

Office of Exemption Determinations
Employee Benefits Security Administration
United States Department of Labor

Submitted through Federal eRulemaking Portal
Docket ID number: EBSA–2020–0003

RE: Hearing on Improving Investment Advice for Workers & Retirees Proposal

To Whom It May Concern:

FACC hereby requests an opportunity to testify on the Investment Advice rule proposal at the upcoming hearing.

Preliminarily we wish to express our concerns about procedure. While we appreciate the Department is now allowing opportunity for additional comment through a public hearing, we think the manner in which this is being done is procedurally defective because of such short notice and an ambiguous standard of germaneness. We further believe this proposal does not abide by recently adopted standards for agency guidance, and among other things, fails to provide proper regulatory impact analysis for guidance embedded within the rulemaking that would have profound effects on various constituencies within the financial services marketplace. We wish to explain these procedural concerns and also offer an outline of substantive topics we would cover if given the opportunity to testify at the hearing.

A. The Notice of Public Hearing is Procedurally Defective

We do not claim to possess expertise on administrative law as it pertains to rulemaking concerning prohibited transactions. However, simply as a matter of due process, we find it troubling the Department now has decided to hold a hearing after having firmly denied requests for a hearing only weeks earlier, offers to hold such hearing on merely two weeks' notice, allows interested parties only one week to frame requests to be heard, and establishes a standard for germaneness that is ambiguous. Given the importance of the matters at stake, and given the concerns raised on all sides of these issues, we question why the Department continues rushing to adopt these rules which are so clearly in need of further deliberation.

Earlier this month the Department indicated it would not hold a hearing because the current proposal is "much narrower in scope" than the prior fiduciary rule and "actions with respect to the regulatory definition of a fiduciary are limited to implementing the court-ordered vacatur of the 2016 rulemaking." Neither statement is true and the decision now only a few weeks later to hold a hearing seems to be a concession by the Department that the rulemaking is neither "narrow" nor "limited" but rather a far-reaching set of rules and requirements that threaten to dramatically alter



the financial services industry. Nonetheless, the notice of hearing gives interested parties merely one week to decide what additional information to provide and only one more week to assemble such information which all must be done at the end of summer in the midst of a pandemic.

What is further concerning is that commenters are told they may present “factual information needing exploration at the hearing that could not have been submitted in writing” which in our view is contradictory. Factual information by its nature can always be put in writing. While perhaps this could be interpreted as an open-ended invitation to comment, it is an ambiguous standard for germaneness that adds to the peculiarity of the Department’s rulemaking process. It is uncertain why the Department has reversed its position on holding a hearing and what the Department seeks in terms of additional information so we object to what increasingly seems to be an arbitrary and capricious process and urge the Department to withdraw or suspend the current proposal.

B. The Class Exemption Contains Guidance That Has Not Been Properly Adopted

We submit that embedded within the class exemption proposal is regulatory guidance on separable matters that warrant consideration separate and apart from adoption of the class exemption. In particular, the reversal of the *Deseret* advisory opinion and reinterpretation of elements of the five-part test are agency actions unto themselves that should be considered independently rather than being subsumed within a class exemption rule proposal. Embedding guidance within the class exemption proposal results in that guidance – i.e., reversing *Deseret* and reinterpreting the five-part test – escaping proper regulatory analysis and scrutiny.

We understand just recently the Department adopted a set of policies known as Promoting Regulatory Openness through Good Guidance or simply “PRO Good Guidance.” These policies ensure proper procedures are followed in issuing, modifying, or withdrawing regulatory guidance such as advisory opinions or other agency interpretative actions other than formal rulemaking. These new policies concerning regulatory guidance adopted by the Department derive from and are based on a White House memorandum dated 10/31/2019 titled Guidance Implementing Executive Order 13891. The purpose of these policies is to ensure transparency and require regulatory agencies to follow prescribed protocols when adopting or rescinding widely applied regulatory interpretations. When guidance is considered significant, it must be published for notice and comment and include an assessment of economic impact.

With respect to withdrawal of *Deseret* and reinterpretation of the five-part test, the Department appears to be bypassing the PRO Good Guidance requirements. Withdrawal of the *Deseret* advisory opinion occurred several days prior to publication of the class exemption, meaning the Department gave no advance notice of this action and thus deprived the public of any opportunity to comment separately on its impact. As to both withdrawal of *Deseret* and reinterpretation of the five-part test, the Department conducted no economic impact analysis because the only regulatory



impact analysis contained in the Notification of Proposed Class Exemption addressed the impact of the class exemption itself. There was no analysis of how expanding reach of the definition of fiduciary to sweep in insurance agents, or expansion of ERISA to sweep in rollover transactions, would affect industry and consumers even though the impact is substantial and overall harmful.

We submit the manner in which the Department is modifying critical longstanding guidance on critical core issues affecting millions of financial services providers and their customers, especially insurance agents and their clients, is contrary to the PRO Good Guidance requirements. Accordingly, we object to the proposed class exemption on these procedural grounds and is another reason we urge the Department to withdraw or suspend the current proposal.

C. FACC Requests to Provide Testimony on Issues Critical to Independent Insurance Agents

FACC requests the opportunity to provide testimony to support salient points made in its written comments provided to the Department. As noted above we believe it is unclear what additional information is sought by the Department and what standard will be used by the Department to determine whether additional information is germane. For the record, FACC is prepared to testify on any points made in its commentary and happy to provide any level of detail or evidence necessary to support or evidence our concerns.

With that said, FACC proposes to testify specifically on the following points to help illustrate how the proposed class exemption combined with the embedded guidance is unnecessary and unworkable:

- FACC would like to provide more information to explain how this proposal will turn ordinary independent insurance agents into fiduciaries in a manner inconsistent with the holding of the Fifth Circuit.
- FACC would like to provide more specific examples to show how turning independent insurance agents into fiduciaries will be highly disruptive to their businesses and will ultimately be a disservice to consumers.
- FACC would like to present additional information about how independent insurance agents operate their business, solicit sales, and meet high standards of sales conduct as required by state insurance laws.
- FACC would like to present additional information on the size of the annuity industry, estimated percentage of agents in the independent channel, and overall impact of these regulations as they apply to independent insurance agents.



- FACC would like to explain in greater detail our concerns on how applying ERISA to rollover sales will hamper the ability of independent insurance agents to help clients looking for product options with minimum rates of return and lifetime guarantee features.
- FACC would like to explain in greater detail why the class exemption will not work for independent insurance agents and will thus put insurance agents at a severe disadvantage compared to brokers and other financial services professionals.

As requested by the Notice of Hearing, specifically (i) the person testifying will be myself Kim O'Brien, (ii) the organization represented will be FACC, (iii) my contact information is 5050 W. Saddehorn Road, Phoenix AZ 85083, number 414-332-9312, email kim@FACCchoice.com, and (iv) the date of our comment letter was August 5, 2020.

It is or view the Department has not adequately considered how these new regulations and guidance would completely upend the livelihoods of thousands of independent insurance agents and how that would be detrimental to millions of consumers served by independent insurance agents across the country. We would welcome 15 to 20 minutes or whatever amount of time is appropriate to address these concerns.

Thank you for considering our above comments and request to testify.

Respectfully Submitted,

Kim O'Brien, CEO