EMPOWER RETIREMENT

August 6, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration
Office of Exemption Determinations
U.S. Department of Labor
200 Constitution Avenue
Washington, DC 20210

Filed Electronically

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

Dear Sir or Madam:

As the second-largest retirement services provider in the U.S. with over 9 million people in the more than 40,000 plans we serve, Empower Retirement appreciates the opportunity to share our comments with the Department of Labor (DOL) Employee Benefit Security Administration with respect to the proposed class exemption from certain prohibited transaction restrictions under the Employee Retirement Income Security Act (ERISA).

We would like to begin by commending DOL on its rule-making efforts. The goal of aligning with the Securities Exchange Commission (SEC) Regulation Best Interest (Reg BI) is particularly welcome. As noted in the preamble to the proposal "…the proposal is designed to promote regulatory efficiencies that might not otherwise exist under the Department's existing administrative exemptions for investment advice fiduciaries."[1]

Similarly, the technical amendment reinstating the "five-part test"[2] as necessitated by the United States Court of Appeals for the Fifth Circuit ruling in *Chamber of Commerce v. Department of Labor* provides clarity. As discussed below, however, we do have some questions regarding DOL's interpretation of some of the prongs under the five-part test.

We appreciate the principles-based approach in drafting the proposed class exemption. We would agree that the proposed exemption provides relief that is broader and more flexible then existing prohibited transaction exemptions covering fiduciary investment advice. Modeling the proposal after Field Assistance Bulletin 2018-02 allows providers to leverage existing processes and procedures and minimize service disruptions. As discussed below, we would like to share thoughts on how the proposal might be improved.

[1] 85 Fed. Reg. 40,836 (July 7, 2020)
[2] 85 Fed. Reg. 40,589 (July 7, 2020)

Interpretation of Five-Part Test

In addition to the proposed class exemption, DOL issued a final technical amendment reinstating the five-part test (test) from the 1975 regulation defining fiduciary status under ERISA.[3] The preamble to the proposed class exemption applies a broad interpretation of when the various prongs of the test are met.

With respect to the requirement that the advice be provided on a regular basis, DOL takes the position that: "advice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider."[4] Similarly DOL takes a broad view of when the mutual agreement prong of the test is met: "the determination of whether there is a mutual agreement, arrangement or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the *reasonable* understanding of each of the parties, if no mutual agreement or arrangement is demonstrated."[5]

These positions would imply that many sales or marketing discussions with an individual concerning the availability of rollover services would satisfy the regular basis and mutual understanding prongs of the test since they could result in an ongoing relationship. This creates a fiduciary relationship between parties in a sales conversation prior to any decision on whether or not to enter into a relationship. This new and broad expansion of a long-standing regulation goes beyond merely reinstating the test and amounts to a reinterpretation of the regulation.

We would also ask for clarification regarding any retroactive effect of the DOL reinterpretation. Is the new interpretation of the 1975 regulation to be applied to all prior interactions? In the preamble DOL notes that the analysis of Advisory Opinion 2005-23A (the Deseret Letter) was "incorrect and that advice to take a distribution of assets from an ERISA-covered Plan is actually to sell, withdraw or transfer investment assets currently held in the plan."[6] It would be helpful to verify that past reliance on the Deseret Letter is not overturned by this new position that DOL has taken.

DOL's reinterpretation of the test also creates uncertainty with respect to plan sponsor and other sophisticated investor interactions and does not harmonize with other regulatory regimes. We are concerned that the new interpretation potentially implicates traditional sales engagements with plan sponsors and wholesaling activities provided to independent fiduciaries with financial expertise.

While DOL seeks to address rollovers specifically, the analysis it uses to expand the "regular basis," "mutual agreement" and "primary basis" prongs can be extrapolated to a number of other conversations, including those outside the traditional individual advice context. As discussed below, the reinterpretation appears to depart from long-held historical interpretations of how the test is applied.

[3] 29 CFR 2510.3-21(c)(1), 40 Fed. Reg. 50,842 (October 31, 1975)
[4] 85 Fed. Reg. 40,839 (July 7, 2020)
[5] 85 Fed. Reg. 40,840 (July 7, 2020)
[6] 85 Fed. Reg. 40,839 (July 7 2020)

In particular, the preamble's description about how one initial rollover transaction can result in a fiduciary relationship can be correlated into a situation in which a Financial Institution conducts a sales conversation with a plan sponsor to provide ongoing plan services. While neither the Financial Institution nor the plan sponsor entered into the sales conversation with a "mutual agreement" that the Financial Institution would act as a fiduciary to the plan sponsor with respect to the conversation, the preamble discussion implies that a mutual agreement can still occur in situations in which an investment advice service is included in the services offered to the plan sponsor. Based on historical interpretations of the test before the preamble, we believe that neither plan sponsors nor Financial Institutions would have considered sales conversations regarding plan services to be fiduciary activity.

Additionally, the preamble discussions make no distinction of instances in which Financial Institutions provide "wholesale" services to non-plan-sponsor independent financial expertise fiduciaries, such as broker-dealers, banks and registered investment advisers. We are concerned that those conversations, as well, could be considered fiduciary advice under DOL's preamble interpretation of the test.

In the preamble to the 2016 final fiduciary rule, DOL generally acknowledged that, subject to reasonable conditions, traditional relationships between Financial Institutions and sophisticated counter parties should not be considered ERISA fiduciary advice. This "Financial Expertise Exclusion" was formally promulgated under § 2510.3-21(c)(1)).[7]

---

[7] Transactions with independent fiduciaries with financial expertise — The provision of any advice by a person (including the provision of asset allocation models or other financial analysis tools) to a fiduciary of the plan or IRA (including a fiduciary to an investment contract, product, or entity that holds plan assets as determined pursuant to sections 3(42) and 401 of the Act and 29 CFR 2510.3-101) who is independent of the person providing the advice with respect to an arm's length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other investment property, if, prior to entering into the transaction the person providing the advice satisfies the requirements of this paragraph (c)(1). (i) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is: (A) A bank as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency; (B) An insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan; (C) An investment adviser registered under the Investment Advisers Act of 1940 or, if not registered an as investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws 199 of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business; (D) A broker-dealer registered under the Securities Exchange Act of 1934; or (E) Any independent fiduciary that holds, or has under management or control, total assets of at least $50 million (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(i)); (ii) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(ii)); (iii) The person fairly informs the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and fairly informs the independent fiduciary of the existence and nature of the person's financial interests in the transaction; (iv) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(iv)); and (v) The person does not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

DOL stated in the 2016 preamble that it "agrees with the commenters that criticized the proposal [referring to the 2015 proposal] with arguments that the criteria in the proposal were not good proxies for appropriately distinguishing non-fiduciary communications taking place in an arm's length transaction from instances where customers should reasonably be able to expect investment recommendations to be unbiased advice that is in their best interest." In further explaining the reformulation of the Financial Expertise Exclusion, DOL went on to say: "Thus, after carefully evaluating the comments, the Department has concluded that the exclusion is better tailored to the Department's stated objective by requiring the communications to take place with plan or IRA fiduciaries who are independent from the person providing the advice and are either licensed and regulated providers of financial services or plan fiduciaries with responsibility for the management of $50 million in assets." Further, "Such parties should have a high degree of financial sophistication and may often engage in arm's length transactions in which neither party has an expectation of reliance on the counterparty's recommendations."

While we believe the Financial Expertise Exclusion could apply to plan sponsors of all sizes, we agree with DOL's 2016 preamble conclusion that traditional "arm's length" sale transactions between Financial Institutions and large plan sponsors do not warrant the additional protections afforded under ERISA. Separately, we strongly concur with DOL's conclusion to carve out Financial Institution traditional wholesaling with financial expert independent fiduciaries, like broker-dealers, registered investment advisers and insurance companies.

Throughout the preamble of the proposal, DOL sought to align the prohibited transaction exemption with the SEC Regulation Best Interest and standard of conduct laws and regulations. We applaud DOL for attempting to harmonize its standard of conduct principles with other regulators in order to avoid a labyrinth of different rules for investment professionals and investors.

However, we are concerned the potential expansion of the test with respect to plan fiduciaries and other independent fiduciaries creates a significant regulatory incongruence.

The SEC sought to protect retail consumers by focusing its rulemaking on recommendations to "natural persons." In turn, the SEC limited the scope of Regulation Best Interest to "retail customers" and clearly distinguished between retirement plan participants and plan sponsors in applying Reg BI protections, specifically: "We also confirm that 'personal, family or household purposes' would cover retirement accounts, as retirement savings is a personal, household or family purpose. Accordingly, the definition of retail customer will include a natural person receiving recommendations for his or her own retirement account, including but not limited to IRAs and individual accounts in workplace retirement plans, such as 401(k) plans and other tax-favored retirement plans."[8]

The SEC further notes: "As such, the Commission *does not believe that workplace retirement plans or their representatives and service providers* (emphasis added) generally fall within the definition of retail customer for purposes of Regulation Best Interest because the workplace

[8] 84 Fed. Reg. (33343) July 12, 2019

retirement plan is not a natural person, and therefore the workplace retirement plan representatives are not a non-professional representative of a natural person that is receiving a recommendation directly from a broker-dealer for 'personal, family, or household purposes.'"[9]

The SEC reiterated its position in the preamble to Form CRS regarding the definition of "retail investor." "Accordingly, the final definition of retail investor does not include most workplace retirement plans *or their plan representatives* (emphasis added) for a plan established, maintained, and operated by an employer to provide pension or retirement savings benefits to employees, because such plans and their representatives are not seeking services primarily for personal, family or household purposes."[10]

States have taken a similar approach to the Securities and Exchange Commission. A number of states have either carved out recommendations to plan sponsors and other fiduciaries or significantly limited the application of the rules to small plan sponsors.

The National Association of Insurance Commissioners (NAIC) and the New York State Department of Financial Services (NYSDFS) both conducted extensive rulemaking over the last few years to heighten standard of conduct requirements for insurance producers. While both the NAIC, in its revised Model Regulation 275, and the NYSDFS, in its amended Regulation 187, substantially updated and enhanced insurance producer standard of conduct and other rules, both kept intact a long-standing principal that any transactions involving group annuity contracts funding employer-sponsored retirement plans are exempt from state insurance standard of conduct regulations.[11]

The Massachusetts Securities Division made a similar distinction as the NAIC and NYSDFS. Earlier this year, the Massachusetts Securities Division finalized its fiduciary regulation for broker-dealers, which imposes a fiduciary regulation on broker-dealer recommendations. However, many institutional investors, including banks, insurance companies, registered investment advisers and broker-dealers, are excluded from the definition of "customer" in the regulation. This exclusion would include large plan sponsors.[12]

The DOL should resolve this issue by providing clear statements in the preamble to the Final Rule that interactions with plan sponsors and other independent fiduciaries are covered under a "hire me" exception. Given DOL's reinstatement and reinterpretation of the test, the preamble discussion in the Final Class Exemption should explicitly clarify that sales discussions between Financial Institutions and plan sponsors and other independent fiduciaries, absent a formal written agreement stating otherwise, are deemed to not meet the test because those transactions are not parties with respect to a mutual agreement to provide advice that will service as the primary basis for investment decisions with respect to a plan.

[9] 84 Fed. Reg. (33344) July 12, 2019
[10] 84 Fed. Reg. (33544) July 12, 2019
[11] 11 NYCRR § 224.2(b) and NAIC Model Laws, Regulations and Guidelines 275-1, § 4
[12] 950 CMR 12.207(3)

Proposed Class Exemption

Exclusion from the Class Exemption

Section I(c) of the proposal specifically excludes certain entities.[13] We do have concerns regarding the staff plan exclusion and the exclusion for investment advice generated from interactive websites or computer-software based programs ("robo-advice").

DOL sometimes excludes retirement plans sponsored by a Financial Institution (so-called "staff plans") from coverage under prohibited transaction exemptions. We understand that applying some exemptions to staff plans presents a unique conflict of interest such that it may be inappropriate from a policy perspective to grant exemptive relief. The proposal excludes staff plans from coverage on these grounds, stating "employers [who are Financial Institutions subject to the proposed exemption] generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards."[14] We believe, however, that DOL concerns in this regard should be limited to instances in which an investment advice fiduciary provides discretionary investment management rather than nondiscretionary investment advice an investor has requested and can independently assess and consider in advance of implementation. Clearly, participants in staff plans can benefit from the types of nondiscretionary advice that can be offered in a streamlined fashion under the exemption, and we believe that the principles-based framework on which the exemption relies can be applied to adequately manage conflicts in the context of a staff plan. A change to this exclusion would also allow staff 401(k) plans to access the same investment advisory service products offered to unrelated client plans. We recommend that the final exemption cover nondiscretionary ERISA investment advice as applied to staff plans.

With respect to robo-advice, the proposal excludes such advice if there is no separate human component available with whom an investor can interact. DOL bases the exemption exclusion on the theory that the exemption landscape for robo-advice has been prescribed by Congress in the form of ERISA section 408(b)(14) and ERISA section 408(g). In our experience, the ERISA section 408(g) exemption is difficult to administer since it requires an advice fiduciary to design investment methodology that meets prescriptive criteria and obtain an annual audit from a third party. We believe future product innovation in the advisory services space would benefit significantly from the flexibility offered by the principles-based structure in the proposed exemption as opposed to the more prescriptive requirements of ERISA section 408(g). Additionally, permitting the exemption to cover pure robo-advice would allow financial institutions to use similar governance, monitoring and control structures (such as those developed to meet Regulation Best Interest requirements) across all of their other advisory service offerings, such as hybrid robo-advice, in-person advice and advisory call centers. This results in economies of scale that can reduce the costs paid by investors for advice.

[13] 85 Fed. Reg. 40,862 (July 7, 2020)
[14] 85 Fed. Reg. 40,841 (July 7, 2020)

Retrospective review

Section II(d) prescribes new responsibilities on a Financial Institution to ensure compliance with the proposed Prohibited Transaction Exemption requirements.[15] We are in full support of a robust, flexible and proactive compliance regime. To that end, retrospective reviews are key components to full compliance. We agree with DOL looking to FINRA Rules 3110, 3120 and 3130 as they represent the most effective and cost-efficient way to implement a retrospective compliance test.

However, under the FINRA program, to the extent specific transactions are identified as non-compliant, the broker-dealer will generally take reasonable steps to equitably correct customer accounts and prospectively remediate the issue through revisions to policies and procedures.

These techniques are workable for FINRA members in most cases because they are principles based. Under ERISA, transactions are prohibited unless a prohibited transaction exemption is met. Similar to the FINRA program, we request that a retrospective review program be accompanied by a reasonable remediation safe harbor for any transaction violations identified in the review.

In addition, we request DOL clarify that any identified transaction violations will not jeopardize the Financial Institution's ability to rely on the Class Exemption for future transactions to the extent the Financial Institution corrects the transactions under the remediation safe harbor and appropriately adjusts its policies and procedures on a prospective basis.

We also have concerns regarding the requirement that the retrospective review be signed by the Chief Executive Officer (CEO). While we agree with the Chief Compliance Officer (CCO) signing the retrospective review certification, we believe requiring the CEO to certify is unnecessary. We assume DOL is using FINRA Rule 3130 as a basis for this requirement. However, there is a material distinction between a CEO formally holding corporate governance responsibilities of a FINRA-member firm versus the DOL establishing firm-level corporate governance through a prohibited transaction exemption. While Financial Institutions should establish compliance procedures and ensure those procedures are accompanied by robust testing and firm accountability, a prohibited transaction exemption should not dictate formal firm-level corporate governance procedures. We are specifically concerned about the unintended consequences of a CEO executing a certification based on a retrospective review that may contain potential prohibited transactions. It is unclear how that certification would be viewed in conjunction with other financial certifications the CEO provides on behalf of the entire company.

To the extent DOL concludes the CEO must execute the certification, we believe it is critical that the certification only apply to the prospective application of revised policies and procedures that are based on findings in the retroactive review.

[15] 85 Fed. Reg. 40,863 (July 7, 2020)

IRA/Rollover documentation requirements

Section II(c)(3) of the proposed exemption requires the Financial Institution to document the specific reasons that a recommendation to roll over funds from an employee benefit plan to another plan or an IRA is in the best interest of the investor. In the Preamble, DOL notes that for purposes of complying with the exemption, a prudent recommendation would "necessarily include" consideration and documentation of several specific factors.[16] We agree that it is important to consider and document the factors for a rollover recommendation. But we believe such factors are variable and will depend on the particular facts and circumstances and arrangement. For example, the set of factors considered for a rollover from a plan to an IRA are different for a participant who is at or near retirement versus a participant who is in the earlier stages of their career. Accordingly, we request that DOL revise the language in the Preamble to provide that the factors ***"may include"*** the list in the Preamble and that financial institutions must carefully determine the appropriate factors to be considered depending on the facts and circumstances of particular investors.

Transition from FAB 2018-02.

We request that DOL clarify the status of the temporary enforcement policy stated in Field Assistance Bulletin (FAB) 2018-02. FAB 2018-02 provides that financial institutions providing fiduciary investment advice may rely on the temporary enforcement policy, and DOL will not pursue claims against investment advice fiduciaries who comply with the impartial conduct standards of the Best Interest Contract Exemption "until after regulations or exemptions or other administrative guidance has been issued." In the Preamble to the proposed exemption, DOL states: "The temporary enforcement policy stated in FAB 2018-02 remains in place." We request that DOL clarify these two separate statements.

Financial institutions currently relying on FAB 2018-02 to provide fiduciary investment advice will require a reasonable transition period after the issuance of a final exemption to update their policies, procedures and materials to comply with the final exemption. During the transition period, the financial institutions will continue to rely on FAB 2018-02 to provide fiduciary investment advice services. We request that DOL confirm that financial institutions that provide fiduciary investment advice may continue to rely on FAB 2018-02 during a transition period after the final exemption is issued.

Account monitoring

In the Preamble to the proposed exemption, the Department notes that "neither the best interest standard or any other condition of the exemption would establish a monitoring requirement."[17] But DOL then subsequently provides that "Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests."[18]

[16] 85 Fed. Reg 40,845 (July 7, 2020)
[17] 85 Fed. Reg. 40,843 (July 7, 2020)
[18] Ibid.

As DOL may be aware, many financial institutions provide different investment advice services for varying costs. Generally, investment advice that includes account monitoring is provided by a registered investment adviser for an ongoing fee whereas an individual “point-in-time” investment recommendation that does not include continuous monitoring and additional cost may be provided by a broker-dealer. This structure dovetails with the SEC’s recent interpretative guidance regarding the “solely incidental” exception in the Investment Advisers Act of 1940.[19] If a broker-dealer has an obligation under ERISA to monitor an account, the broker-dealer may not be able to avail itself of the solely incidental exception, and the broker-dealer may subject itself to regulation under the Investment Advisers Act of 1940. We believe that financial institutions, including broker-dealers, should be able to offer and provide individual point-in-time investment recommendations to retirement investors without requiring ongoing monitoring if it is clearly disclosed to the investor that the financial institution will not monitor the investor’s account.

If DOL intends to maintain the monitoring requirement for complex and risky investments in the final exemption, then we request that DOL provide guidance regarding what types of investments would require monitoring and include specific examples.

We appreciate the opportunity to provide our thoughts and comments. Again, we commend DOL on its overall approach in the proposal, and we would welcome any opportunity to discuss our comments.

Sincerely,

Edmund F. Murphy III, President & CEO
Empower Retirement | Great-West Life & Annuity

8515 E. Orchard Rd. | Greenwood Village, CO 80111
empower-retirement.com

For important disclosures and product information, click here.

[19] 84 Fed. Reg. 33,681 (June 5, 2019)