August 6, 2020

Via Federal eRulemaking Portal

Office of Exemptions Determinations
Employee Benefits Security Administration
U.S. Department of Labor
Federal eRulemaking Portal
Application No. D-12011

Re: Improving Investment Advice for Workers and Retirees (Docket ID number: EBSA-2020-0003)

To Whom It May Concern:

On July 7, 2020, the Department of Labor ("DOL") published its request for public comment on an ERISA proposed class exemption entitled Improving Investment Advice for Workers & Retirees (the "Proposed Exemption").[1] In addition, the DOL issued a technical amendment that restored to the Code of Federal Regulations its 1975 investment advice regulation (consisting of a five-part test to determine when a person is acting as an ERISA investment advice fiduciary) and its 1996 investment education guidance ("Technical Amendment"). In the preamble to the Proposed Exemption, the DOL also indicates that its 2005 Advisory Opinion on rollover advice is no longer valid and that investment advice fiduciaries who recommend a rollover from an employee benefit plan are subject to the fiduciary duties imposed by Title I of ERISA as well as the prohibited transactions provisions in Title I and the Internal Revenue Code of 1986 (the Code).

The Bank, Insurance, and Securities Association ("BISA") appreciates the opportunity to respond to this request for comment.

OVERVIEW OF BISA

BISA is the leading financial services industry association dedicated to serving those responsible for the marketing, sales, and distribution of securities, insurance, and other financial products and advisory services through the bank channel. Member companies include depository institutions of all sizes from all regions across the United States, their broker-dealer and mutual fund subsidiaries, third-party marketing companies, product manufacturers, and firms providing products, technology, and services to support these enterprises. Our members are deeply intertwined with the distribution of securities products through bank-affiliated broker-dealers, and are constructively involved in enhancing the financial security of working Americans and retail investors.

BISA and its member companies generally support the DOL's Proposed Exemption that would enable investment advice fiduciaries, including registered broker-dealers and investment advisers, to continue providing their essential services to retirement investors while receiving a broad range of otherwise prohibited compensation types and payments from third parties in connection with transactions involving employee benefit retirement plans and retirement accounts and annuities. BISA also supports the flexibility of the Proposed Exemption, as it

[1] Dep't of Labor, "Improving Investment Advice for Workers and Retirees," 85 Fed. Reg. 40834 (July 6, 2020), *available at* https://www.federalregister.gov/documents/2020/07/07/2020-14261/improving-investment-advice-for-workers-and-retirees.

generally aligns with the standard of care imposed by the U.S. Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI"), which took effect from a compliance standpoint on June 30, 2020.[2] In BISA's view, the Proposed Exemption has been purposefully and carefully constructed, offers a workable uniform fiduciary standard of conduct that is business model neutral and doesn't negatively impact the bank-affiliated brokerage business model, and protects affordable choices for investors among financial professionals.

However, BISA does have certain concerns with the Proposed Exemption, and offers the following suggestions and comments to improve and enhance the Proposed Exemption. The comments set forth below in this letter address BISA's main concerns with the Proposed Exemption. We would be happy to meet with the DOL to discuss BISA's concerns in greater detail.

BISA COMMENTS

<u>The DOL Should Eliminate the "Fiduciary" Acknowledgement Requirement</u>

As with any class exemption, the Proposed Exemption sets forth a number of conditions for relief, including, among other things, the provision of certain advanced written disclosures to retirement investors. These written disclosures are generally intended to align with disclosures required by the financial institution's primary regulator (e.g., the SEC's Reg BI disclosure requirement), but would also require acknowledgement that the financial institution and its financial professionals are fiduciaries under ERISA and/or the Code.

BISA is concerned that the "fiduciary" status disclosure required by the Proposed Exemption is misleading and will cause investor confusion, particularly since the disclosures provided by Reg BI explain that broker-dealers are obligated to act in the investor's "best interest." By using the term "fiduciary," such disclosure suggests that the standard of conduct imposed on financial institutions and financial professionals by the Proposed Exemption is something more or different than the best interest standard outlined in Reg BI and incorporated into the Proposed Exemption. The DOL should consider eliminating this fiduciary disclosure obligation to avoid misleading investors.

<u>Fiduciary Investment Advice Does Not Perfectly Overlap with the Scope of Reg BI</u>

BISA's membership may have interactions with retirement investors that would be deemed "fiduciary investment advice" for purposes of ERISA, but would be outside the scope of Reg BI. For instance, fiduciary investment advice provided to plan sponsors outside the participant setting, or advice that does not involve a securities transaction or recommendation of an investment strategy would not be covered by Reg BI's standard of care.

As a result of the fact that fiduciary investment advice does not perfectly overlap with Reg BI, financial institutions relying on the Proposed Exemption will need to enhance their policies and procedures adopted pursuant to Reg BI to encompass these additional interactions that are outside the scope of Reg BI. Although these enhancements may be modeled on Reg BI, financial institutions will need variations in their Reg BI procedures because Reg BI is focused around retail investors and the interactions contemplated by the Proposed Exemption may be broader than such retail-focused investment recommendations. We recommend that the DOL

---

[2] *See* "Regulation Best Interest: The Broker-Dealer Standard of Conduct," SEC Release No. 34-86031 (June 5, 2019), *available at* https://www.sec.gov/rules/final/2019/34-86031.pdf.

acknowledge the need for such variations in the final version of the Proposed Exemption adopted by the DOL.

The DOL Should Clarify its Treatment of "Hire Me" Interactions

We note that in the preambles to the Technical Amendment and Proposed Exemption, the DOL articulates a novel interpretation of the "regular basis" prong of the five-part test for determining investment advice fiduciary status. We share the concerns being expressed by many other commenters about the workability of this interpretation. Otherwise, however, we note that the preamble does not include any direct discussion of the treatment of "hire me" or other "gating" interactions with retirement investors. Discussions with retirement investors prior to opening an account are a necessary part of the retirement investor being able to explore and compare who to hire to eventually provide investment advice, and therefore are not themselves the provision of investment advice. We ask that the DOL confirm that financial professionals would not become investment advice fiduciaries under the five-part test when engaging in these "hire me" or "gating" interactions.

The Proposed Exemption Should be Effective on Publication

The Proposed Exemption should be effective on the date of its publication in the Federal Register. Since many BISA members are already relying on Reg BI and have already successfully implemented Reg BI compliance programs and disclosure documents, these same financial institutions should be permitte to rely on the Proposed Exemption in less than 60 days after publication in the Federal Register. In addition, these financial institutions may require immediate exemptive relief in light of the DOL's new interpretation of the five-part test, particularly as applied to rollovers as investment advice. Consequently, we urge the DOL to make the Proposed Exemption effective upon publication in the Federal Register.

* * * * *

On behalf of BISA and its member companies, we thank you for considering these comments. We would welcome the opportunity to discuss these comments and engage in a productive dialogue with the DOL on these important issues.

Respectfully submitted,

Bank Insurance & Securities Association

BY:
Jeff Hartney, Executive Director