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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510–6300

June 30, 2024

VIA ELECTRONIC TRANSMISSION

Lisa M. Gomez
Assistant Secretary
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Ms. Gomez:

As Ranking Member of the Senate Health, Education, Labor, and Pensions (HELP) Committee, I write concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, and the significant changes that federal agencies will make to their rulemaking and other processes in its aftermath. For 40 years, Congress and federal courts have ceded their respective responsibilities to write and interpret statutes to federal agencies. Under the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts were required to give broad deference to agencies' interpretations of ambiguous provisions in statutes.[1] The Court has now overturned that deference, reinforcing that Congress and the courts are responsible for writing and interpreting the laws, respectively; not agencies.[2] The Court held that such deference defies the Administrative Procedure Act, and that agency interpretations are no longer entitled to deference.[3]

This decision is an opportunity for executive agencies to re-examine their role relative to Congress, and to return legislating to the people's elected representatives. For too long, *Chevron* deference has let agencies make broad decisions governing a diverse country of over 330 million people. Instead of engaging in the hard work of making tradeoffs and building coalitions needed to legislate, unelected agency bureaucrats exploit statutes to impose policy decisions that exceed their authority from Congress and exercise discretion far outside their core expertise and purpose.

Such unfettered agency power by the unelected is a perversion of the Constitution. *Loper Bright* makes clear that no agency is above the law or should be afforded special treatment when its authority is challenged. Moreover, the Court has separately confirmed that agencies need clear,

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[1] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Loper Bright Enterprises v. Raimondo*, No. 22-1219, 2024 WL 3208360 (U.S. June 28, 2024).
[3] *Id.* at *3.

specific statutory authorization from Congress to take action on issues of "vast 'economic and political significance.'"[4] Agencies cannot seize broad power based on authorities that Congress intended to be exercised narrowly—subtle, vague, or ambiguous statutory provisions provide no foundation for sweeping action.[5] Even then, Congress cannot delegate its Article I legislative powers to agencies.[6]

Congress is the most politically accountable branch in our government, and should be responsible for making the most important policy decisions that affect the American people. The Court also makes clear that Congress makes law, not agencies. When the Executive Branch does make law, such as promulgating new regulations, it does so to implement the laws Congress makes and only within the clearly established guardrails that Congress sets. In *Loper Bright*, the Court makes clear that the role of federal courts is to "independently interpret the statute and effectuate the will of Congress subject to constitutional limits."[7]

Despite the Court's decision, given your agency's track record, I am concerned about whether and how the Employee Benefit Security Administration (EBSA) will adapt to and faithfully implement both the letter and spirit of this decision. For example, EBSA has implemented at least two significant rules, each with their own shortcomings: a rule attempting to expand functions covered by the Department of Labor's (DOL) fiduciary standard (Fiduciary Rule),[8] and another creating a loophole that would allow fiduciaries to consider environmental, social, and governance (ESG) factors when making financial decisions (ESG Rule).[9] Both of these rules are contrary to federal law.

First, as federal courts have already informed DOL and EBSA, the Fiduciary Rule violates the Employee Retirement Income Security Act of 1974 (ERISA).[10] Furthermore, the Fiduciary Rule seeks to regulate matters well in excess of DOL's authority, including individual retirement accounts and insurance regulations. Notwithstanding other violations, EBSA may have also failed to follow other requirements with this rulemaking. For example, the comment period was rushed (far shorter than other substantive rules from the agency), and relied on a recycled impact analysis

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[4] *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).
[5] *See Whitman v. Am. Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
[6] *See, e.g.*, *Gundy v. United States*, 588 U.S. 128, 135 (2019) ("Congress, this Court explained early on, may not transfer to another branch 'powers which are strictly and exclusively legislative.'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))).
[7] *Loper Bright*, 2024 WL 3208360 at *2.
[8] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 89 Fed. Reg. 32122 (Apr. 25, 2024) (to be codified at 29 C.F.R. 2510).
[9] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (to be codified at 29 C.F.R. 2550).
[10] *Chamber of Com. of the U.S. v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018) (overturning the Obama administration's 2016 Fiduciary Rule); *Am. Sec. Ass'n v. U.S. Dep't of Lab.*, No. 8:22-CV-00330-VMC-CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023) (overturning DOL's attempt to implement the Fiduciary Rule through agency guidance).

that is no longer relevant given the extensive federal and state rulemaking that has occurred since the original struck Fiduciary Rule was issued.[11]

Similarly, the ESG Rule violates the long-standing common law maxim that fiduciaries make decisions in the sole interest of their clients, not based on a fiduciary's personal values. Not only was this rule issued in the absence of any statutory authority, but the rule directly contradicts ERISA and will create long-term damage to average Americans' retirement security, as ESG accounts have proven to substantially underperform traditional accounts.

Politically-driven rulemaking at odds with the laws Congress has passed is unacceptable, and will no longer receive the lenient judicial review to which DOL and EBSA have become accustomed. Accordingly, to understand how EBSA will abide by and implement the Court's new framework, I ask that you answer the following questions, on a question-by-question basis, **by July 19, 2024**:

1. How will EBSA change its current practices to enforce the laws as Congress writes them, and not to improperly legislate via agency action?

    a. Will the EBSA be conducting a systematic, action-by-action review of its ongoing activities to identify opportunities where the EBSA needs to make changes to comply with or otherwise account for the decision?

    b. Will EBSA pause or stop any existing rulemaking activities in light of the Court's decision? If so, what rule(s) is EBSA halting? If not, why does EBSA feel it is legally able to continue existing rulemakings without considering the impacts of the Court's decision?

2. How does the EBSA plan to facilitate greater congressional involvement in policy issues under the agency's purview? Please be as specific as possible with respect to oversight responses, regular briefings, trainings and seminars, and other actions you plan to take.

3. What are your current policies about when your staff may or may not provide briefings to congressional staff? Under what situations would you refuse to brief congressional staff in response to a request for such a briefing? Where are such policies codified?

4. How do you plan on increasing EBSA's responsiveness to oversight and technical assistance requests from Congress?

    a. For example, how do you plan to streamline the EBSA's process for clearing technical assistance to reduce response times to congressional requests?

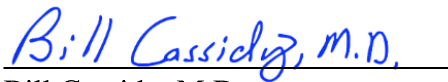
[11] The new regulations that EBSA failed to account for include Best Interest standards issued by the Securities and Exchange Commission (SEC) and National Association of Insurance Commissioners (NAIC), the latter of which is rapidly being adopted at the state level.

5. Moving forward, will you commit to providing a substantive response to congressional oversight requests within 30 days of receipt of the request? If not, why not?

6. How will the Court's decision in *Loper Bright* impact your drastic rewrite of ERISA's Fiduciary Standard?

Thank you for your prompt attention to this important matter.

Sincerely,



Bill Cassidy, M.D.
Ranking Member
U.S. Senate Committee on Health,
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