

August 6, 2020

Filed electronically at <http://www.regulations.gov> (Docket ID EBSA-2020-0003; Application No. D-12011)

Office of Exemption Determinations
Federal eRulemaking Portal: www.regulations.gov
Docket ID number: EBSA 2020-0003

**Re: Improving Investment Advice for Workers & Retirees
Application No. D-12011 (ZRIN 1210-ZA29)**

This letter is submitted on behalf of the Defined Contribution Institutional Investment Association (“DCIIA”). We appreciate the opportunity to comment on the Department’s Request for Information on the “Improving Investment Advice for Workers & Retirees” prohibited transaction class exemption (the “Proposed Exemption”). In fact, the goal expressly stated in the Proposed Exemption’s title, to “improve investment advice for workers & retirees,” parallels DCIIA’s mission—enhancing the retirement security of America’s workers.

Members of the DCIIA community, which include leading recordkeepers, investment consultants and advisers, investment managers, education and advice providers, trustees and custodians, law firms, plan sponsors and other industry participants, support initiatives that expand access to retirement savings and enhance retirement security. DCIIA also believes that fiduciary rulemaking should promote good actors (those motivated to help plan participants achieve positive outcomes) to take action, including implementing innovative solutions to seek to improve retirement investors’ probability of a successful retirement.

We appreciate the Department’s efforts to confirm the impact of the vacatur to eliminate uncertainty, including to:

- reinstate Interpretive Bulletin 96-1 which has been relied on heavily by plan fiduciaries and industry participants alike to deploy investment and retirement saving education to retirement plan participants;
- confirm the removal and inapplicability of the Best Interest Contract Exemption and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, and formally rescind the amendments

to Prohibited Transaction Class Exemptions (PTEs) 75-1, 77-4, 80-83, 83-1, 84-24 and 86-128, to restore the exemptions to their prior state; and

- confirm that the temporary enforcement policy announced in Field Assistance Bulletin 2018-02 may continue to be relied on.

We also thank the Department for its attempt to harmonize its new rulemaking,¹ specifically the Proposed Exemption, with the Securities and Exchange Commission’s (“SEC”) recently finalized regulatory package relating to conduct standards for broker-dealers and investment advisers.² DCIIA agrees with the Department on the importance of harmonizing regulatory rules and other guidance to facilitate consistency of regulatory and enforcement measures adopted by the Department and the SEC.

We anticipate that members of the DCIIA community will provide detailed comments on, and fully develop the record regarding the potential impacts of, the specific provisions in the Proposed Exemption. Therefore, DCIIA’s comments will focus more narrowly on concerns we have heard from our members regarding the impacts of the Department seeking to provide guidance through the Preamble of the Proposed Exemption.

As a general matter, members of the DCIIA community are concerned that the Department has, by including critical guidance in the Proposed Exemption’s Preamble instead of using a more formal mechanism, created a paradigm that will make it unnecessarily challenging for fiduciaries and other market participants to innovate. For example, the Preamble includes critical commentary on both the “regular basis” component (specifically with regard to whether advice to roll assets out of a plan is part of an ongoing advice relationship or in circumstances where advice is provided at the start of a potential advice relationship), and the “primary basis” component (in

¹ “The standard is to be interpreted and applied consistent with the standard set forth in the SEC’s Regulation Best Interest and the SEC’s interpretation regarding the conduct standard for registered investment advisers.” Improving Investment Advice for Workers & Retirees, 85 FR 40842-40843, available at <https://www.govinfo.gov/content/pkg/FR-2020-07-07/pdf/2020-14261.pdf>. See also Improving Investment Advice for Workers & Retirees Fact Sheet, Department of Labor, available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/improving-investment-advice-for-workers-and-retirees> (last visited July 22, 2020).

² The regulatory package consisted of Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019) available at <https://www.federalregister.gov/documents/2019/07/12/2019-12164/regulation-best-interest-the-broker-dealer-standard-of-conduct>; Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019) available at <https://www.federalregister.gov/documents/2019/07/12/2019-12208/commission-interpretation-regarding-standard-of-conduct-for-investment-advisers>; and Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019) available at <https://www.federalregister.gov/documents/2019/07/12/2019-12376/form-crs-relationship-summary-amendments-to-form-adv>.

seeking to distinguish between the need for something to be “a” primary basis instead of “the” primary basis) of the five-part test.

Members of the DCIIA community have suggested that commentary of the Department in the Preamble to the Proposed Exemption be instead provided through formal regulatory guidance, following regulatory input, economic analysis and public comment, to establish a fair, clear and level playing field for all involved. Simply put, the Preamble discussion does not provide the clarity the industry needs to design innovative service models or lay a foundation on which good actors in the retirement industry can effectively rely with confidence when engaging with plan participants.

For instance, members of the DCIIA community have asked for an example of how the “regular basis” component would apply at the beginning of a relationship without the benefit of hindsight to know that the relationship actually will be established. Members of the DCIIA community have also asked that the Department consider providing additional clarification of its statement that “the five-part test does not look at whether the advice serves as ‘the’ primary basis of investment decisions, but whether it serves as ‘a’ primary basis”—a distinction which is at odds with the commonly understood definition of “primary.” Among other things, these DCIIA members are concerned that this conflict leaves uncertainty with regard to the weight that advice may have before it constitutes fiduciary investment advice for purposes of Section 3(21) of ERISA. In addition, other members of the DCIIA community have asked for confirmation that if an investment advice provider seeks to comply with the SEC’s Regulation Best Interest, it would not automatically trigger application of the “primary basis” component of the five-part test.

Thank you for considering DCIIA’s position. Please do not hesitate to reach out if DCIIA can offer more direct assistance.

Sincerely,



Lew Minsky
President and CEO