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August 6, 2020

*Via:* https://www.regulations.gov and e-mail

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Application No. D-12011
ZRIN 1210-ZA29
Improving Investment Advice for Workers & Retirees
Docket ID #: EBSA-2020-0003

Dear Acting Assistant Secretary Wilson:

I am writing to express my strong opposition to the new Proposed Class Exemption and related rulemaking on investment advice. These rules would put the retirement security of millions of American workers and retirees at risk by exposing them to conflicted retirement investment advice with little or no meaningful protection to limit the harmful impact of those conflicts of interest. I therefore urge you to rescind the Proposed Class Exemption along with the related rulemaking. Instead, the Department of Labor (DOL) should begin the rulemaking anew to ensure that the retirement savings of ERISA plan participants and their families are protected.

## I. Statement of Interest

I am a partner at Kantor & Kantor in Northridge, California, where I represent plan participants in a variety of ERISA matters. Prior to joining Kantor & Kantor in 2018, I worked as an attorney for DOL for over three decades in Washington, D.C. and then in Los Angeles, California. During most of that time, I worked for the Plan Benefits Security Division of the Solicitor's Office, where my work involved ERISA litigation, regulations and advice.

I am very familiar with the issues addressed in the proposed Exemption and related regulations. Toward the end of my career at DOL, I worked on the litigation defending the prior version of the fiduciary investment advice regulations. Those regulations were the culmination of many years of study, and were well designed to protect plan participants from conflicted and self-serving investment advice. These regulations are not.

## II. Background

For many people, the account balance in their 401(k) plan or Individual Retirement Account (IRA) represents their most valuable asset and the bulk of their personal savings. The very "crucible of congressional concern" in enacting ERISA was to protect the retirement security of American workers by ensuring that these retirement savings are managed prudently and solely in their interests. Congress recognized that self-dealing always injures participants and beneficiaries, and for that reason categorically prohibited all such transactions.[1] Because conflicted investment advice is unequivocally self-dealing, it is prohibited under ERISA's prohibited transaction rules. The proposed Exemption waters down these prohibitions, and thereby undermines rather than furthers ERISA's protective goals.

## III. The Proposed Exemption Does Not Adequately Protect Plan Participants and Beneficiaries from the Conflicted or Self-Dealing Advice.

### A. The Exemption Inappropriately Adopts SEC Regulations Governing Conflicted and Self-Dealing Advice Given to Retail Investors, Contrary to ERISA's Imposition of the Highest Level of Fiduciary Duties and Far More Protective Scheme With Respect to ERISA Plan Participants.

In enacting ERISA, Congress recognized that existing state and federal laws were inadequate to protect pension plan participants and beneficiaries.[2] For this reason, Congress imposed the highest fiduciary standards, drawn from the trust law,[3] on all those who manage and administer ERISA plans, including those hired to give investment advice to pension plans and their participants.

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[1] *Comm'r v. Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993).
[2] *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S.359, 375 (1980).
[3] H.R. Rep. No. 93-533, reprinted at 1974 U.S.C.C.A.N. 4639, 4642.

This proposed Exemption undermines these protective goals by improperly deferring to the marketplace standards expressed in Securities and Exchange Commission's (SEC's) Regulation Best Interest (Regulation B-I). In adopting this regulation, the SEC explicitly acknowledged that it was not imposing a fiduciary standard. Indeed, under Regulation B-I's non-fiduciary "best interest" standard, the brokers have no obligation to recommend the investments they reasonably believe are the best available option for the investor. Instead, they have largely unfettered discretion to decide for themselves how to comply with the best interest standard. This is weak tea and is wholly inadequate to accomplish ERISA's protective aims.

In adopting this standard for investment advice in the ERISA plan context, the Exemption completely ignores ERISA's strict loyalty standards, which require investment advisors and other fiduciaries to act under a strict standard of prudence and solely in the interests of plan participants and beneficiaries. To add insult to injury, DOL has extended the weak and largely unenforceable "best interest" standard beyond the securities brokers governed by the SEC rule to all types of investment advisers and products, including to those selling insurance products, such as variable annuities.

The purpose of ERISA was to provide more protection for participants than state and federal law did at the time of ERISA's enactment.[4] Accordingly, using securities regulations to define the limits of fiduciary duties with respect to conflicted investment advice simply fails to provide adequate, higher-than-marketplace protection to workers and their families whose retirement security depends on the adequacy of their investments.

### B. The Proposed Exemption Provides Inadequate Protection to Plan Participants and Beneficiaries.

The Proposed Exemption is inadequate to protect participants and beneficiaries from the injury that conflicted investment advice causes, for a number of reasons.

First, the Exemption's reasonable compensation requirement do not adequately protect pension plan participants and beneficiaries. It does not require the adviser to recommend investments with the lowest fees, does not require the adviser to explain to the retirement saver why the adviser is recommending an investment that generates more compensation for the adviser, and does not provide a standard by which to measure reasonable compensation.

[4] 29 U.S.C. § 1001.

Second, the Exemption does not specifically include omissions in the "materially misleading statements about the investment transaction and other relevant matters" that the exemption prohibits. Omissions can be just as misleading as affirmative statements, as numerous cases, including *Varity, Amara,* and *Footlocker*, illustrate, and can have just as devastating an impact on the retirement savings of plan participants.

Third, the Exemption only requires the advisor to make two disclosures before engaging in transactions that would otherwise be prohibited: (1) an acknowledgement that the adviser is a fiduciary; and (2) a written description of services to be rendered and the material conflicts of interest of the adviser. Given the critical nature of this advice for workers and their families in planning for retirement, these disclosures are not adequate.[5]

To the contrary, the Exemption as proposed permits the "fox to guard the henhouse." It envisions a self-regulatory regime under which investment advisers and the institutions for whom they work themselves establish impartial conduct policies and procedures. Under these self-adopted policies, the advisors need not disclose the financial conflicts under which they are operating. The Exemption provides no substantive direction concerning the content of these self-imposed policies and procedures, but merely unhelpfully states that the procedures must be prudent. Furthermore, by requiring advisers to assure plan participants that they are acting as fiduciaries, it is likely that, far from protecting plan participants, the Exemption actually will do little more than lull participants into a false sense of security with respect to the advice they receive.

For an exemption to be protective of participants and beneficiaries, more is required than a mere precatory description of required conduct. Congress recognized in ERISA that where fiduciaries engage in conflicted and self-dealing transactions involving pension plans, prohibition, not self-regulation, is in order.

Finally, for those millions of Americans who save for retirement through IRAs, the Proposed Exemption provides no meaningful enforcement mechanism for IRA holders. IRA investors who are financially harmed by conflicted investment advice would have no recourse and no ability to recover their losses. Neither advisers nor their firms will have any incentive to comply with the Exemption's requirements when advising IRA investors. There is no downside for them to act completely in their own interests, even when those interests are completely antithetical to those of the plan participants.

[5] In its 2016 Regulatory Analysis, DOL found that disclosures alone were ineffective to mitigate the impact of conflicted advice.

The Proposed Exemption fails to adequately mitigate the harmful effects caused by conflicted and self-dealing investment advice. Essentially, the DOL is giving a green light to most conflicted practices and providing little or no protections for participants and beneficiaries.

## IV. The Secretary of Labor, Who Represented Private Parties in Litigation Challenging the Former Investment Advice Regulations, Should Take No Further Part in This Rulemaking Process.

While in private practice prior to being appointed Secretary of Labor, the Secretary represented the United States Chamber of Commerce in litigation challenging the prior regulations governing fiduciary advice. This court challenge was ultimately successful and resulted in a Fifth Circuit decision striking down the regulations. *Chamber of Commerce of U.S. of Am. v. U.S. Dep't of Labor*, 885 F.3d 360 (5th Cir. 2018). Many of the issues that the Chamber of Commerce challenged with respect to the prior regulations have now been resolved in the proposed Exemption in a manner far more favorable to the Chamber of Commerce.

All federal employees operate under ethics regulations known as the *Standards of Ethical Conduct for Employees of the Executive Branch* that are set forth in 5 C.F.R. Part 2635. Among other things, these standards require federal officials to take "appropriate steps to avoid any appearance of loss of impartiality in the performance of your official duties." 5 C.F.R. § 2635.502. Under this regulation, even where the official is not operating under a financial conflict of interest prohibited under 18 U.S.C. § 208, these "ethics regulations require all employees to recuse themselves from participating in an official matter if their impartiality would be questioned." 5 C.F.R. § 2635.502. These ethical standards, particularly the regulation on impartiality, are especially important for high government officials, such as agency heads.

Under the impartiality regulation, the Secretary should recuse himself from further participation in this rulemaking. Given that the subject matter is precisely the same as in the suit challenging the more participant-protective regulations, the Secretary's role in that suit calls into question his impartiality in this rulemaking.

## Conclusion

By limiting the entities and individuals who would be considered fiduciaries, exempting those that meet the narrowed fiduciary definition from prohibitions that would otherwise apply, and providing little in the way of protections, the Department has given cover to advisors who operate under financial conflicts to act in a way that promotes their own interests at the expense of participants planning for retirement. The Department should rescind the rulemaking package and begin anew.

I appreciate the opportunity to share my views on these important issues to ensure that participants and beneficiaries have the information they need to make informed decisions about their retirement benefits. If you have any questions, please feel free to contact me (818) 886-2525 or ehopkins@kantorlaw.net.

Sincerely,

Elizabeth Hopkins