

GROOM LAW GROUP

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August 28, 2020

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

Re: Written Request to Be Heard and Outline of Proposed Testimony on Improving
Investment Advice for Workers & Retirees (ZRIN 1210-ZA29)

Dear Assistant Secretary Klinefelter Wilson:

In response to the Notice of Public Hearing regarding the Department's proposed prohibited transaction exemption, *Improving Investment Advice for Workers & Retirees* (the "Proposed Exemption"), Groom Law Group, on behalf of our clients who provide retirement savings related services (the "Group"), submits this written request to testify at the public hearing to be held on September 3 and continuing on September 4 (if necessary).

Stephen M. Saxon and Jon W. Breyfogle would like to present testimony on behalf of the Group. Members consist of financial institutions and administrative services providers that offer insurance, investment products and/or services, recordkeeping, plan administrative services, and advisory services to employee benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Overall, Group members serve hundreds of thousands of employer-sponsored retirement plans with millions of plan participants, and millions of individual customers through individual retirement accounts, mutual funds, collective investment funds, annuities and other retirement-related products. The Group and many Group members individually have submitted substantive comment letters, and we will testify on behalf of the Group to describe factual issues and scenarios that could not be raised through our initial comment letter but that should be considered in any final exemption. The Group submitted its comment letter on August 6, 2020.

Overall, we are very appreciative of the Department's work in developing the Proposed Exemption. We believe the Proposed Exemption will benefit both Retirement Investors and the Financial Institutions who serve Retirement Investors. Many of our Group members are already designing new service offerings based on the expectation that the Proposed Exemption will be finalized in the near future. As described in the attached outline, we believe that certain changes

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should be made. Our Group members believe the Proposed Exemption must be refined to ensure that they are able to offer high-quality investment advice and investment products benefitting the plans, participants and IRA holders they serve. While Group members are excited about the Proposed Exemption, members are also concerned about the Department's novel interpretation of the "five part test," 29 CFR § 2510.3-21(c).

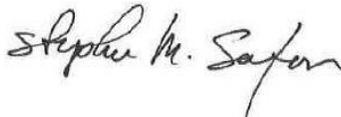
Our testimony will focus on the real-world consequences of the Department's preamble statements and highlight some of the problematic implications of certain provisions of the Proposed Exemption as a way of showing where changes are needed. We will focus on factual examples that are best described through the setting of a hearing – where the Department will have the opportunity to ask follow up questions – rather than through written commentary. The Group, like the Department, seeks to ensure that Retirement Investors both have access to high-quality investment advice and that they are protected from those who would put their interests ahead of the interests of those Retirement Investors.

The following is our contact information:

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As indicated in the Notice of Public Hearing, we expect the testimony to take less than 10 minutes, and we will be prepared to answer the Department's questions. An outline of our proposed remarks is attached to this letter. While the outline includes the primary topics the Group has identified, it is possible that additional areas will be identified after we submit this outline. Again, we appreciate the opportunity to testify on this important proposal.

Very truly yours,



Stephen M. Saxon

cc: Jon W. Breyfogle
Kevin L. Walsh
Scott C. Mayland

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Outline of Stephen M. Saxon and Jon W. Breyfogle Testimony Regarding Proposed Investment Advice Exemption

- We appreciate the work done by the Department. We believe it is extremely important that the Proposed Exemption be finalized. Specific examples of the positive effects of the Proposed Exemption include:
 - Retirement service providers will be more apt to provide advisory tools in a broad array of scenarios to participants. A Financial Institution's representatives will be permitted to consider whether a broad array of investment products may be appropriate for a Retirement Investor, and will not be limited to investment products covered by a pre-existing exemption, some of which were issued more than 40 years ago. For example, a Financial Institution may be able to comply with PTE 77-4 to recommend mutual fund investments, but not to comply with PTE 84-24 to recommend annuities. Additionally, there are no current exemptions for new kinds of investment products. The Proposed Exemption would solve this issue of prior exemptions' being product specific and would harmonize compliance efforts.
 - Without an exemption, Retirement Investors may have to go without important assistance, or may only receive generalized educational materials that may or may not be applicable to their personal circumstances. As the Department's research has consistently shown, Retirement Investors who receive investment advice have better retirement savings outcomes.
 - By creating a pathway to receive badly needed advice, investment products and services, Retirement Investors will be better positioned to make informed investment decisions enabling them to prepare for a secure retirement. Simply put, Retirement Investors will have access to a broader range of investment tools to help them save for a secure retirement.
- Removal or replacement of the Proposed Exemption's requirement to acknowledge fiduciary status would allow Financial Institutions to rely on the Proposed Exemption on a wider array of occasions, including, for example:
 - Investor at one time in the past, it is unclear whether any additional recommendation, or even a casual conversation would cause the regular basis prong to be met. If the Financial Institution prefers not to act as a fiduciary, it would need to avoid providing a recommendation to the Retirement Investor. However, if this condition were to be removed or replaced, then the Financial Institution could provide the recommendation and comply with the Proposed Exemption even in the event its second recommendation did cause it to meet the regular basis prong.

- The Department states that a Financial Institution’s disclaimer of fiduciary status is not determinative, meaning there will always be an element of uncertainty as to whether the mutual agreement prong of the five-part test has been met. Again, if the Financial Institution preferred not to act as a fiduciary, it would need to avoid providing any personalized investment recommendations, notwithstanding that this would inevitably disadvantage Retirement Investors. If the fiduciary acknowledgment is removed, then the Financial Institution could provide the recommendation and comply with the exemption in the event the mutual agreement prong were met.
- Because “fiduciary” status is based on a functional test, removing the acknowledgement could also help avert investor confusion that could occur if someone acknowledges fiduciary status while also providing non-fiduciary services.
- Essentially, removing the fiduciary acknowledgement would allow a broader array of Financial Institutions to choose to provide gold-standard advice that complies with the Proposed Exemption regardless of whether they are legally required to comply with ERISA or be a fiduciary. For example, an adviser helping a family save for college could market that they provide advice that complies with the Proposed Exemption if the ERISA fiduciary acknowledgement is removed.
- Moreover, from a purely regulatory standpoint, removing the fiduciary acknowledgement requirement will mean that the exemption will be relied upon by a great many more Financial Institutions, thereby broadening the compliance impact of this initiative.
- The Group members comply with many existing prohibited transaction exemptions on a daily basis. There is no need for the Proposed Exemption to require an annual compliance review to ensure compliance. However, if the condition is sustained, the review should be certified by a person in the organization with sufficient knowledge of its compliance practices. We will describe how this condition will impact the pricing of investment advice services and we will highlight how this is duplicative of other compliance requirements
- The condition of the Proposed Exemption that would make it unavailable to Financial Institutions in certain circumstances creates regulatory uncertainty. Some Group members may not be willing to dedicate the resources to create advisory and compliance programs in light of this uncertainty. Additionally, the Group members already have sufficient incentive to comply, and therefore this condition does not provide any additional protections to retirement investors. We will help describe the process and costs that will go into deciding whether to use the Proposed Exemption and the start-up and ongoing compliance costs.
- The Department’s statement that the regular-basis prong of the five-part test can be met retroactively if a recommendation to rollover is followed up with additional advice will

cause investment advice to become unavailable to many Retirement Investors. Examples of how the Department's interpretation is unworkable include:

- There are potentially millions of IRA owners for whom a Financial Institution has provided a rollover recommendation in the past. Under the Department's interpretation, if the Financial Institution were to provide an additional investment recommendation, then the prior rollover recommendation would be transformed into fiduciary investment advice, and it would be a non-exempt prohibited transaction. As a result, Financial Institutions would be effectively barred from providing investment advice to these individuals.
- In a Financial Institution's first meeting with a Retirement Investor, the Financial Institution generally touts the quality of products and services. But there is no relationship of trust and confidence present. However, retroactive application of fiduciary status would transform these initial interactions into the provision of fiduciary investment advice, contrary to the reasonable expectations of the parties.
- If a Financial Institution makes one recommendation to multiple plans or to a plan and an IRA owner, there is no relationship of trust and confidence with any one plan or IRA owner. However, the Department's aggregation of recommendations across the plans and accounts of a participant could be interpreted as requiring aggregation elsewhere.
- There are many factors that determine whether or not a Retirement Investor will consider a Financial Institution's recommendation as the primary basis for his or her investment decision. Retirement Investors do not rely on recommendations merely because they are personalized. Examples of circumstances where there is a relationship of trust and confidence, where a Retirement Investor may view the advice as a primary basis for an investment decision and other relationships where, because there is a lack of trust and confidence, a Retirement Investor would not view the recommendation as serving a primary basis for an investment decision include:
 - Under circumstances where a Financial Institution has an ongoing investment advisory relationship and where it has knowledge of the Retirement Investor's risk tolerance and investment goals, there may be a reasonable understanding that the Financial Institution's investment recommendations will serve as the primary basis for the Retirement Investor's investment decisions. But the opposite is also true. And the existence of a relationship of trust and confidence should not be assumed simply because a Financial Institution has had multiple interactions with a Retirement Investor.
 - If a Retirement Investor meets with several Financial Professionals of different Financial Institutions over the course of a day, and provides basic information on his or her assets, income, and age to the Financial Professionals, and each Financial Professional touts the quality of their Financial Institutions' products and services, stating that the Retirement Investor should establish an IRA with the Financial Institution, no relationship of trust and confidence with any particular

Financial Institution has been formed, and there is no reasonable understanding that the Financial Professionals' recommendations should serve as a primary basis for the Retirement Investor's investment decisions.

- If a Retirement Investor navigates to a Financial Institution's website, submits basic information on the Retirement Investor's assets, income, and age on a form on the website, and the website outputs a fund that may be appropriate for the Retirement Investor, no relationship of trust and confidence has been formed, and there is no reasonable understanding that output of the website should serve as a primary basis for the Retirement Investor's investment decisions.