

August 6, 2020

**VIA ELECTRONIC FILING – www.regulations.gov**

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

**RE: Notification of Proposed Class Exemption – Improving Investment Advice  
for Workers & Retirees  
ZRIN 1210-ZA29  
Docket ID No. EBSA-2020-0003  
Application No. D-12011**

Dear Assistant Secretary Wilson:

The Council of Insurance Agents and Brokers (“The Council”) appreciates this opportunity to comment on the Department of Labor’s (“Department”) notice of a proposed class exemption for investment advice fiduciaries under the Employee Retirement Income Security Act of 1974 (“ERISA”) and the Internal Revenue Code of 1986 (“Code”).<sup>1</sup> For reasons outlined below, the Council urges the Department to make one important clarification to the proposal and explicitly exclude non-cash-value employee welfare plans that do not have an investment component.

By way of background, The Council represents the largest and most successful employee benefits and property/casualty agencies and brokerage firms. Council member firms annually place more than \$300 billion in commercial insurance business in the United States and abroad. In fact, they place 90 percent of all U.S. insurance products and services and they administer billions of dollars in employee benefits. Council members conduct business in some 30,000 locations and employ upward of 350,000 people worldwide, specializing in a wide range of insurance products and risk management services for business, industry, government, and the public.

***The Department should add language to the PTE’s “Plan” definition to clearly exclude non-cash-value welfare benefit plans that do not have an investment component.***

As drafted, the proposal defines “Plan” broadly to include employee welfare benefit plans and employee pension benefit plans.<sup>2</sup> Many welfare benefit plans, as you know, offer non-cash-value benefits such as health, life, and disability coverage. These plans do not have an

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<sup>1</sup> U.S. Department of Labor, Employee Benefits Security Administration, Notification of Proposed Class Exemption, *Improving Investment Advice for Workers & Retirees*, 85 Fed. Reg. 40834 (July 7, 2020).

<sup>2</sup> See 29 U.S.C. 1002(3).

investment component and are not designed to generate income, increase wealth, or serve as a savings vehicle.

In response to comments submitted by The Council and others, the Department clarified in its 2016 final rule on fiduciary “investment advice” that advice pertaining to these welfare plans without an investment component was not intended to be treated as fiduciary advice under ERISA or the Code.<sup>3</sup> More specifically, the Department stated, “[It] does not believe that the definition of investment advice in ERISA’s statutory text, the Department’s 1975 regulation, or the prior [exemption] proposals are properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance or similar insurance policies that do not have an investment component.”<sup>4</sup> Accordingly, the Department added clarifying language to the definition of “investment property” in the 2016 rule explicitly excluding “health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component.”<sup>5</sup>

The 2016 rule was vacated by the Fifth Circuit Court of Appeals in *Chamber of Commerce of the United States v. U.S. Department of Labor*<sup>6</sup> and the current proposal, along with re-codification of the 1975 regulation referenced in the quotation above, is part of the Department’s response to that opinion. We therefore urge the Department, in the interest of clarity and certainty, to act again here to clarify treatment of welfare plans without an investment component.

Specifically, we request that the Department revise the definition of “Plan” in the same fashion it clarified its 2016 rule, so that it reads:

“‘Plan’ means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A). The term ‘Plan’ does not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component.”

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<sup>3</sup> See, Department of Labor, Definition of the Term “Fiduciary”; Conflict of Interest Rule—Retirement Investment Advice, 81 Fed. Reg. 20946, 20962 (Apr. 8, 2016), <https://www.govinfo.gov/content/pkg/FR-2016-04-08/pdf/2016-07924.pdf> (“It was *not the intent of the proposal to treat as fiduciary investment advice, advice as to the purchase of health, disability, and term life insurance policies to provide benefits to plan participants or IRA owners if the policies do not have an investment component. It would depart from a plain and natural reading of the term “investment advice” to conclude that recommendations to purchase group health and disability insurance constitute investment advice.*”) (emphasis supplied).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 885 F.3d 360 (5th Cir. 2018).

We appreciate your work on this proposal and your consideration of our comments.

Respectfully submitted,

A handwritten signature in black ink that reads "Ken A. Crerar". The signature is written in a cursive, flowing style.

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