



January 2, 2024

Submitted Online Through <https://www.regulations.gov>

Lisa M. Gomez
Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

**RE: RIN 1210-AC02: Retirement Security Rule:
Definition of an Investment Advice Fiduciary**

Dear Assistant Secretary Gomez:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the Department of Labor Employee Benefit Security Administration’s (“DOL”) proposed rule RIN 1210-AC02, *Retirement Security Rule: Definition of an Investment Advice Fiduciary* (the “Proposal”).² The Proposal is designed to better protect retirement investors by creating a new definition of “investment advice fiduciary” under Titles I and II of the Employee Retirement Income Security Act of 1974 (“ERISA”) that would apply generally to recommendations made “in the context of a professional relationship in which an investor would reasonably expect to receive sound investment recommendations that are in their best interest[.]”³ It would also amend certain prohibited transaction exemptions so that investment advice fiduciaries who use them must follow consistent and protective compliance requirements.

NASAA writes here specifically to support the elimination of the five-part test under the 1975 rule for determining when a securities registrant acts as an investment advice fiduciary for ERISA purposes because we believe that a recommendation to roll over securities from a

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, the U.S. Virgin Islands, and Guam. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is posted in the Federal Register at 88 F.R. 75890 (Nov. 3, 2023), <https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf>.

³ Employee Benefits Security Administration, *Fact Sheet: Retirement Security Proposed Rule and Proposed Amendments to Class Prohibited Transaction Exemptions for Investment Advice Fiduciaries* (Oct. 31, 2023), <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/retirement-security-proposed-rule-and-proposed-amendments-to-class-pte-for-investment-advice-fiduciaries>.

workplace retirement plan to an individual retirement account (“IRA”) – which for many workers is the most important financial decision they will make – needs to be subject to the ERISA standard.

I. Scope: Broker-Dealers and Registered Securities Professionals

For purposes of this letter, our comments are limited to the potential for improvements to recommendations made by securities registrants, particularly broker-dealers. As the DOL notes, in recent years various regulators, including state regulators, have enacted new laws and regulations to strengthen conduct standards applicable to the financial professionals under their regulatory purview. As part of its rulemaking effort, the DOL should ensure that it gives close consideration to all recent improvements to the current regulatory regime, including the role of state regulators in protecting retirees and retail investors.

II. The Importance of Rollover Decisions Requires Application of ERISA Obligations.

A. Many Workers Need Help to Make a Single Critical Decision.

As the Proposal recognizes, 401(k)-type plans with individual accounts and IRAs have become the predominant way workers save for retirement.⁴ This means that most employees are therefore responsible for making their own investment choices and strategies among a myriad of products and strategies in the marketplace. For most workers, the most critical moment comes when they decide whether or not to roll retirement savings over from ERISA-qualified employer-managed plans to other types of accounts, usually IRAs. Indeed, the Proposal is timely because the rate of rollovers is rising.⁵ While it is encouraging that research indicates that most IRA owners consult a financial professional such as a broker-dealer agent when creating a retirement strategy,⁶ the quality of advice those workers have encountered has varied considerably. As the Proposal finds, the combination of inexperienced customers and conflicted registrants results in investment underperformance and negative outcomes for investors.⁷

⁴ Proposal at 75,892.

⁵ There has been a steady increase in rollovers in the years following the Fifth Circuit’s vacation of the DOL’s Fiduciary Rule in 2018, with rollovers into traditional IRA plans being the most common. See Internal Revenue Service, *SOI Tax Stats – Accumulation and Distribution of Individual Retirement Arrangements* (last visited Jan. 2, 2024), <https://www.irs.gov/statistics/soi-tax-stats-accumulation-and-distribution-of-individual-retirement-arrangements> (comparing rollover data in statistical table 1 for IRA plan tax years 2017, 2018, 2019, and 2020); Investment Company Institute, *The Role of IRAs in US Households’ Saving for Retirement, 2022* (Feb. 2022) at 4, https://www.ici.org/system/files/2023-02/per29-01_0.pdf.

⁶ *The Role of IRAs in US Households’ Saving for Retirement, 2022*, *supra* note 5, at 19.

⁷ Proposal at 75,916-17.

B. Rollover Recommendations Have Been Subject to Confusion and Abuse.

NASAA has consistently advocated for stronger investor protections for individuals who are making decisions about how to manage their retirement savings. Often, individuals facing these decisions are nearing the end of their careers. This means that they have a limited amount of time in which to recover potential losses or overcome the burden of excessive fees that may accompany an ill-advised decision to rollover a retirement account.⁸ Further, retirement savings typically make up the bulk of future income for retirees, meaning that the harm from losses are compounded. As the Securities and Exchange Commission (“SEC”) has noted, “[f]or many families, the assets held in IRAs and [defined contribution] plans (typically associated with either a current job or a past job) are among the most important components of their balance sheets and are a key determinant of their future retirement security.”⁹

Our position is based on the observations of state securities regulators who have routinely observed abuse in rollover and account transfer recommendations, “such as in cases where an investor is advised to liquidate a well-balanced portfolio in exchange for an over-concentration in a high-fee product.”¹⁰ DOL referred to similar findings in its 2016 Regulatory Impact Analysis,¹¹ and estimates included in the Proposal showing that conflicted advice can lead to materially less available retirement savings, or the possibility of running out of money years earlier than would be the case of conflict-free advice, are simply alarming.¹²

NASAA therefore agrees with DOL’s assessment that the 1975 rule is underinclusive because it fails to capture many circumstances that would appear to trigger ERISA obligations to an investor.¹³ The general impetus behind recent improvements to registrant conduct standards from the SEC, DOL and state regulators is a common recognition that most investors do not

⁸ Securities and Exchange Commission, *Staff Review of the “Accredited Investor” Definition under the Dodd-Frank Act* (Dec. 14, 2023) (“SEC Staff 2023 Accredited Investor Report”) at 33, <https://www.sec.gov/files/review-definition-accredited-investor-2023.pdf> (stating that “investors who are investing for imminent retirement, or to provide income in retirement, may have a lower risk tolerance than the general population of investors and less ability to bear the burden of potential losses, even where their net worth is substantial. Older investors who are either nearing retirement or have already left the workforce may have a limited ability to recover any investment losses.”).

⁹ See Board of Governors of the Federal Reserve System, *Changes in U.S. Family Finances from 2019 to 2022: Evidence from the Survey of Consumer Finances* (Oct. 2023) at 17, <https://doi.org/10.17016/8799>; see also SEC Staff 2023 Accredited Investor Report, *supra* note 8, at 30 & n.121.

¹⁰ Letter from NASAA President William Beatty to Phyllis C. Borzi re: RIN 1210-AB32 *Definition of the Term “Fiduciary”* (July 21, 2015) at 4, <https://www.nasaa.org/wp-content/uploads/2011/07/2015-07-21-NASAA-Comment-to-DOL.pdf>.

¹¹ Proposal at 75,917.

¹² *Id.*

¹³ *Id.* at 75,899.

understand differences in the standards of conduct between different kinds of advice providers, which can be exacerbated by confusing marketing and disclosures.¹⁴

Unfortunately, that confusion has been exacerbated by the five-part test, with its requirements that a recommendation does not need to adhere to ERISA's standard if such advice is not provided to the investor on a "regular basis," or when there are questions as to whether such recommendations are the "primary basis" for a customer's investment decisions. As DOL notes, without applying ERISA obligations "the advice provider is free to disregard ERISA's duties of prudence and loyalty and to engage in self-dealing transactions that would otherwise be flatly prohibited by ERISA and the [Internal Revenue Code] because of the dangers they pose to plans and plan participants."¹⁵

C. The Proposal Would Strengthen Investor Protections and Reduce the Potential for Improper Rollover Recommendations.

As the Proposal notes, it is intended to promote uniformity among conduct standards by aligning with Regulation Best Interest ("Reg BI").¹⁶ The Proposal would do this by extending the ERISA standard to discrete transactional and account selection recommendations and eliminating carveouts for avoiding the rule. That is a good thing generally because it reduces the impact of investor confusion by making differences in conduct standards between intermediaries irrelevant, at least in the context of retirement investment recommendations covered by ERISA.

One might ask if the Proposal is needed for broker-dealers given that Reg BI applies both to investment selection and account type recommendations. NASAA believes it does. As the Proposal notes, the "primary basis" plank of the 1975 test has "encouraged investment advice providers in the current marketplace to use fine print disclaimers as potential means of avoiding ERISA fiduciary status," and the "regular basis" plank has encouraged advice providers to regard discrete recommendations as not subject to ERISA obligations.¹⁷ The continued existence of these planks, regardless of improvements in standards of conduct elsewhere, could encourage registrants such as broker-dealer agents to find circumstances under which they can claim that they do not have to act in their customers' best interests. In other words, so long as these planks exist, registrants looking to enjoy conflicts will regard the five-part test as textual support for the notion that some recommendations are free from ERISA obligations, especially for transactional and episodic recommendations like those made by broker-dealers. Given that the aim of the Proposal is to align with Reg BI, eliminating these planks will help ensure that no gaps can be perceived or exploited between the two frameworks.

¹⁴ *Id.* at 75,917.

¹⁵ *Id.* at 75,915.

¹⁶ *See id.* at 75,938. In particular, the Proposal defines "recommendation of any securities transaction" in a manner that largely parallels Reg BI. *See id.* at 75,904.

¹⁷ *Id.* at 75,893.

Also, NASAA's experience has been that there are significant disparities in the degree to which firms are implementing Reg BI's requirements. While some firms are enacting and enforcing robust policies meant to strengthen investor protection consistent with the regulation, we have found that a significant number of broker-dealers are moving slowly and reluctantly to implement Reg BI. In particular, in our November 2021 Reg BI Phase IIA examination sweep report NASAA members found, *inter alia*, that the percentage of broker-dealer firms recommending complex, costly and risky products *increased* following the adoption of Reg BI and that approximately two thirds of broker-dealer firms were not discussing lower-cost or lower-risk products with their customers.¹⁸ Add to this the fact that NASAA found that prior to the implementation of Reg BI only 30% of firms had any policies and procedures to guide agents on the proper handling of IRA rollovers.¹⁹ More recently, in our September 2023 Reg BI Phase IIB examination sweep report, NASAA members found that many broker-dealers are still ignoring common lower-cost and lower-risk products when recommending complex, costly, and risky products and are still relying too heavily on financial incentives. The report concluded that more work needs to be done to truly elevate the standard of care for retail customers.²⁰

III. Conclusion

For the reasons explained above, NASAA supports the proposed elimination of the five-part test under the 1975 rule because we believe doing so will curtail the ability of broker-dealers and their agents to engage in regulatory arbitrage when making rollover recommendations. Should you have any questions about this letter, please contact either the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,



Joseph Brady
NASAA Executive Director

¹⁸ NASAA, *Report and Findings of NASAA's Regulation Best Interest Implementation Committee: National Examination Initiative Phase II(A)* (Nov. 2021) at 6, https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf.

¹⁹ Written Testimony of Andrea Seidt, Ohio Commissioner of Securities and NASAA Regulation Best Interest Implementation Committee Chair on Behalf of the North American Securities Administrators Association (Sept. 3, 2020), <https://www.nasaa.org/55674/improving-investment-advice-for-workers-and-retirees/?qoid=testimony>.

²⁰ NASAA, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II(B)* (Sept. 2023) at 3, <https://www.nasaa.org/wp-content/uploads/2023/08/Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf>.