



August 6, 2020

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

Re: Proposed Class Exemption “Improving Investment Advice for Workers and Retirees” (Docket ID: EBSA-2020-0003)

Ladies and Gentlemen:

The American Securities Association¹ welcomes the opportunity to comment on the proposed class exemption issued by the Department of Labor (“Department”) related to standards of conduct for financial professionals (“Proposal”). The Proposal is intended to provide regulatory certainty in the wake of the U.S. Court of Appeals for the Fifth Circuit vacating the Department’s 2016 fiduciary rule (“2016 Rule”) and the Securities and Exchange Commission’s (“SEC”) national Best Interest Standard regulation (“Reg BI”).

Reg BI is a strong national standard that includes significant investor protections and establishes clear rules for broker-dealers, without crippling business models that have served investors well for years. A national standard established by a regulator with expertise in the securities markets is all the more urgent given efforts by several states to impose their own varying standards on broker-dealers and investment advisers.

The Proposal represents an important opportunity to avoid a conflicting and costly regulatory framework that could harm investors. While the ASA supports many aspects of the Proposal and appreciates the Department’s efforts to align certain standards under the Employee Retirement Income Security Act (“ERISA”) with Reg BI, certain provisions could limit the usefulness of the class exemption and increase litigation risk for financial professionals. Accordingly, we believe the changes outlined below should be incorporated into a final rulemaking to avoid this outcome:

¹ The ASA is a trade association that represents the retail and institutional capital markets interests of regional financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The ASA’s mission is to promote trust and confidence among investors, facilitate capital formation, and support efficient and competitively balanced capital markets. This mission advances financial independence, stimulates job creation, and increases prosperity. The ASA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.





- **The Proposal should make explicit that the ERISA “five-part test” will be consistent with the Fifth Circuit’s opinion regarding the 2016 Rule.** The Proposal’s preamble appears to include an interpretation of the five-part test that has traditionally determined whether someone is a fiduciary under ERISA. For example, under the Proposal the “regular basis” prong of the five-part test could be reinterpreted to apply to episodic recommendations. This would be a significant departure from Department precedent, as the requirements of ERISA have typically only applied to ongoing monitoring of portfolios and investment recommendations.
- **Requiring broker-dealers to disclose “fiduciary” status under the PTE is unnecessary and could have adverse impacts.** Those who rely on the proposed class exemption must acknowledge in writing that they are a fiduciary which would render the five-part test irrelevant. The Proposal states that disclaimers related to a mutual understanding about whether advice will be the primary basis for investment decisions are not determinative, only that they will be considered in determining whether or not a mutual understanding exists. This adds unnecessary subjectivity and complexity, and the Proposal does not specify the types of relationships to which this standard will apply (e.g. brokerage versus advisory). The written affirmation requirements would also create confusion in light of SEC Form CRS requirements which mandate that broker-dealers disclose they are subject to the SEC’s best interest standard whereas investment advisors are required to disclose that they are a “fiduciary.” Given these concerns, we strongly urge the Department to avoid adopting any standards that are contrary to the Fifth Circuit’s ruling and would create new requirements that are in serious conflict with Reg BI.
- **The Department should not adopt standards for broker-dealers that have been considered and rejected by the SEC.** The preamble to the Proposal states that “When financial services professionals make recommendations to a Retirement Investor, particularly to a best interest standard such as the one in the SEC’s Regulation Best Interest...the advice will serve as at least a primary basis for the investment decisions.” This would appear to apply an ERISA-like fiduciary standard to certain broker-dealer activities – an outcome that the SEC specifically avoided when promulgating Reg BI. We believe that a final rule should not include any language that could be interpreted as applying new standards to broker-dealers that are already complying with Reg BI.
- **The impartial conduct standards outlined in the Proposal should embrace the standards set by Reg BI.** The Proposal’s impartial conduct standards are a vast improvement over legally flawed “best interest contract exemption” that was included as part of the 2016 Rule. Aspects of the impartial conduct standards align with Reg BI,





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Given these concerns, the ASA recommends that the Proposal be modified to explicitly state that financial professionals already in compliance with Reg BI would satisfy all of the requirements of the impartial conduct standards.

We believe that the preamble to the Proposal indicates the Department's intent is to align its standards with that of the SEC, but remain concerned that some of the differences noted above – if interpreted differently by the Department in the future – could create conflicting requirements for broker-dealers, investment advisers, and other financial providers that would ultimately harm retail investors. In particular, we are concerned that Department's proposal has the potential to create patchwork compliance requirements and increased legal exposure that could result in firms and their financial professionals favoring investment advisory arrangements, thus limiting access and choice for investors whose best interests may be served best by a brokerage account. Allowing substitutability for compliance for those already in compliance with Reg BI will prevent this outcome.

We thank the Department for their efforts on this critical issue and look forward to working with you as this initiative moves forward.

Sincerely,

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