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Via submission to the rulemaking portal:
www.regulations.gov
Docket ID number: EBSA-2020-0003.

August 25, 2020

Office of Exemption Determinations
Application No. D-12011
U.S. Department of Labor, EBSA
Office of Exemption Determinations
200 Constitution Avenue NW,
Suite 400
Washington, DC 20210

Re: REQUEST TO TESTIFY; OUTLINE

Re: ZRIN 1210-ZA29 [Application No. D-12011]
"Improving Investment Advice for Workers & Retirees"

Ladies and Gentlemen:

I am writing to request to testify on my own behalf at the upcoming hearing on "Improving Investment Advice for Workers & Retirees." I submitted two comment letters on the rule proposal:

(1) https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00001.pdf

(2) https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00052.pdf

MY OUTLINE FOR TESTIMONY:

If invited to testify, I would focus the very limited time you provide on the following factual topics:

A. Evidence from my own review of many 401k plans, from the perspective of advising plan sponsors as their potential liabilities under ERISA;

B. Evidence from my reviews of many 401k plans, from perspective of advising plan participants, as to their often-poor investment choices found in their retirement plan accounts;

C. The consumer confusion that results from those involved in financial services who hold out as acting in the "best interest" of their customers, while denying fiduciary status, and the detrimental impact of same on both plan sponsors and individual investors;

D. The consumer confusion that results from disclosures from mutual funds and annuities; and

E. The academic evidence on impact of fees and costs on returns of investors, and retirement plan accumulations.

As stated below, I am concerned that the artificial boundaries on the topics of the testimony present burdens upon the interchange between the public and the government, and exploration of the complex interplay of the proposed rule.

CONCERNS OVER INADEQACY OF PUBLIC INPUT, AND ARTIFICIAL LIMITATIONS IMPOSED UPON THE TOPICS TO BE COVERED.

I don't believe, however, that the Department should constrain the topics addressed in the hearing, or constrain who can appear to testify, as the notice of hearing states.

There is a clear need for the Department to hear more factual and legal information regarding this proposed rulemaking, including but not limited to:

(1) A legal rebuttal of various arguments put forward by various industry organizations in their comment letters, including but not limited to arguments not reasonably anticipated by the Department's own proposed rule, as well as similar arguments advanced by various law firms and others on behalf of certain financial services firms in their comment letters just submitted earlier this month;

(2) A more complete factual rebuttal of various arguments put forward in the previously submitted comment letters, by those who did not submit comment letters, but who possess evidence that would address the previous comments submitted;

(3) A more complete legal and factual analysis as to why the Department's proposal to permit conflicted advice is violative of the prudent investor rule under ERISA, ERISA's provisions for the grant of class exemptions, and the requirements of pertinent fiduciary law;

(4) An economic analysis of the negative impacts of the proposed rule upon:

a. individual retirement plan participants;

b. those who engage in rollovers to IRAs from qualified retirement plans governed by ERISA;

c. plan sponsors (including the viability and profitability of businesses, both large and small, when subjected to the increased risks, including those arising from class action lawsuits, which are certain to arise if the proposed rule is enacted);

d. the number of ERISA-covered qualified retirement plans, given the increased liabilities to plan sponsors (and lack of ability to hold those providing investment recommendations to plan sponsors responsible), at a time when increased availability of qualified retirement plans in the United States should be promoted;

e. capital formation in the United States (and the detriments to same occurring from higher fees and costs due to excessive intermediation, as well as from betrayals of trust);

f. U.S. economic growth, resulting from excessive intermediation and the resulting lower amounts of capital available for investment, especially given the compounding effects of high fees and costs on the availability of investment capital;

g. the personal savings rate in the United States, due to investor perception that will arise from conflicted advice provided to plan sponsors and plan participants; and

h. the investment advisory and financial planning professions, and the reputation and economic prospects of professionals within such professions, as plan sponsor and individual plan participant trust is increasingly betrayed.

(5) Recent developments regarding various interpretations of Regulation Best Interest, upon which the Department's intended interpretation of its own rule expressly relies; and

(6) Much more, which time to properly consider the proposals would reveal.

I am concerned that the artificial limitation on testimony to "individuals or parties who submitted, in accordance with the instructions included in the proposed prohibited transaction exemption, a comment or hearing request on the proposed exemption before the close of the comment period" results in a lack of adherence to fundamental notions of fairness and the Administrative Procedures Act, especially given the Department's receipt of evidence and legal arguments during the first short comment period. There would be, no doubt, interested parties who could provide meaningful insight to the Department, who do not meet the artificial constraints so imposed by the Department.

I am also concerned that the limitation of testimony is ill-advised: "Outlines should present material *factual issues* and demonstrate that the *proposed testimony is both germane to factual issues needing exploration at the hearing that could not have been submitted in writing*, and not duplicative of arguments and factual material previously included in the requestor's comment letter." This constraint is altogether non-sensical. Simple factual information, without more, could be presented in writing.

But the purpose of a hearing, to inform the government's rule-making process, is much more than the mere receipt of explanations of faculty issues. There is a complex interaction between the application of a law (or rule, or proposed rule) and the factual circumstances as they relate to investments, the delivery of

investment recommendations and advice, the marketplace for financial services, and the economic impacts that may occur. Limiting outlines to addressing "factual issues" alone ignores the absolute necessity to explore the complex and intertwined nature of the proposed rules and its legal, practical and economic impacts. "Factual issues" and "legal issues" are intertwined, especially in such a rulemaking as this proposed rule with its huge economic, industry, and social impacts.

As stated above, this stated constraint also likely runs afoul of the requirements of the Administrative Procedures Act, and is certainly evidence that the Department seeks to rush this rulemaking through without a proper consideration of its impact upon major areas of our economy, the financial services industry, consumers, financial professionals, and much more.

Hearings on rules of this nature should be designed to permit adequate exploration of the *interplay* of the rule, in all of its complexity, and a due consideration of the major ramifications and impact of this proposed rule. This involves exploring both factual and legal issues, and their interplay, and what lies in between. The exchange between those testifying, and those who are charged with adhering to the requirements for the adoption of rules that are neither arbitrary nor capricious as well as being reflective of the true environment in which the rule is intended to operate, should not be artificially restricted by the limits as to who may testify, or by limiting the topics upon which they may testify.

CONCERNS OVER RUSH OF THE HEARING SCHEDULING, AND THE RUSH FROM NOTIFICATION OF TESTIMONY TO THE DATE OF TESTIMONY.

I would also repeat my concerns that the Department's proposed rule-making, on an issue as complex as this, and which has such far-reaching implications for millions upon millions of business owners and retirement savers, as well as impacting upon capital formation and U.S. economic growth, is rushed in the extreme.

Additionally, there has simply been insufficient time to gather evidence and legal analysis and respond to the Department's proposed rule, given the extraordinarily short comment period.

Nor has then been presented any time to submit comments to rebut the evidence, such as it is, and the legal arguments, from previously submitted comment letters (few if any of which were posted prior to the deadline of the comment period) of those who present arguments that are opposed to my own views.

The August 25, 2020 publication in the Federal Register of this "Announcement of Hearing," with a reply required just three days later – by 11:59 p.m. on August 28, 2020, is also extremely rushed and gives little time to gather factual evidence and submit same.

Presumably, given the existence of Labor Day (a federal holiday), and with testimony to be scheduled on Thursday, Sept. 3rd (and "if necessary" Sept. 4th), those individuals invited to testify would receive notification that their testimony has been scheduled (at least in some, if not many, instances) less than 48 hours to prepare their actual testimony. This is insufficient time for those who desire to provide testimony to further consider the topics upon which they will be permitted to testify, and then to craft the succinct yet meaningful and impactful testimony the Department should expect.

I would note that if I possessed, myself, adequate time for thought on the complex interplay of the Department's proposals with the complex web of financial services regulation at both the federal and state levels, the impact of preemption, the rise of state retirement plans which may or may not be covered by ERISA, recent SEC rulemaking, recent state legislative and regulatory developments, and for a review of all of the previously submitted comment letters earlier this month, no doubt I would identify other factual (as well as legal) issues deserving of commentary and, in many cases, rebuttal.

Accordingly, I remain concerned that the Department is not adhering properly to the Administrative Procedures Act by undertaking, in such a rushed and hurried fashion, with constraints on receipt of testimony and further comment letters, such a monumental rulemaking. The burdens of the COVID-19 pandemic, which are huge in terms of additional time to complete everyday work and personal activities, adds to my concerns over the inherent fairness of rushing the Department's proposed rule through.

If the Department truly desires well-reasoned, thorough, thoughtful, and complete testimony, it would afford more time for those testifying to construct their testimony, both in establishing a far more reasonable time period to submit outlines, and with regard to permitting more time from notification of the testimony time and date to the actual date of the hearing.

MY QUALIFICATIONS.

While my testimony is not on behalf of any institution, firm, or organization, I possess the following qualifications to provide such testimony:

A) Associate Professor of Finance, teaching courses in Applied Investments, Advanced Investments, Retirement Planning and Employee Benefits, Insurance and Risk Management, Money & Capital Markets, and several other courses;

B) My research interests, as an academic, include the application of the fiduciary standard, mutual fund fees and costs, and due diligence as to both investment strategies and investment product selection;

C) Director of the Personal Financial Planning Program at Western Kentucky University;

D) Frequent writer and commentator and speaker at industry events, for over 15 years, on the application of the fiduciary standard to the delivery of financial products and services;

E) Served as a consultant to broker-dealer firms at times throughout my career;

F) Practicing registered investment adviser, since 2001;

G) Certified Financial Planner™ since 2005; and

H) Attorney-at-law, with a focus on trusts and estates, including the trust law that informs the interpretation of ERISA.

[I am also a fast typist, which is the only reason I can submit this 6-page request to testify so quickly.]

Please let me know if you have any questions or need additional information.

I look forward to being provided the opportunity to testify.

Ron A. Rhoades, JD, CFP®