December 22, 2023

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Office of Regulations and Interpretations
Employee Benefits Security Administration
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: *Retirement Security Rule: Definition of an Investment Advice Fiduciary*

The National Society of Compliance Professionals ("NSCP") submits this letter in response to the United States Department of Labor's ("Department's" or "DOL's") proposal ("Proposal") published in the Federal Register on November 3, 2023. The Department proposes to substantially amend its regulation defining "investment advice" under section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and under section 4975(e)(3)(B) of the Internal Revenue Code of 1986, as amended ("Code") ("Advice Proposal"), as well as the Department's proposed amendments to Prohibited Transaction Exemption 2020-02 ("PTE 2020-02 Proposal") and other prohibited transactions ("Other Exemptions Proposal").

NSCP is a nonprofit, membership organization with approximately 2,000 members and is dedicated to serving and supporting the compliance professional in the financial services industry in both the U.S. and Canada. To our knowledge, NSCP is the largest organization of securities industry professionals in the United States and Canada devoted exclusively to compliance. Considering NSCP's focus on compliance and compliance professionals, our comments will be limited to concerns that impact compliance programs and/or compliance professionals. The Proposal and PTE 2020-02 Proposal would pose considerable and unnecessary compliance burdens on our members and therefore make the following recommendations.

1. **The Department should create a safe harbor to mitigate the negative effect of overlapping regulatory regimes.**

If the Department determines to move forward the with the Proposal, the Proposal should be revised to expressly provide that compliance with the Securities and Exchange Commission's ("SEC's") overlapping regulatory regime constitutes a safe harbor from liability under ERISA, the Code and related regulations with respect to conduct governed by the SEC.[1] There is simply no reason for the same underlying transaction or recommendation to be subject to two overlapping and

[1] We understand that the federal securities laws do not necessarily apply to advice with respect to all retirement assets. We note, however, that the SEC takes the position that a registered adviser owes relevant fiduciary obligations to its clients even when advising with respect to non-securities. *See*, *e.g.*, *SEC v. Cutler*, No. 1:23-cv-10589-DJC (D. Mass. July 28, 2023),

duplicative regulatory regimes: such an approach needlessly increases compliance risks and costs, in addition to the collateral technology, personnel, and operational expenses.

As the Department recognizes in the preamble to the Advice Proposal, the SEC's Regulation Best Interest ("Reg BI")[2] and the fiduciary obligations arising under Section 206 of the Investment Advisers Act of 1940, as amended ("Advisers Act"), each apply to advice with respect to retirement assets, including advice with respect to the roll-over of retirement assets. We recognize that the Department has heard from many stakeholders that it should design its approach considering existing regulations and regulatory oversight. We wish to emphasize the interest of our members, who are charged with responsibility for administering internal compliance programs, in uniformity and consistency of regulatory approach, both in the substance of rules and in their application.

The approach we suggest would substantially facilitate the work of compliance personnel. The same broker-dealer and investment adviser representatives frequently provide advice, within the meaning of the Advice Proposal, to owners of retirement accounts and owners of taxable or non-retirement tax-advantaged accounts. Indeed, many clients invest in both retirement accounts and taxable and non-retirement tax-advantaged accounts. The safe harbor approach would allow development of uniform internal policies and procedures, training, and monitoring with respect to both categories of account. It also would avoid the potential for confusion on the part of representatives and their customers alike, particularly where the same interaction could be subject to two regulatory and enforcement regimes. For example, our members are extremely concerned that the DOL's Office of Enforcement will interpret the "best interest" standard differently than their counterparts at the SEC or the Financial Industry Regulatory Authority regarding a particular recommendation.

2. **The Proposal would increase needed compliance resources unnecessarily in light of the already existing Regulation Best Interest and Advisers Act regime.**

If adopted as proposed, the Proposal, by adding requirements well beyond those required by SEC rules and interpretations, would require a substantial increase in the resources (e.g., time, personnel, technology) needed to meet compliance demands. Some and perhaps all the costs associated with the deployment of such resources ultimately will be passed on to customers.[3]

In view of the SEC's current existing best interest regime, there will be little, if any, benefit to customers with retirement asset accounts. As the Department recognizes in the preamble to the Advice Proposal, "the regulatory landscape today is very different than it was even five years ago." We agree, and note that the regulatory landscape as it relates to retirement advice has developed and

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[2] Terms not otherwise defined in this letter have the meaning found in the Proposal.
[3] Unfortunately, because of the extremely short comment period held during the holidays, we have not been able to gather from our members specific statistics as to the additional resources required, including costs. We note that much of the information in which the Department based its economic analysis is several years old and we expect does not accurately reflect the resources need to comply with the Proposal. In the required cost benefit analysis section of the Proposal, the Department supports this Rule making project by referencing several facts about lacking investor savviness and the resulting harms flowing from the provision of conflicted investment advice. More specifically, the DOL cites a 2015 study asserting the proposition that $1.7 trillion in assets are invested in what the DOL considers "conflicted accounts". Notably all of DOL's supporting actual data is gleaned from studies predating the SEC's Reg BI Package which included updates to RIA obligations applicable in the retail and institutional markets, and the adoption, by a majority of the states, of the NAIC Model Best Interest Rule.

firms have developed robust compliance, supervisory and risk management infrastructures to satisfy Regulation BI and related rules. The Proposal would disrupt and considerably set back that hard-fought progress that has benefited investors and the marketplace generally. Since the DOL began seeking to expand the definition of fiduciary investment advice, the SEC had adopted Regulation BI and materially expanded its interpretation of an investment adviser's fiduciary obligations under the Advisers Act, expressly including obligations with respect to roll-over of retirement assets. The DOL's Proposal does not identify a factual basis for its premise that the SEC regime is insufficient as applied to securities retirement assets.

3. **The Department should not require an affirmative statement of fiduciary status as required in the PTE 2020-02 Proposal.**

Consistent with long-standing jurisprudence related to the meaning of the terms "fiduciary" under ERISA and section 4975 of the Code, the Department in the Proposal recognizes that our members should apply a functional test for purposes of determining whether their Financial Institutions and Financial Professionals act as a fiduciary by reason of providing investment advice. However, we believe that the DOL's requirement in the PTE 2020-02 Proposal that the financial institution unequivocally acknowledge fiduciary status is contrary to functional definition and will put our members in an untenable position when trying to identify when a person provides investment advice and still comply with the exemption.

PTE 2020-02 Proposal requires an unequivocal, written acknowledgment of fiduciary status "[p]rior to engaging in a transaction pursuant to this exemption." Currently, Financial Institutions and their Financial Professionals often provide the required disclosures at the beginning of discussions with the Retirement Investor and, possibly, well before any actual recommendation is provided. Therefore, when they provide the disclosure, they do not necessarily know which communications they will have with the investor will constitute "investment advice" for purposes of ERISA and the Code. This is necessary to assure that the disclosures are in fact delivered as required by the exemption. It would be difficult or impossible to have sufficient controls in place to assure that each Investment Professional recognizes when the Investment Professional in fact provides investment advice and thus should provide the disclosures. This will be even more so the case with the broader definition of investment advice in the Advice Proposal.

As proposed, our members will have no choice but to require the Financial Institution to recognize fiduciary status more broadly to comply with the exemption because Financial Institutions could not assure that Financial Professionals would otherwise recognize every circumstance in which they provide investment advice. This result flies in the face of a functional definition of fiduciary. In essence, the advice providers will have to attest to fiduciary status more broadly than might actually be the case in order to avoid non-exempt prohibited transactions. Effectively, it may be impossible to assert non-fiduciary status and comply with PTE 2020-02. The fiduciary acknowledgment provision as proposed unnecessarily exposes Financial Institutions and Investment Professionals to increased compliance and litigation risk. NSCP strongly opposes the voluntary assumption of a fiduciary standard when not otherwise required by law – it grants rights and benefits to the customer that are not supported by law and thus creates confusion for the customer, which we presume to be at odds with the Proposal's intent.

4. **The Department should consider an effective date substantially longer than the proposed sixty days.**

The Department proposes that the Proposal will become effective sixty days after the final versions of the Advice Proposal, PTE 2020-02 Proposal, and Other Exemptions Proposal are published in the Federal Register. We believe that such a short time period is unreasonable and that the effective date should be at least twelve months from the date final versions are published in the Federal Register. At this point, NSCP members have developed considerable experience in implementing compliance programs relating to fiduciary advice and sixty days is not at all realistic, particularly for large diversified financial services firms.

A final investment advice regulation, as proposed, will require members to again assess all the interactions they have with their clients to determine what additional interactions may result in the provision of investment advice. Furthermore, to the extent they provide investment advice in a broader number of circumstances, our members would have to adapt their compliance policies and procedures to accommodate the changes found in the PTE 2020-02 Proposal and the Other Exemptions. A sixty-day effective date is simply an unrealistic and unworkable period of time for our members to appropriately address the Proposal as drafted. Again, a compliance period of at least twelve months is necessary.

In summary, NSCP members are dedicated compliance professionals and NSCP's mission is to help such professionals be even better at their jobs. We have very real concerns that the Proposal fails to adequately recognize the regulatory efforts of its counterparts at the SEC and the unnecessary burdens it proposes to impose on our members. Therefore, NSCP respectfully requests consideration of our comments.

Sincerely,

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