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August 6, 2020

United States Department of Labor
Employee Benefits Security Administration
Office of Exemption Determinations
Attention: Application No. D-12011
Room N-1513
200 Constitution Avenue NW
Washington, DC 20210

Re: Improving Investment Advice for Workers & Retirees; Docket #: EBSA-2020-0003.

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 115 million members. On behalf of our members, we are writing regarding the Department of Labor's (the Department) proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code).

The proposed exemption would permit investment advice fiduciaries under the ERISA to receive compensation for rendering investment advice that would otherwise violate the Act's prohibited transaction provisions. This exemption would be available to financial institutions and investment professionals that provide "investment advice" for compensation to (1) any participant or beneficiary of a retirement plan, (2) any owner of an individual retirement account (IRA), and (3) any fiduciary of a plan or IRA. The term "investment advice" is defined by the "Five-Part Test" (the Test).¹ The Test has been reinstated in response to the Department's previous amended rule on fiduciary investment advice (2016 Fiduciary Rule) being vacated in 2018 by the Fifth Circuit Court of Appeals.²

CUNA supports the Department's goal of protecting workers and retirees and ensuring fiduciaries act in their client's best interest. Credit unions exist to serve their members, and inherent in the credit union movement is acting in a member's best interest. Credit unions offering investment services to their members do so to assist members receive information about saving for retirement and planning for their future. CUNA expressed significant concerns with the 2016 Fiduciary Rule as it sought to considerably expand the class of communications considered to be fiduciary advice and potentially subjected additional credit union employees to a heightened standard of care. We are glad the Department has changed course and has instead proposed a less invasive means to harmonize standards and recognize the broad spectrum of investment advice models and relationships designed to assist consumers planning for their financial future.

While we generally support the proposed exemption, CUNA would like to raise several recommendations for the Department:

- Reconsider the exemption's requirement for financial institution to acknowledge, in writing, a fiduciary status with respect to any fiduciary investment advice provided. This requirement may inadvertently result in a reduction of services available to workers and retirees, as financial

¹ See 29 C.F.R. § 2510.3-21(c)(1)(ii)(B)

² Chamber of Commerce of the United States of America et al v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018).

institutions may limit services to just those that are *clearly* outside of the scope of what is considered “investment advice.”

- Clarify the “regular basis” requirement of the Five-Part Test does not include a one-time recommendation to roll over assets from a plan or IRA absent the entity also providing advice regarding the assets of the plan or IRA on a regular basis.
- Avoid adopting language that could be interpreted as expanding the coverage of the Five-Part Test. Any unwarranted expansion of the Test would likely result in confusion, increase compliance and legal services costs, run contrary to the Fifth Circuit’s decision, and likely result in reduced services for consumers.
- Clarify that arrangements with third-party brokers, including Credit Union Service Organizations (CUSOs), that clearly outline the duties and responsibilities of each party in the arrangement and do not include fees or compensation are not considered “investment advice” pursuant to the Five-Part Test.

On behalf of America’s credit unions and their 115 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel