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July 30, 2020

Office of Exemption Determinations
Department of Labor
Employee Benefits Security Administration
200 Constitution Ave, NW
Washington, DC 20210

RE: Application No. D-12011, ZRIN 1210-ZA29, Proposed Exemption, entitled
“Improving Investment Advice for Workers & Retirees”

Dear Sir or Madam:

On behalf of a group of firm clients, including brokerage firms, mutual funds, insurance companies, asset managers, and banks, we are writing to request (1) a hearing on the proposed exemption, entitled “Improving Investment Advice for Workers & Retirees,” ZRIN 1210-ZA29, and (2) the opportunity to testify at the hearing.

We will present the following at the hearing, as more fully discussed in our comment letter also submitted today.

- In brief, the preamble to the proposed exemption attempts to rewrite the five-part test for determining fiduciary investment advice by (1) effectively eliminating three core parts of the test – the mutual understanding, primary basis, and regular basis tests, and (2) thus effectively reinstating the invalidated 2016 fiduciary definition. Moreover, because the preamble purports to be interpreting present law, these changes are fully retroactive for all past years back to the 1970s.
- Because these invalid changes would attempt to effectively resurrect the 2016 fiduciary definition, they are in stark violation of (1) the Fifth Circuit decision¹ that voided the 2016 definition of a fiduciary and reinstated the original five-part test, (2) the Administrative Procedure Act, (3) the President’s 2017 Fiduciary Duty Rule Memorandum, and (4) the regulatory policies and instructions announced in at least three Executive Orders issued by this Administration.
- The reinstatement of the 2016 rule would trigger the same damage done by the 2016 rule, as documented in our comment letter.

¹ *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F. 3d 360 (5th Cir. 2018).

- We are also extremely concerned about the retroactive revocation of Advisory Opinion 2005-23A. By declaring the analysis incorrect and withdrawing the Opinion on June 29, 2020, DOL is announcing that the Opinion is and has always been inconsistent with ERISA. This is not only stunningly unfair, but it is also inconsistent with the prospective way that this issue was handled in 2016.
- We ask that the final exemption (1) repudiate the preamble language in the proposed exemption regarding the interpretation of the five-part test, and (2) otherwise stay silent on the interpretation of the five-part test. The five-part test has been in effect for over 40 years and no additional guidance is needed on it. We also ask that any modification of the position taken in Advisory Opinion 2005-23A be done through a prospective regulatory process as was done in 2016.
- Contrary to the preamble statement, the exemption requirement to acknowledge fiduciary status would unnecessarily trigger new liabilities and private rights of action.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kent A. Mason".

Kent A. Mason