogether and requiring that all WHCA claims be processed through the online portal?

Response: *The Department is and will continue to consider improvements in the WHCA program consistent with its authorities and available resources.*

Federal Employees Compensation Act (FECA)

59. During the hearing, Rep. Eric Burlison (R-MO) asked you whether DOL has any plans to nationalize state workers' compensation programs. DOL has previously argued that it was granted this authority under the 1974 amendments to FECA. However, a report that Congress requested 49 years ago does not give DOL the authority to monitor state workers' compensation programs. DOL does not have this authority. States workers' compensation programs were established up to 100 years ago under state constitutions and legislation independent from federal programs. Workers' compensation has been effectively and efficiently state-regulated for decades.

a. Does DOL have the authority to monitor state workers' compensation programs? Why or why not?
b. Does DOL have plans to undertake such oversight?

Response: *The Department has no plans to nationalize state workers' compensation programs.*

Workforce Development

Job Corps

60. A 2021 Inspector General audit raised significant concerns with the Job Corps program during the pandemic, finding that enrollment dropped 56 percent from March 2020 to April 2021 and zero students completed technical skills education. During this period, the estimated cost per participant rose to $96,000.

    a) What is the current enrollment in the Job Corps program, and what is preventing enrollment from returning to pre-pandemic levels?
    b) What is the current cost per participant for the Job Corps program?
    c) What percent of the current enrollment is through Job Corps' new 60-day virtual enrollment option?
    d) What percentage of students who enroll in this virtual option go on to enroll in a residential Job Corps center?
    e) How does DOL verify participant job placements and earnings data reported by Job Corps contractors?

Response:

a. *In Program Year (PY) 2022, Job Corps enrolled approximately 27,500 students. As enrollments have begun to increase in PY 2023, some of the challenges preventing the program's return to pre-pandemic levels include retention of students due to competitive labor markets for youth employment, personal challenges youth are encountering, and centers' ability to hire and retain quality staff to recruit and engage students actively.*

b. *Cost per participant is influenced by the overall number of students in the program as well as overhead costs to pay for facilities. Based on PY 2021 data, the cost per participant for the Job Corps program is $74,477. The cost per participant will decrease as the program increases its enrollment.*

c. *In PY 2022 year-to-date (July 1, 2022, through May 31, 2023), 5.7 percent of enrollment was through Job Corps' 60-day virtual enrollment option. On August 16th, Job Corps ended virtual enrollment and is now focused on traditional enrollment only. Traditional enrollment, which was paused as a result of the Covid-19 pandemic and resumed in October 2021, allows students to begin their Career Preparation Period and get acclimated to a Job Corps campus living before* entering into the Career Development Period/ career development training.

d. *In PY 2022 year-to-date (July 1, 2022, through May 31, 2023), 76.4 percent of students who enrolled in this virtual option continued the program in a residential Job Corps center.*

e. *All job placement data from Job Corps contractors, including information about earnings, must adhere to the verification requirements stated in Job Corps' Policy and Requirements Handbook (PRH), Chapter 4, Exhibit 4-2, which requires that contractors verify each placement using specific methods. Specifically, Exhibit 4-2 states:*

- *Job Corps contractors can use pay stubs, verification directly from the employer, or a third-party verification form to verify employment.*
- *Verification must include employer's name; date the student actually reported for employment; number of hours per weeks the student actually worked; name, title, and phone number of person at the place of employment who verified the information; and the date of verification.*

Job Corps verifies the initial job placement and earnings data reported by auditing. Job Corps contracts with a third-party auditor to review the documentation of all Job Corps contractors in charge of placement services every two years. The auditing process includes a review of sample student record placement documentation, particularly those targeted based on selection criteria that may indicate unusual circumstances. The third-party auditor develops audit reports and sends them to Job Corps Regional Offices for follow-up.

Job Corps also verifies the initial placement and earnings data reported by the post-separation employment surveys, the Quarter 2 after exit quarter (Q2) and Quarter 4 after exit quarter (Q4) surveys. All students with an initial placement are asked, during the Q2 or Q4 survey, to verify their placement information that Job Corps contractors have reported. Placements not verified by the student are reported to the Job Corps Regional Offices as questionable placements. Additionally, all placements identified as questionable are flagged for review by Job Corps' third-party auditors.

Apprenticeship Grants

61. DOL continues to push for and fund apprenticeship "intermediaries" as a solution to expand Registered Apprenticeship programs. While it is often difficult for businesses to cut through the bureaucratic red tape in the Registered Apprenticeship system, it seems that intermediaries are duplicating functions of the WIOA system. Why isn't DOL instead helping state workforce agencies and local workforce boards serve this role within the existing structure of the public workforce system?

Response: *The Department strongly supports an expanded and thriving Registered Apprenticeship system – across all industries – to build a next generation, competitive workforce. To do so, the Department supports increased workforce and education system alignment with the National Apprenticeship System through funding opportunities and technical assistance and believes that the state workforce agencies and local workforce boards are key partners in this alignment. Additionally, the Department believes intermediaries can play a critical role in expanding the benefits of registered apprenticeship across a wide array of industries and occupations.*

It is critical the Department continues to invest in intermediaries and other industry experts to ensure high quality program design, shorten the learning curve of the registered apprenticeship model, and generate growth across a range of industry sectors, including manufacturing, finance, information technology, healthcare and more. Intermediaries have been key partners as part of the Department's strategic initiatives to rapidly scale apprenticeship programs in diverse areas from trucking to cybersecurity to K-12 teachers. Additionally, the Department supports the system alignment through State Apprenticeship Expansion funding, where efforts to increase alignment

across the national apprenticeship, education, and workforce systems is a required activity and has also funded a Registered Apprenticeship Technical Assistance (TA) Center for system alignment to provide in a national scope in support of improving alignment. All these investments work collectively to ensure alignment with and leveraging of WIOA.

The Department believes that working with partners, including the workforce system, is vital to the success of Registered Apprenticeships. These partners increase awareness through industry outreach, connect employers and labor organizations with workforce and education partners, and provide technical assistance, as well as seed funding, to launch and expand Registered Apprenticeship programs.

62. The amount the DOL has spent on grants to expand apprenticeships has nearly doubled over the last five years, yet the number of new Registered Apprentices in FY 2021 is similar to the number from FY 2018. How are you determining if DOL's apprenticeship grants have been successful? Are you tracking the participant employment and earnings outcomes for each grantee, and if so, will this performance information be made publicly available?

Response: *The Department's investments in Registered Apprenticeship have supported the growth of the National Apprenticeship System (NAS) by providing funding that advances the NAS as a workforce development strategy and post-secondary education career pathway, increases system capacity to engage industry and meet the demand for new programs in both traditional and non-traditional industries, and allows states and territories to build capacity to significantly increase pre-apprenticeship and Registered Apprenticeship opportunities for all American workers, particularly underrepresented and underserved communities. All Registered Apprenticeship grantees report quarterly data to the Department for use in tracking grantee and program progress toward meeting target outcomes goals, to identify areas where technical assistance is needed, and to identify promising practices. Data reported for apprentices includes demographic information, enrollment, completion, employment, and credential attainment, as well as data necessary for the Department to track longer-term employment and wages information on behalf of the grantees. In addition, these investments also support the development of Registered Apprenticeship programs and other efforts that support the system's ability to increase capacity to expand, modernize, and diversify Registered Apprenticeship. Further, the data reported by grantees is used to support DOL-funded evaluations of these grants to identify evidence-based strategies for expanding, modernizing, and diversifying Registered Apprenticeship to inform both NAS overall and future funding opportunities. The Department is tracking the participant employment and earnings outcomes for each grantee, among other performance data, and will make them public as they become available.*

These strategic investments across a range of industry sectors help employers address critical talent needs in manufacturing, finance, information technology, healthcare, and more.

Additionally, the Department publishes a range of data and statistics on registered apprenticeship programs in the National Apprenticeship System through the Apprenticeship.gov website (https://www.apprenticeship.gov/data-and-statistics) and is continuing to identify more ways to share this important information to the public.

WIOA Accountability for State Performance

63. The accountability provisions under the *Workforce Innovation and Opportunity Act* have not been implemented as Congress intended. Under the Department's regulations, a state can miss its agreed-upon performance target on a primary indicator of performance by 50 percent and still be considered a success. Furthermore, the Department has yet to fully implement the performance accountability system under the law, relying on WIOA's transition authority as a justification almost a decade after the law was enacted.

    a) Will the Department implement sanctions for performance failures on the *Overall State Program Score* and the *Overall State Indicator Score* for the current program year? If not, why not?
    b) Is the Department aware of any state that has imposed sanctions on a local area for failure to meet local accountability measures, as required under WIOA sec. 116(g)?

Response: *Section 116 of the Workforce Innovation and Opportunity Act (WIOA) establishes primary performance indicators that apply to the six core programs and reporting requirements that assess states' effectiveness in achieving positive outcomes for individuals and employers served by WIOA's six core programs. WIOA also requires that the Department of Labor and the Department of Education (Departments) use a statistical adjustment model to assess state performance by adjusting negotiated performance levels for the characteristics of participants served throughout the program year and for the actual economic conditions within the state. WIOA requires the Departments to build such a model, necessarily based on data collected for the statutory measures, and use the model to assess state performance and determine whether a state has failed to meet its adjusted levels of performance. The Departments developed a model and process for this purpose. To date, the implementation of a model and the performance accountability provisions have informed the Departments' performance negotiations and technical assistance efforts with states and have advanced the workforce system toward a more objective and data-driven accountability structure.*

The Departments have collected and transparently published performance data for several years and promoted robust practices related to data collection, data integrity, and complete reporting. As additional data are collected, the Departments continue to review and refine the statistical adjustment model. Furthermore, the Departments look forward to an opportunity to work with Congress to improve this process through WIOA reauthorization.
The Departments similarly examined outputs for the statistical adjustment model in PY 2021, and for that year determined that the model was only sufficiently providing reliable estimates for the Employment Rate in the 2nd Quarter after Exit and the Employment Rate in the 4th Quarter after Exit for the WIOA Adult, WIOA Dislocated Worker, WIOA Youth, and Wagner-Peyser Act Employment Service. The Departments assessed these indicators in PY 2021 and there were no performance failures. It should be noted that since there were no WIOA performance failures in PY 2021, there cannot be sanctions for performance in PY 2022 as WIOA requires two consecutive years of failure in the same indicator score, overall program score, or overall indicator score.

Regarding local area sanctions, the Department is not aware of any state that has imposed a financial sanction to a local area due to repeated performance failure.

Industry-Recognized Apprenticeship Program

64. Just months after the Trump administration created the Industry Recognized Apprenticeship Program (IRAP), 132 apprenticeship programs for nursing credentials were created. The Biden administration swiftly moved to end IRAPs, despite its success in expanding the apprenticeship model in the healthcare industry. What performance data on IRAPs did the Department rely upon when it ended the IRAP program?

Response: *The rescission of the 2020 IRAP rule enabled the Department to refocus its efforts and resources on expanding, modernizing, strengthening, and diversifying the current Registered Apprenticeship system. The Department determined it would yield better results by investing in and modernizing the Registered Apprenticeship (RA) system than could be achieved through a duplicative new program in IRAPs. As part of its final rule, the Department will work with previously recognized Standards Recognition Entities and IRAPs, some of whom were already simultaneously engaged in the RA system. Specifically, the Department will help SREs explore opportunities to become program sponsors or intermediaries in the RA system, and will provide IRAP apprentices with resources to connect them with Registered Apprenticeship as well as other training opportunities. The Department is committed to working with Congress on the effort to continue to grow and modernize the Registered Apprenticeship system.*

WIOA Provider Performance Data

65. A recent report from Harvard's Project on Workforce identified over 75,000 eligible programs in more than 700 occupational fields nationwide in the WIOA system yet found that DOL's "TrainingProviderResults.gov" website lacked critical performance information for over 75 percent of programs.

    a) If a jobseeker does not have access to this information, what other venues does the Department have for a jobseeker to access this data?
    b) Why doesn't the Department have performance data for the vast majority of eligible providers, and what have you done to address this issue?

Response: *WIOA requires that the Governor or state agency disseminate the eligible training provider (ETP) list through a variety of methods and to several stakeholders. Each state must post its ETP list online for consumers, and the Department provides links to those web pages via Career One Stop. At a minimum, the ETP list must be accompanied by appropriate information to assist participants in choosing employment and training activities including:*

- *Recognized post-secondary credential(s) offered;*
- *Provider information supplied to meet the eligibility procedure;*
- *Performance and cost information; and*
- *Any additional information as the state determines appropriate, such as the number of units (for example, credits, hours or semesters) needed to earn the credentials offered.*

Stakeholders include local boards in the state, members of the public, the one-stop delivery system and its program partners, and the state's secondary and postsecondary education systems

via online methods such as websites, searchable databases, or other means the state uses to disseminate information to consumers. The Department of Labor does not maintain provider-level records.

The Department is aware of the data challenges on www.TrainingProviderResults.gov. Much of the information that the Project on Workforce's report identified is not displayed on the website because of data suppression for the protection of Personally Identifiable Information (PII). At the time that the Project on Workforce was conducting their analysis, the data available on the website reflected three years of data (July 1, 2018, through June 30, 2021). During this time period more than 30 states received a waiver of the requirement to collect and report data on "all students" (not exclusively students supported by WIOA funds) in a program of study. This, combined with the oftentimes small size of the programs, means that a substantial amount of data the Department receives from states cannot be displayed and therefore resulted in the suppression issue identified from the Project on Workforce.

The data available on the website now reflect training programs approved to be on states' ETPL as of June 30, 2022, and now covers the four-year period from July 1, 2018, through June 30, 2022. PY 2021 (July 1, 2021-June 30, 2022) represents the first report for which all states were required to collect and report "all student" data. Remaining "all students" waivers expired on July 1, 2021, and ETA discontinued approval of any subsequent requests. This additional year of data, the elimination of the "All Students" waiver, and the Department's various accountability and technical assistance efforts have resulted in a significant reduction in the percentage of programs with suppressed data on the website (nearly 20 percent of previously suppressed data is now available). The Department has also developed new tools, validation/logic rules, and provided significant technical assistance designed to help grantees to better understand and meet the Department's expectations with respect to ETP data quality and completeness. The Department will continue identifying grantee's technical assistance needs and expanding on the technical assistance tools and events to further improve the quality and completeness of the ETP data.

Overall data quality and completeness has improved each year since eligible training program data was first collected and the Employment and Training Administration will continue to provide support and oversight to states in order to fulfill its mission to provide quality data for users to make informed decisions. ETA has provided technical assistance to states on eligible training provider data gathering and reporting, to include a data vetting tool that will allow states to flag data errors and abnormalities before results are officially reported to the Department.

Furthermore, the Department is planning future enhancements to the ETP information collection request and trainingproviderresults.gov website to display the aggregate of provider-level results, as opposed to only programs within a provider, so that data are still available at a provider level even if they must be suppressed at a program level.

Duplicative Workforce Programs

66. With the *Workforce Innovation and Opportunity Act*, it was a bipartisan priority to reduce the number of duplicative or overlapping workforce programs so resources could be focused on

the core programs for adults, dislocated workers, and youth. Yet DOL continues to spin up new grant programs, often relying on the "evaluations and research" section in WIOA as the authority authorizing the creation of these programs.

a) Is the Department conducting a rigorous evaluation of each of the new grant programs it has created through section 169 authority?
b) Please share the evaluations for each grant program created through the section 169 authority with the Committee.

Response: *The Department administers grant programs that are authorized by WIOA section 169, and each year Congress directs the Department in its annual appropriations acts to use appropriated funds for certain initiatives.*

WIOA Section 169, which authorizes evaluation and research, provides the authorization for several programs for which Congress has appropriated funds. For instance, WIOA Section 169 authorizes the Reentry Employment Opportunities grant programs, for which Congress most recently appropriated $115 million. The appropriation requires the Department to dedicate a portion of these funds to grants serving young adults; the Department recently awarded Growth Opportunities grants that provides paid work experiences for young people affected by community violence, particularly in areas of concentrated crime and poverty. The funding also supports skills training, and employment and mentorship services. The remaining funds appropriated for reentry programs support the Pathway Home grants, which the Department initiated in 2020, and which provide employment and training services that begin prior to release from prison or jail and continue after individuals reenter their communities. The Pathway Home grants build on research findings from the Linking Employment Activities PreRelease (LEAP) implementation study in 2018. The two-year LEAP pilots, which ended in 2018, demonstrated potential for breaking the cycle of recidivism by linking participants to an employment case manager while still in jail—and then continuing the case management connection post-release. These grants are job-driven and build connections to local employers that enable transitioning participants to secure employment.

These following initiatives occurred because recent appropriations acts have directed the Department to administer them. The Workforce Opportunity for Rural Communities grants began with the FY 2018 Appropriations Act; Strengthening Community Colleges grants began in the FY 2019 Appropriations Act; and Workforce Pathways for Youth grants began in the FY 2020 Appropriations Act, referred to in the appropriation as career pathways grants for out-of-school-time organizations. Most recently, the FY 2022 Appropriations Act provided $137,638,000 in congressionally directed funds for 173 organizations to carry out demonstration and pilot projects under WIOA Section 169(c); in FY 2023 Congress appropriated $217,324,000 for 249 such projects.

Across multiple Administrations, the Department has continually increased the quantity and rigor of evaluations to build evidence. Since 2017, the Department has been engaged in a comprehensive evaluation of Reentry Employment Opportunities grant programs. An implementation study is now available on the Department's website (https://www.dol.gov/agencies/oasp/evaluation/completedstudies/Reentry-Projects-Grant-Evaluation) and an impact study is ongoing, with results expected when the study concludes in

2024. The Pathway Home grant program is also the focus of a multi-year evaluation that includes an early implementation study, an implementation study, and an impact study to determine the effectiveness of services provided to the reentry population. Congressional appropriations also required Strengthening Community Colleges grantees to individually procure third-party evaluators. To ensure that such disparate evaluations could still yield evidence, the Department established evaluation support to advise grantees on designing their evaluations and collecting robust data and is further beginning work on a national impact evaluation in FY 2023 to gather rigorous data at a cross-grantee level.

Another program authorized by WIOA Section 169 is the Workforce Data Quality Initiative, for which Congress has appropriated funding since FY 2010. This initiative is a collaboration between the Departments of Labor and Education to support states' development of, or enhancements to, longitudinal administrative databases that integrate workforce data and education data. These investments improve performance of workforce programs and provide user-friendly information to help customers select the training and education programs that best suit their needs.

Miscellaneous

Regulatory Analysis

67. Small businesses are the economic engine of the United States and generate most new jobs. It is important for all federal agencies, including DOL, to consider the needs of small businesses when developing regulations. However, the Small Business Administration's Office of Advocacy has submitted five comment letters in response to DOL regulations that failed to analyze the impact of the agencies' rules on small businesses. Can you explain why DOL consistently fails to conduct adequate regulatory flexibility analysis?

Response: *The Department recognizes the important role small businesses play in our economy and is committed to engaging with them across our programs, including regulatory development, compliance assistance, and other outreach. The Department appreciates the importance of the RFA, SBREFA, and Executive Order 13272 in assessing the potential impact of covered rules on small entities—and especially rules that are likely to have a significant economic impact on a substantial number of small businesses, small governmental jurisdictions, and small organizations—and in considering regulatory alternatives that could minimize such impact.*

The Department has taken steps to ensure that appropriate regulatory staff are trained on the relevant requirements. Agencies across the Department regularly partner with the Small Business Administration Office of Advocacy (SBA Advocacy) for comprehensive training on producing Regulatory Flexibility Analyses when required. Between trainings, the Department's Office of the Assistant Secretary for Policy (OASP) regularly provides technical assistance to DOL agencies that are conducting relevant analysis and identifying regulatory alternatives. A variety of the Department's agencies also attend SBA Advocacy roundtables – both regularly and upon request – to ensure that small businesses have appropriate input into our regulatory proposals. In addition, Department officials are also in consistent contact with Small Business Administration (SBA) officials concerning small business impacts.

68. At a public meeting in December 2022 regarding cybersecurity issues, a Deputy Assistant Secretary of EBSA said that due to limited resources, not every area for guidance can go through notice-and-comment rulemaking. I am very troubled by this. The law requires public notice and comment for new rules. This is not optional. How do you explain this statement and how it was made on your watch?

Response: *The Department is committed to conducting its rulemaking consistent with the requirements of the Administrative Procedure Act and related statutes. The Department has various ways that it can communicate with plan fiduciaries and other private sector stakeholders that are not regulations or rules subject to the public notice and comment requirements of the Administrative Procedure Act. We use those avenues when appropriate to, for example, alert plan fiduciaries to enforcement positions the Department is taking on issues of concern, facilitate voluntary compliance efforts by plan fiduciaries, educate the public about rights and obligations under ERISA, and facilitate consistent investigative processes and practices among the Employee Benefits Security Administration's Regional Offices conducting audits. Unlike a new regulation, such sub-regulatory guidance does not create new law, have independent legal effect, or give the Department new enforcement rights.*

Cybersecurity

69. I am concerned about DOL's apparent inability to protect personal information from falling into the hands of people who should not have it. On March 31, DOL's Inspector General published his concerns about DOL's "ability to safeguard its data and information systems."

    a) What agencies at DOL have failed to protect personal information, and what kinds of personal information have been lost?

    b) What caused these failures, and what are you doing to keep this personal information secure?

Response: *The Department is committed to protecting the personal information in its possession and safeguarding its data and information systems. The report mentioned above specifically concerned equity and security related to the use of identity verification service contractors used by State Workforce Agencies in the administration of their unemployment insurance program as a way to combat fraudulent claims. The OIG report was not about any inability to safeguard data held by the Department. As the Department stated in its response to the report, the Employment and Training Administration (ETA) concurs with the IG's recommendation that it provide guidance to State Workforce Agencies to help ensure that contracts with identity verification service providers include requirements on the secure storage of data. ETA has provided guidance to states regarding contractors and safeguarding information against unauthorized access or redisclosure and protecting personally identifiable information. ETA also plans to issue additional guidance to states that includes recommended contract provisions states should consider concerning service providers delivering ID proofing solutions and services.*

70. DOL has engaged in litigation with a plan service provider regarding a subpoena DOL issued

for unredacted participant records containing personally identifiable information in connection with a cybersecurity investigation.

a) Why does DOL need this information to conduct this or similar investigations?
b) What resources has DOL expended in pursing and protecting this information?
c) What is the cost of keeping the information secure, including new contracts or equipment purchased that will be used to keep information secure?

Response: *The Department may require participant records and other personally identifiable information as part of investigations and enforcement actions taken pursuant to its statutory authorities. The Department keeps such information secure consistent with relevant statutes, regulations, and policies.*

Actions as Deputy Secretary

71. The position of Deputy Secretary of Labor is not specifically defined. Its role and duties are up to the Secretary to decide. What role did you play as Deputy Secretary in the following matters?

a) WHD's effort to rescind the Trump administration's rule on independent contractors;
b) WHD's rescission of the Trump administration's rule on joint employment under the FLSA;
c) WHD's rulemaking to revise the definition of an independent contractor under the FLSA;
d) WHD's expected rulemaking to revise the regulation on when an employee is exempt from being paid overtime under the FLSA; and,
e) OSHA's effort to finalize the COVID-19 Emergency Temporary Standard for health care facilities.

Response: *Secretary Walsh and I established an agenda for DOL's component agencies to propose rules that implement the Department's mission and the President's agenda. We work closely with our agency heads, OASP, and SOL to ensure that they are taking into account the breadth of comments that we receive from stakeholders and ensuring that any final rule considers those comments while advancing our mission.*

Rep. Tim Walberg (R-MI)

1. Saving for retirement is important and it's equally important to ensure those savings provide an income that lasts throughout retirement. As traditional pension plans that provide retirees with a guaranteed income have largely disappeared, the 401(k) model has become the dominant retirement vehicle. While 401(k)s help workers accumulate assets, they generally fall short when it comes to helping workers convert their savings into a guaranteed income stream in retirement.

a) Do you feel it's important for the DOL to focus on policies that will improve access to retirement income for Americans?
b) What are some things the DOL could do to help move the needle on this important

issue?

Response: *Retirement security is vitally important and protecting the assets of Americans is a priority for the Department. The Department enforces ERISA, which sets minimum standards for retirement plans in private industry so that workers know that the funds they place in retirement plans during their working lives will be there when they retire. ERISA does not require employers to establish a retirement plan or direct that employers use a particular form of retirement plan, such as a 401(k), provided the plan meets minimum standards. We would be happy to discuss ways to further protect retirement savings of American workers.*

2. Many farmers across Michigan's 5th District use the H-2A visa program to fulfil their workforce needs. However, due to the increased Adverse Effect Wage Rate last year, many farmers are facing increased labor costs, or even being forced out of the industry. My state of Michigan has one of the highest AEWR hourly rates of $17.34, which was an increase of 12.8%. A farmer in my district estimates that this hourly rate increase is costing his business over $400,000 dollars this year. If Michigan farmers are to remain competitive with foreign competitors, there must be a predictable and stable wage rate. What actions is the Department of Labor taking to ensure these hourly wage rates are not driving family farmers out of business?

   Response: *The Department works with H-2A employers to meet the need for agricultural workers while ensuring that the hiring of H-2A foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed, which is a key statutory mandate in the Immigration and Nationality Act. To protect the wages of workers in the United States similarly employed, the Department's regulations at 20 CFR 655 subpart B require employers who seek workers through the H-2A visa program to offer, advertise in their recruitment, and pay a wage that is the highest of the Adverse Effect Wage Rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage.*

   Requiring H-2A employers to pay at least the AEWR to H-2A workers and other workers in corresponding employment when it is the highest applicable wage is one of the primary ways the Department meets its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of workers in the United States similarly employed.

3. Congress has now twice directed the DOL to provide regulatory clarity on the proper process for an ESOP Trustee to use for valuing a company – first with the passage of ERISA in 1974 and again last year with the passage of the SECURE 2.0 Act. Yet the DOL has never followed through with this regulation. Only recently has the DOL indicated it would conduct a notice and comment rulemaking, but it has yet to comment on the timing. What's the timeline for issuing this rule, and can you commit to prioritizing a long overdue notice and comment rulemaking on this matter?

   Response: *Please see response to Question 4, below.*

4. I understand from my constituents and from the DOL website that EBSA has been

undertaking a "National Enforcement Project" against ESOPs since 2005. Yet the DOL has never completed the notice and comment rulemaking it was required to undertake by ERISA decades ago that would provide clarity on the topic for which they are nearly universally being investigated – the valuation of the company. How does the Department justify enforcement on rules it has never issued?

Response: *On December 29, 2022, the SECURE 2.0 Act of 2022 (SECURE 2.0 Act or Act) was signed into law. The Act gives the Department multiple regulatory and guidance responsibilities, some of which have statutory deadlines. Section 346 of the SECURE 2.0 Act directs the Department to establish an Employee Ownership Initiative to support and facilitate new and existing state programs designed to promote employee ownership. Under that initiative, the Department – in consultation with the Secretary of the Treasury – is also responsible for issuing "formal guidance, for . . . acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan....."*

In the context of closely held companies, ESOPs can provide a tax-advantaged way for existing owners to sell their stock, without going public or trying to sell the stock in the larger market. Without a ready market price for the stock, however, there is a danger that the ESOPS, which are retirement plans governed by ERISA, will overpay for the stock in ways that undermine ERISA's retirement-protective goals, and may even jeopardize the long-run viability of the company. This is especially true when the sellers exercise undue influence over the stock transaction because their interest in obtaining the highest possible sales price and the best possible terms for the seller are diametrically opposed to the plan's interest as the buyer. For that reason, it is critically important that the plan's interests are represented by an independent fiduciary that is looking out for the plan's interests and ensuring that it pay no more than fair market value as determined by a prudent process and reliable valuation.

ERISA section 408(e) addresses conflicts of interest with a conditional exemption for the ESOP's purchase of qualifying employer securities from a party in interest, provided, among other conditions, that the transaction is for "adequate consideration." If there is no generally recognized market for the securities, ERISA section 3(18)(B) provides that adequate consideration means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary."

A well-established body of caselaw is available to guide fiduciaries in relying on expert valuations as part of a prudent process for arriving at fair market value of privately held stock to be purchased by an ESOP. Courts have found that the fiduciaries relying on expert valuations must (1) prudently investigate the appraiser's qualifications in selecting the appraiser; (2) ensure that the appraisal is based upon complete, current, and accurate information; and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances (i.e., ensure that reliance is prudent). As an important part of this process of critically evaluating the appraisal and ensuring that reliance is justified, prudent fiduciaries ensure that they have read and understood the information underpinning the appraisal; fully understand the appraisal; identify, question, and test the appraisal's underlying assumptions; verify that the conclusions are consistent with the relevant data and analysis; and verify that the appraisal is internally consistent

and well-reasoned.

Since 2005, EBSA has had a national enforcement project that focuses on ESOP compliance with ERISA. As part of the project, EBSA examines ESOP purchases of employer stock for conflicts of interest and to evaluate whether the purchases were conducted at fair market value. Overpayment for employer stock is not an insignificant or infrequent problem, and it can jeopardize the retirement security of ESOP participants and beneficiaries. Since FY 2015, EBSA's ESOP investigations have recovered losses of more than $380 million. In addition to the well-developed body of caselaw on ESOP appraisals, EBSA has frequently shared its views in public forums and has published detailed settlement agreements with ESOP trustees on the appraisal process and associated issues (ESOP Appraisal Process Agreements) on its website. The ESOP Appraisal Process Agreements address a broad range of issues related to fiduciary engagements, appraisal guidelines, and process requirements.

Nevertheless, the Department views its formal guidance obligation in SECURE 2.0 Act as a way to improve ESOP compliance efforts, strengthen EBSA's enforcement program, and enhance the retirement security of ESOP participants and beneficiaries. Accordingly, the Department added a regulatory project to its most recently published Spring 2023 semi-annual regulatory agenda entitled Worker Ownership, Readiness, and Knowledge. To be clear, the Department has decided to move forward with notice and comment rulemaking on the "adequate consideration" requirement in connection with ESOP acquisitions of qualifying employer securities and looks forward to hearing from a wide range of stakeholders on the relevant issues. The Department will consult with the Department of the Treasury in accordance with the SECURE 2.0 Act. The Department expects to move forward and engage with interested stakeholders as the first step of the rulemaking process. The specific timing of next steps in the process will depend on the breadth and depth of public input from those public engagement sessions with interested stakeholders as well as the Department's overall evaluation of regulatory priorities and available regulatory resources.

Rep. Rick Allen (R-GA)

1. We all know that keeping retirement plan costs low is an important part of ensuring that as many Americans as possible can achieve a secure retirement. However, instead of bolstering retirement accounts for Americans, your recent proposed amendments to the long-standing exemption for Qualified Professional Asset Managers (QPAM) would impose significant new costs on our retirement system and, by extension, American workers and retirees. In fact, I have heard many concerns from stakeholders that the Department's amendments to this 40-year policy will have negative impacts on workers, retirees, plan sponsors, unions, and financial institutions. Has the Department done—or will you commit to doing—a detailed and realistic cost-benefit analysis of these proposed amendments that reflects input from stakeholders?

Response: *The Department is committed to conducting its rulemaking consistent with the requirements of the Administrative Procedure Act and related statutes. The Department is in the process of reviewing the comments it received in response to its July 27, 2022 proposed amendment. If a final amendment is published it will contain a regulatory impact*

analysis as required by Executive Orders 12866, 13563, and other laws related to the administrative process.

Rep. Ron Estes (R-KS)

1. Ms. Su, the recently enacted SECURE 2.0 Act requires that the Department issue formal written guidance on the definition and regulation of what constitutes adequate consideration and the establishment of a good faith fair market value for shares of a business to be acquired by an Employee Stock Ownership Plan (ESOP) as defined in section 407(d)(6) of ERISA. To date, DOL has not provided any timeline on when this rule making process will begin. There is serious concern among the employee ownership community that, given the Department's history of "regulation by litigation," it will continue resisting any notice and comment rulemaking, continuing the regulatory vacuum chilling effect on ESOPs. What's the timeline for issuing this rule, and can you commit to prioritizing a long overdue notice and comment rulemaking on this matter, and finally end 49 years of uncertainty and costly legal action?

   Response: *Please see response to Question 2, below.*

2. Ms. Su, I understand from my constituents and from the Department website that Employee Benefits Security Administration (EBSA) has been undertaking a "National Enforcement Project" against ESOPs since 2005. Since then, more than 1 in 3 ESOPs have come under regulatory scrutiny by the Department. This enforcement has been undertaken regardless of the fact the Department has never issued any formal rulemaking on which to base these actions against ESOPs. EBSA investigators like to point to a small handful of settlement agreements with individual companies as all the guidance that is needed for enforcement action. Unfortunately, those agreements were made between the government and individual companies under the threat of crippling and very expensive lawsuits brought by the federal government. Those agreements are limited to the unique facts of those specific cases and should not form the basis of blanket regulation. How does the Department justify enforcement on rules it has never issued*?*

   Response: *On December 29, 2022, the SECURE 2.0 Act of 2022 (SECURE 2.0 Act or Act) was signed into law. The Act gives the Department multiple regulatory and guidance responsibilities, some of which have statutory deadlines. Section 346 of the SECURE 2.0 Act directs the Department to establish an Employee Ownership Initiative to support and facilitate new and existing state programs designed to promote employee ownership. Under that initiative, the Department – in consultation with the Secretary of the Treasury – is also responsible for issuing "formal guidance, for . . . acceptable standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan ..... "*

   In the context of closely held companies, ESOPs can provide a tax-advantaged way for existing owners to sell their stock, without going public or trying to sell the stock in the larger market. Without a ready market price for the stock, however, there is a danger that the ESOPS, which are retirement plans governed by ERISA, will overpay for the stock in ways that undermine ERISA's retirement-protective goals, and may even jeopardize the long-run viability of the company. This is especially true when the sellers exercise undue influence over the stock transaction because

their interest in obtaining the highest possible sales price and the best possible terms for the seller are diametrically opposed to the plan's interest as the buyer. For that reason, it is critically important that the plan's interests are represented by an independent fiduciary that is looking out for the plan's interests and ensuring that it pay no more than fair market value as determined by a prudent process and reliable valuation.

ERISA section 408(e) addresses conflicts of interest with a conditional exemption for the ESOP's purchase of qualifying employer securities from a party in interest, provided, among other conditions, that the transaction is for "adequate consideration." If there is no generally recognized market for the securities, ERISA section 3(18)(B) provides that adequate consideration means "the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary."

A well-established body of caselaw is available to guide fiduciaries in relying on expert valuations as part of a prudent process for arriving at fair market value of privately held stock to be purchased by an ESOP. Courts have found that the fiduciaries relying on expert valuations must (1) prudently investigate the appraiser's qualifications in selecting the appraiser; (2) ensure that the appraisal is based upon complete, current, and accurate information; and (3) make certain that reliance on the expert's advice is reasonably justified under the circumstances (i.e., ensure that reliance is prudent). As an important part of this process of critically evaluating the appraisal and ensuring that reliance is justified, prudent fiduciaries ensure that they have read and understood the information underpinning the appraisal; fully understand the appraisal; identify, question, and test the appraisal's underlying assumptions; verify that the conclusions are consistent with the relevant data and analysis; and verify that the appraisal is internally consistent and well-reasoned.

Since 2005, EBSA has had a national enforcement project that focuses on ESOP compliance with ERISA. As part of the project, EBSA examines ESOP purchases of employer stock for conflicts of interest and to evaluate whether the purchases were conducted at fair market value. Overpayment for employer stock is not an insignificant or infrequent problem, and it can jeopardize the retirement security of ESOP participants and beneficiaries. Since FY 2015, EBSA's ESOP investigations have recovered losses of more than $380 million. In addition to the well-developed body of caselaw on ESOP appraisals, EBSA has frequently shared its views in public forums and has published detailed settlement agreements with ESOP trustees on the appraisal process and associated issues (ESOP Appraisal Process Agreements) on its website. The ESOP Appraisal Process Agreements address a broad range of issues related to fiduciary engagements, appraisal guidelines, and process requirements.

Nevertheless, the Department views its formal guidance obligation in SECURE 2.0 Act as a way to improve ESOP compliance efforts, strengthen EBSA's enforcement program, and enhance the retirement security of ESOP participants and beneficiaries. Accordingly, the Department added a regulatory project to its most recently published Spring 2023 semi-annual regulatory agenda entitled Worker Ownership, Readiness, and Knowledge. To be clear, the Department has decided to move forward with notice and comment rulemaking on the "adequate consideration" requirement in connection with ESOP acquisitions of qualifying employer securities and looks forward to hearing from a wide range of stakeholders on the relevant issues. The Department will consult with the Department of the Treasury in accordance with the SECURE 2.0 Act. The

Department expects to move forward and engage with interested stakeholders as the first step of the rulemaking process. The specific timing of next steps in the process will depend on the breadth and depth of public input from those public engagement sessions with interested stakeholders as well as the Department's overall evaluation of regulatory priorities and available regulatory resources.

Rep. Julia Letlow (R-LA)

1. Since 2001, Northshore Technical Community College in Bogalusa has hosted a highly successful YouthBuild program in a rural, impoverished area. I am told that this program has an impressive degree or certificate completion rate of 96% percent and an above average post-program placement rate with many students choosing to attend Northshore Community College to further their education.

   Unfortunately, this Department did not award Bogalusa's program in the latest YouthBuild grant competition. It is my understanding that this Department instead prioritized awarding grants to a number of new applicants while many long standing, successful programs were shut out. I am extremely disappointed with this outcome, as are my constituents.

   Some of the feedback the Department provided on Northshore's application is that it did not do enough to promote green jobs, ensure post-program employment will allow students the opportunity to collectively bargain, and form or join a union, and increase equity in apprenticeships for people of color and women. This is an odd conclusion, because I am told that at least half of the Bogalusa program's participants are minorities and women!

   a) Why did the Department start pushing its own agenda items over the original intent of the program, which is providing education, workforce development, and life and leadership skills for out-of-school youth?
   b) Why did the Department not prioritize proven performance metrics of successful, longstanding YouthBuild programs?

   Response: *The Department competes YouthBuild grants every year through a Funding Opportunity Announcement (FOA) with specific scoring criteria. Most scoring criteria are drawn from statute, and past performance is the most significant criterion in every competition for YouthBuild grants. Ensuring that YouthBuild grant activities are equitably available t benefits participants, communities, and businesses who then have a wider talent pool from which to hire. In the 2022 YouthBuild FOA, past performance accounted for 34 out of a possible 100 points, by far the most significant rating factor. To compare, the next most significant factors – Statement of Need, Training/Curriculum, and Partnership – were worth 12 points each. The Post-Program Placement criterion allowed several options for prospective grantees to describe the types of jobs for which they prepare participants. In addition to jobs that allow collective bargaining and the ability to join or form a union, applicants could describe target occupations' wages and benefits, or working with employer partners to develop a career pathway curriculum in in-demand industries to place participants. Competition is heavy for YouthBuild awards, and not every application can receive an award. In 2022, 142 organizations applied for*

YouthBuild, and the Department was able to award 68. Over multiple administrations, the Department has dedicated a percentage of awards to new awardees, to expand the YouthBuild model and ensure that new organizations have an opportunity to compete. The Department recognizes the potential impact this may have on local YouthBuild sites and supports them in diversifying their funding sources. For instance, the statutorily required 25 percent YouthBuild match ensures grantees develop relationships that help with program sustainability. Through ongoing technical assistance, the Department provides tools and resources on sustaining the programming without federal funds.

2. The change in H-2A Adverse Effect Wage Rate methodology will tremendously increase the Wage Rate for H-2A workers in certain job classifications. I believe this is probably the most detrimental rule that has hit Louisiana agriculture in recent years and has created a firestorm throughout U.S. agriculture.

   For example, in Louisiana, H-2A workers who drive sugarcane trucks from the field to the sugar mill will have the wage rate change from $13.67 to $22.60 per hour. That is almost a $9 per hour increase in one year! The impact to Louisiana sugarcane harvest drivers alone will cost sugarcane farmers in my state an additional $37 million in additional wages. The impact is not specific to sugar; the impact is this severe to many other commodities in my district and across the nation. I must insist that the estimated impact of the March 30, 2023, H-2A Wage Rule of $100 million has been grossly understated and will cause a severe hardship for the U.S. agriculture industry.

   a) Did the Department solicit meaningful input from the agriculture industry prior to promulgating the rule? If so, what type of input?
   b) The Department often points to feedback from a distributed survey to receive comments from farmers. How many agricultural producers in Louisiana's Fifth Congressional District answered this survey?

   Response: *The Department works with H-2A employers to meet the need for agricultural workers while ensuring that the hiring of H-2A foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed, which is a key statutory mandate in the Immigration and Nationality Act. To protect the wages of workers in the United States similarly employed, the Department's regulations at 20 CFR 655 subpart B require employers who seek workers through the H-2A visa program to offer, advertise in their recruitment, and pay a wage that is the highest of the Adverse Effect Wage Rate (AEWR), the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the state minimum wage.*

   Requiring H-2A employers to pay at least the AEWR to H-2A workers and other workers in corresponding employment when it is the highest applicable wage is one of the primary ways the Department meets its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of workers in the United States similarly employed. Prior to the publication of the recently finalized rule, for non-range occupations the Department set the AEWR for all H-2A job opportunities at the annual average hourly gross wage for field and livestock workers (combined) for the State or region based on the Farm Labor Survey conducted by the U.S. Department of Agriculture's National Agricultural Statistics Service.

As explained in detail in its proposed rule, the Department determined that the 2010 Final Rule AEWR methodology's use of the USDA Farm Labor Survey was not the best wage source for certain occupations and for use in certain locations. The Farm Labor Survey does not consistently report wage data for occupations outside the field and livestock workers category and does not report wage data for field and livestock workers (combined) in certain locations, such as Alaska and Puerto Rico. The Department determined that use of the Farm Labor Survey to establish the AEWR in those occupations and locations would not adequately prevent adverse effect on the wages of agricultural workers in the United States similarly employed. The Department therefore engaged in rulemaking to address these concerns with the AEWR methodology.

After consideration of 92 public comments from a wide range of stakeholders, on February 28, 2023, the Department published the final rule, Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States. The final rule, which took effect on March 30, 2023, implements a methodology that uses wage data reported by the U.S. Department of Agriculture (USDA) Farm Labor Survey (FLS) and the Department's Bureau of Labor Statistics (BLS) Occupational Employment and Wage Statistics (OEWS) survey depending on the occupation and location of the job opportunity. The final rule anticipated the AEWRs for the vast majority of job opportunities would not change under this new methodology, and as of August 22, 2023, of the 101,047 worker positions certified under the 2023 AEWR Final Rule, 97,578 (or approximately 97 percent) have been assigned an FLS-based AEWR only. The methodology adopted in this final rule generally enables the Department to establish appropriate AEWRs in all geographic areas and for all SOC codes in which employers may seek to employ H-2A workers, thus making for more accurate and protective wage rates that more effectively meet the Department's statutory mandate.

3. As I've traveled the Fifth District, I've heard from farmers and business owners about the importance of the Department's H-2B program. Seasonal workers are vital in helping producers process their crops and keep businesses running, which in turn benefits the local economy. Many businesses have shared their frustrations with the Department's significant delay in processing H-2B applications.

   It is my understanding that regulations require the Department to issue a first action, either a Notice of Acceptance or Notice of Deficiency, on every application within seven business days of receipt. I have been told that this year, the Department has taken more than 90 days to issue a first action on an alarming number of applications. For many employers to receive their workers on time, they must receive a first action from the Department on or before the middle of February. However, this year more than half of spring applications did not receive a first action until after mid-February.

   It is my understanding that many employers who first filed with the Department between January 1 and January 3 with a requested worker start date of April 1 did not receive a first action until as late as the third week of April, with labor certifications issued as late as the second week of May. Unfortunately, the Department's delays result in much-needed workers arriving weeks and even months after the intended employment start date, which has been detrimental to these businesses.

a) What performance metrics are in place so the Department can adequately meet the milestones and timelines that are part of the H-2B application process?
b) How are these metrics used in the performance appraisal process for Department personnel?
c) Is the Department working to identify the problems that have resulted in H-2B visa application processing delays? If so, how?
d) What additional changes to the H-2B application process would enable the Department to expeditiously adjudicate all labor certification applications so that certification would be issued at least 30 days prior to employers' requested start date?
e) What is the Department doing to resolve any identified problems to adhere to regulatory timelines established for the H-2B program?
f) What percentage of the Department personnel were working in-person at their duty station workplace 5 days-a-week prior to the pandemic and what percentage of the Department personnel are currently working in-person at their duty station workplace 5 days-a-week?
g) What is the telework policy that currently applies to Department personnel?
h) Has the Department assessed whether teleworking or other alternative work arrangements have impacted productivity in processing H-2B applications? If so, what were the findings of those assessments?

Response: *The Department's Employment and Training Administration (ETA) is working to meet the unprecedented demand for H-2B visas, which the agency first encounters in the extraordinary, still-growing number of foreign labor certification applications employers and their representatives file with the Department every filing season. The agency has worked strategically and creatively to leverage available dollars to their fullest, making a variety of management and technological improvements. Specifically, ETA is (1) temporarily re-assigning Federal staff from other foreign labor programs that it administers; (2) hiring temporary contract staff during the fall time-period (e.g., Fiscal Year 2022) to help Federal staff review applications, and (3) offering overtime to help boost staff productivity in anticipation of this peak filing season. ETA is also addressing demand through efficiencies available in its electronic Foreign Labor Application Gateway (FLAG) processing system, to which the agency has made well-placed enhancements in recent years. In all, these actions have helped ETA successfully manage its rising workloads to date. However, year over year, demand continues to grow, and the agency cannot absorb these annual increases indefinitely and still achieve its regulatory adjudication time requirements without additional resources. To adequately resource the agency to meet employer demand for these programs annually and in the long term, the FY 2024 Budget again asks the Congress for permanent fee authority. As in past years, the Department's proposal is for a narrowly tailored fee, scaled to demand, and focused specifically on employers who use the Department's foreign labor programs.*

ETA's Office of Foreign Labor Certification (OFLC) receives and processes all H-2B applications electronically, and staff engaged in the review and processing of H-2B applications are afforded full-time telework opportunities. OFLC has received an unprecedented number of H-2B applications this year and is processing them as quickly as possible. For the second half H-2B cap, the peak filing season starts on January 1-3 of each year, which is the earliest applications may be submitted for the second half cap. As in previous years, OFLC received more than

enough applications in that three-day period to fill the statutory H-2B cap. This year, OFLC received a record number of applications from January 1-3—in particular, 8,693 H-2B applications requesting 142,796 worker positions with April 1, 2023, start dates, which is more than four times greater than the 33,000 statutory cap for the second half of FY 2023. The H-2B applications received during FY 2023 represented a 7 percent increase over FY 2022 and a 60 percent increase from FY 2019. This historic increase in submissions caused some delays in issuing first actions and resulted in an unusually high number of pending applications at the time when the annual H-2B peak filing season began.

OFLC has processed this unprecedented level of applications as quickly as possible, and for applications filed on January 1-3, OFLC issued enough certifications to fill the statutory H-2B cap by the middle of February 2023, which is about six weeks prior to employers' start date of need. This means, for the vast majority of these employers, while there were initial delays given unprecedented demand and lack of resources, they were still in a position to seek visas for requested workers available under the cap in a timely way based on their stated dates of need. OFLC staff have worked diligently to process this unprecedented volume of applications. OFLC has seen consistent increases in production since 2021, including a 4.7percent increase in 2021 and a 47percent increase in 2022. OFLC is currently on pace to exceed production compared to last year.

To help address this issue, the President's FY 2024 Budget includes a legislative proposal that would provide the Department with authority to charge cost-based filing fees to employers filing foreign labor certification applications. A fee-based structure would better align the supply of funding to the demand for certifications, reduce reliance on annual appropriations, and impose the costs of administering certification programs on the group of employers that uses and most benefits from these programs.

Rep. John James (R-MI)

1. Michigan Works! Association, which has an office a floor above of my district office, does critical staffing work throughout the State of Michigan. On April of last year, DOL issued a proposed rule that would require states to impose "state merit staff" requirements to provide services for public employment offices, with extremely limited waiver options. Michigan Works! has communicated with my staff their opposition to the DOL rule, specifically the Wegner-Peyser rule. If implemented, it would reduce 75% of their staff, therefore significantly limiting access to critical job training services for individuals and employers in my district.

   I submitted an appropriations request to zero out any funding that would allow the DOL to implement such an inflexible and destructive rule.

   Eighty-one percent of business leaders in Michigan are conveying concerns regarding the lack of applicants with necessary skills. On top of that, Michigan's labor force participation rate stands at 59.9%--lower than the national average of 62.4%. I don't believe now is the time to limit ourselves.

a) Did DOL consult organizations in Michigan like Michigan Works! prior to initiating this rule?
b) My state has tremendously benefited from waivers. Abolishing them would overturn decades of precedent. What rationale is DOL using to forgo waivers?

Response: *In April 2022, DOL issued a notice of proposed rulemaking (NPRM) that proposed to require that states use state merit staff to provide Wagner-Peyser Act Employment Service (ES) services. The NPRM provides the Department's rationale for this rulemaking, which includes better aligning ES and Unemployment Insurance (UI) staffing and allowing ES staff to respond to surges of demand in UI. The Department sought comments for the rulemaking from the public, including states like Michigan, via the Federal eRulemaking portal. The public comment period closed on June 21, 2022, and any comment received timely is available on this site. The Department received numerous comments regarding the impacts on Michigan and on other states. The Department is in the process of reviewing those comments and developing the final rule, which will describe the Department's determinations.*

Rep. Erin Houchin (R-IN)

1. The challenges associated with the growing number of older adults in our country who want to age at home, combined with the growing divide between the number of people who need care and the number of people available to provide care, is an issue of national importance. My state of Indiana recently developed a Direct Service Workforce Plan which seeks to expand the professional Home and Community Based Services (HCBS) workforce. My state is also developing programs to support family caregivers who provide care to older adults and people with disabilities who are covered by Medicaid and live at home. Most of that care is "informal" and unpaid, but many family caregivers receive support, sometimes including payment, through various HCBS administered by providers contracted with the State Medicaid agency.

   The Department of Labor (DOL) issued a proposed rule in October 2022, the "Employee or Independent Contractor Classification Under the Fair Labor Standards Act". There is concern that the rule, as proposed, would inadvertently introduce uncertainty into certain Medicaid HCBS in which individuals – typically family caregivers – are currently appropriately classified as independent contractors (e.g., Shared Living, Structured Family Caregiving, Adult Foster Care). Uncertainty could create significant concern and disruption for family caregivers, providers, and States at a time when we can least afford to have any further disruptions in HCBS.

   (Following DOL's Home Care Final Rule in 2013, DOL was compelled to issue a subsequent Administrator's Interpretation (2014-1) to attempt to clarify the applicability of requirements to Shared Living-type situations.)

   I understand that DOL and CMS have been engaged in discussions on DOL's proposed rule; please provide details on how these conversations sufficiently address these concerns and ensure the proposed rule does not harm family members when they are in these kinds of

caregiving roles.

Response: *The Department understands the importance and value of family caregiving and recognizes the critical role that certain Medicaid-funded and other publicly funded programs play in providing support or pay for family caregiving and in allowing older adults or individuals with disabilities to remain in their homes.*

Under the FLSA, as the Department stated in a 2013 final rule concerning home care workers, family or household members may be hired as employees of other family or household members to provide home care services. As the Department has explained, where an employment relationship exists, family caregivers are entitled to the same minimum wage and overtime pay for hours worked as other employees unless a statutory exemption applies. See 78 FR 60488. As with all classification determinations under the FLSA, such an analysis depends on the facts and circumstances of each particular case.

On October 13, 2022, the Department published a Notice of Proposed Rulemaking (NPRM) to rescind the 2021 Independent Contractor Rule and replace it with alternative regulatory guidance that would be more consistent with judicial precedent and the FLSA's text and purpose. See 87 FR 62218.