

THE
NEW ENGLAND
COUNCIL

August 6, 2020

The Honorable Eugene Scalia
Secretary of Labor
Department of Labor
200 Constitution Ave. NW
Washington, D.C. 20210

RE: Docket ID Number: EBSA-2020-0003

Dear Secretary Scalia:

On behalf of The New England Council —the nation’s oldest regional business association— I write to you today regarding the Department of Labor’s (DOL) recent proposed rule titled “**Improving Investment Advice for Workers & Retirees - EBSA-2020-0003.**” The financial services industry is a vital part of our region’s economy and we appreciate your consideration of the Council’s comments during this rule making process.

The New England Council is a non-partisan alliance of businesses, academic and health institutions, and public and private organizations throughout New England formed to promote economic growth and a high quality of life in the New England region. Our Financial Services Committee is representative of the industry as a whole, with members including large investment banks, community banks, credit unions, investment management firms, insurance companies, and accounting firms. Many of these institutions will be directly impacted by this proposed exemption, benefiting the work that they do daily on behalf of their clients.

The Council is proud of its member companies in the financial services industry, and we know that they strive every day to put their customers first when providing investment and financial advice. We believe that the proposed exemption will allow our members to offer a wider range of investment advice to their clients, ensuring that such advice is in the clients’ best interest. Fiduciaries who seek to provide investment advice for a fee or engage in certain principal transactions with plans will also see significant benefits as a result of this exemption.

The New England Council and our financial services members request that you consider the following comments during your review process, knowing that our members' expertise will be beneficial to any changes made to this proposed exemption:

Five-Part Test for Status as an Investment Advice Fiduciary – The Council applauds the reinstatement of the original five-part test for fiduciary status as set forth in the Employee Retirement Income Security Act of 1974 (ERISA). The reinstated regulation will continue to properly define investment advice subject to ERISA. However, we are concerned that the preamble of the proposed exemption significantly alters the interpretation of the reinstated five-part test in a manner that could harm the ability of millions of Americans to access investment guidance and education.

In particular, the new interpretation of the “regular basis” prong of the five-part test uproots the Department’s decades long view and vastly expands the coverage of the rule to advice, guidance, and education for which no relationship of trust and confidence exists. This is also contrary to the ruling of the 5th Circuit Court of Appeals. Specifically, an “anticipated relationship” with a retirement saver following a rollover recommendation may now trigger fiduciary status, despite not having an established ongoing relationship at the time of the initial discussion. We believe it is incorrect to assert that, due to the amount of transactions or the longevity of a relationship, that a fiduciary relationship exists and ask that the preamble language be removed in the final rule.

Fiduciary Investment Advice Concerning Rollovers from Employee Benefit Plans to IRAs – The Council believes that advice to rollover investments from an Employees Benefit Plan to an Individual retirement account (IRA) should be considered investment advice and such advice is fiduciary in nature, and therefore subject to ERISA’s fiduciary requirements the Code, if each component of the five-part test described above is satisfied with regard to the person providing the advice.

Best Interest Standard – The Council supports the inclusion of the best interest standard in the new proposed class exemption, and we further support that standard being aligned with the conduct standards in the Securities and Exchange Commission's Regulation Best Interest and the fiduciary duty of registered investment advisers under securities laws.

Additional Comments on the Proposed Exemption

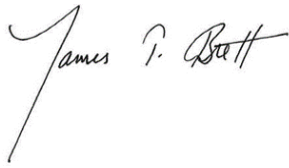
- The exemption requires that the financial professional and the firm provide written notice to the retirement saver that they are acting as a fiduciary. It may not be clear to us at the time of disclosure whether we and/or the financial professional are acting as a fiduciary.
- The exemption requires an annual CEO certification regarding policies and procedures, etc. We believe this is more appropriate for the Chief Compliance Officer, who is closer to these matters, and not appropriate for the CEO.

Ultimately, it is important that any final rule achieve a balance between protecting investors and financial consumers from unscrupulous actors and ensuring that those consumers have access to the types of retirement products, education, and advice that can help them achieve the American dream. As

such, we hope that, prior to issuing a final rule, you will thoroughly examine all comments on these issues and work with all stakeholders – particularly those in the financial services industry charged with providing advice to Americans – to make any necessary and productive changes that will assuage these concerns and ensure that the rule is workable for all parties involved.

We thank you for your consideration of the concerns laid out in this letter, and we look forward to continuing to work with you on this important matter. If you have any questions regarding this letter, please contact me at 617-723-4009.

Sincerely,

A handwritten signature in black ink that reads "James T. Brett". The signature is written in a cursive style with a large, sweeping initial "J".

James T. Brett

President & CEO

CC: New England Congressional delegation