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Attention: Definition of Fiduciary—RIN 1210–AC02

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N–5655
U.S. Department of Labor
200 Constitution Ave. NW, Washington, DC 20210

Dear EBSA staff:

Raymond James appreciates the invitation to comment on the Department of Labor's (the "Department") Retirement Security Rule: Definition of an Investment Advice Fiduciary (the "Rule") and amendments to associated Prohibited Transaction Exemptions ("PTEs"). Raymond James has been a longtime advocate of both a uniform best interest standard overseen by the appropriate regulator, as well as preservation of clients' choice regarding the type of relationship they would like to maintain with their financial professionals and how they choose to pay for the recommendations and services provided. In a 2018 letter to the Department and Securities Exchange Commission (the "SEC"), we advocated for a client-first solution that could consistently be applied across all account types. Regulation Best Interest ("Reg BI"), the fiduciary standard imposed on investment advisers under the Investment Advisers Act of 1940 (the "Advisers Act"), as well as the best interest model approved by the National Association of Insurance Commissioners (and adopted by many states by statute or rule) have sufficiently raised and further aligned the standards of conduct for financial professionals across product and service areas. The principles-based nature of these established rules allows for regulatory evolution as times and products change. Respectfully, the Department's proposed rule would destabilize the considerable progress made by the industry, self-governing bodies, and regulators over the past five years. Raymond James respectfully recommends the Department withdraw its proposed rule in its entirety along with the proposed amendments to the PTEs. This would allow the industry to continue its compliance with existing robust regulations including Reg BI, PTE 2020-02, and state best interest rules applicable to annuities, and develop further enhancements as we work with regulators.

Issues with the public launch of the Rule proposal

Before commenting on the Rule and amendments to PTEs, it is important to discuss the executive branch's comments when the Rule was released. While the preamble and Department staff have indicated the Rule is agnostic towards product types, both the preamble as well as the press release materials clearly indicate otherwise. The press release and the President's own remarks criticize fixed index annuities as an entire product class. Such remarks are concerning for two reasons. First, after carefully scrutinizing their features and benefits, we make available many such products that offer clients sound solutions given a variety of risk tolerances and investment goals; therefore, it is prejudicial to criticize and creates a bias against an entire product class that has historically been a viable and beneficial option for certain clients.

Second, and more troubling, is if the Department chooses to take a view contrary to state and federal securities regulators on products and is successful in redefining transactional brokerage as fiduciary under ERISA or the Code, the Department's view on products will inevitably conflict with the views of the securities regulators creating confusion for clients, firms, and those same regulators. Confusion that can lead to unnecessary and unintended non-compliance with existing rules.

Another concerning part of the introduction to these proposals are the President's repeated remarks that somehow this proposal is aligned with the administration's battle against "junk fees". Given the highly regulated environment in which we operate, along with regulatory requirements and firms' proactive disclosure of costs and fees, it is inaccurate to assert this Rule is intended to stop behavior synonymous with the example the President used of a firm charging a client thirty dollars to check a balance. Portraying this rule as tackling junk fees is a false equivalence inferring that legitimate and reasonable fees are in the "junk" category, and only serves to confuse the public over why the administration believes this Rule is necessary.

Concerns with the proposed definition of fiduciary

We respectfully begin our comments on the Rule and amendments to PTEs by focusing on the proposed definition of fiduciary. In short, we don't believe there are material differences between the 2016 rule and this proposed one. The definition remains so broad that almost any interaction with an existing ERISA or IRA client, or a potential retirement client could be considered fiduciary under this definition. This blurs and arguably obliterates the distinction between investment advice fiduciary standard in advisory accounts and best interest standard (non-fiduciary) in brokerage accounts.

While there are a host of issues with the approach described below, the most important in our view is the chilling nature this Rule will have on financial education and literacy conversations between financial advisors and clients. This Rule will disadvantage all clients, but especially those in underserved communities, with lower account balances, and new investors. Education and financial literacy are the foundation to creating a viable retirement future for Americans. The Rule imposes ERISA Title I fiduciary liability and risk on financial professionals communicating with potential clients even though no contracts for services have been signed, and no meeting of the minds exists about the type of relationship between potential client and financial advisor. The collective class action risk from these conversations will outweigh any perceived advantages. In our view, the definition as proposed will contribute to the financial literacy gaps many Americans face. It also violates the Fifth Circuit decision in that many of these conversations would not meet the "trust and confidence" test described by the court. But regardless of the legal arguments, we are most concerned with the practical negative effect this definition will have on desperately needed financial education.

Rollovers and fiduciary status

We respectfully disagree with the Department's assertion that rollover discussions are fiduciary advice covered by Title 1 of ERISA. This assertion contradicts ERISA's intent as well as Congressional intent. Congress has had several opportunities to declare rollover advice as covered ERISA fiduciary advice under the two SECURE Acts as well as other retirement legislation and, they have not. We do not read the Fifth Circuit opinion to say that a rollover conversation is fiduciary in nature.

The requirements to add a full comparison of the plan vs. account at investment firm creates books and records requirements that are not required by other regulatory regimes, and importantly will be overly burdensome to small broker-dealers and investment advisors which constitute many of the small businesses that drive America's economy. The Department should make it clear to Congress that this interpretation will subject millions of transactions to potential private right of action as well as class action litigation where none exists now. This does not comport with Congressional intent or the Fifth Circuit opinion. In many ways this represents a resurrection of contract warranties under the Best Interest Contract (the "BIC") that the Fifth Circuit struck down. Finally, reiterating that the expanded definition of an ERISA fiduciary will create confusion and suppress educational efforts for clients and potential clients resulting in Americans with assets in sub-par plans that do not meet their needs, or in plans where no advice is available, and they must self-direct investments without much needed guidance.

Existing discretion eliminates client choice for other account types and services

Another complication in determining ERISA fiduciary status is the supposition that if the financial professional or an affiliate provide discretionary advisory services to an individual, all subsequent conversations about rollovers or other retirement investments would be considered ERISA Fiduciary under this Rule. First, this notion contradicts security laws where the fiduciary status of a relationship is account and agreement based. One can have both a discretionary account managed by a financial advisor, as well as a non-fiduciary brokerage account managed by the same professional. As it should be, the client in this example is given the choice of how they want to engage the professional and the fees they are prepared to pay. Under this proposal, they would have no choice. We do not believe this comports with either the Fifth Circuit decision or the way securities laws are structured. Second, the meaning of "discretionary" is unclear under the Rule. If a firm is sub-advisor on a mutual fund held by a client, does that mean that the firm is an ERISA fiduciary with respect to all retirement conversations and accounts in that relationship? It is difficult to determine how far through the organization this concept of discretion as proposed by the Department extends.

Concerns with one time advice as fiduciary

Clients should have the choice between relationship types and the associated fees. The SEC preserved client choice with Reg BI, which applies a non-fiduciary best interest standard to point in time brokerage recommendations. Unfortunately, this proposed Rule paints almost any conversation as fiduciary under ERISA, or at least creates enough ambiguity that most conversations could be argued to be fiduciary. To preserve and respect clients' right to choose, we continue to ask the Department to provide flexibility under the Rule for firms to contractually agree with clients that some activities are not fiduciary in nature. Clear, plain English disclosures to clients outlining roles and expectations will be necessary and are achievable as evidenced by Reg BI.

Concerns with proposed PTE 2020-02

The proposed sweeping new definition of an ERISA Fiduciary by design forces firms to use PTE 2020-02 to provide services, to execute trades, and to even have client conversations, even if only preliminary. There are several issues with the exemption as proposed.

First, and most concerning is the apparent contradiction between the Department's statement that firms with processes and procedures to comply with Reg BI should be in compliance with the terms of this exemption juxtaposed with the Department's criticism in the preamble of mutual fund share types that are permitted under Reg BI. Coupled with the unsupported criticism of an entire product/class of annuities, it is difficult to see how the Department's views and regulatory enforcement would be consistent with the SEC, FINRA, and state insurance and security regulators. Such ambiguity and at times overt contradiction of other agencies' regulatory views threaten the clarity of the space in which institutions attempt to serve their clients' best interest. This is the opposite of a unified best interest standard and would create grave regulatory uncertainty for firms attempting to comply with multiple and competing regimes. Worse yet, if the Department were to take exception to a practice that is acceptable under Reg BI or state rule, the firm could lose use of this exemption for ten years which would effectively put many firms out of business – a disproportionate and dangerous consequence for a difference of opinion. Furthermore, this loss of exemption at the Department's discretion appears to be a fundamental violation of due process.

Second, the cost and third-party revenue disclosure contemplated by the Department does not align and is far more difficult to implement than those required by other regulatory regimes. Under this Rule a firm would be subject to potentially losing the exemption due to simple data and reporting inaccuracies that have no material bearing on whether a client would desire a product. The Department should defer to the disclosure regimes already in place by appropriate regulators for cost and third-party fee disclosures not only because they already exist, but because they are clear and inform clients appropriately.

Third, as described in previous letters to the Department, the prohibition on syndicate and other principal trades contrasts with SEC rules and has a negative implication for client choice and economic welfare. Clients are adequately protected under Reg BI, and it is unclear why a principal trade alone is considered harmful. This trade prohibition is costly to implement, but most importantly harms clients by reducing choice. Given the work required to introduce this prohibition into trading systems, a sixty-day compliance period is not realistic. It required upwards of a year or so to prepare for the 2016 rule as well as Reg BI; therefore, sixty days to implement this proposal does not align.

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We hope the Department recognizes the significant strides firms and regulators have made over the past several years on standards of conduct. Unfortunately, this proposal is unworkable and a repeat of the 2016 rule with most of the same embedded problems. We appreciate the Department's invitation to comment on the proposal and ask that you consider our comments along with others and withdraw the proposal. We all have the same goal – helping clients achieve their financial objectives.

Sincerely,

Scott Curtis

President, Private Client Group
Raymond James Financial, Inc.