

THE WILLARD
1455 PENNSYLVANIA AVENUE, NW, SUITE 1200
WASHINGTON, DC 20004

TEL 202-347-2230
FAX 202-393-3310 WWW.DAVIS-HARMAN.COM

August 26, 2020

Office of Exemption Determinations
Department of Labor
Employee Benefits Security Administration
200 Constitution Ave, NW
Washington, DC 20210

RE: Request to testify at the hearing on RIN 1210-ZA29, Proposed Exemption, entitled
“Improving Investment Advice for Workers & Retirees,” Docket ID number EBSA-
2020-0003

Dear Sir or Madam:

On behalf of a group of firm clients, including brokerage firms, mutual funds, insurance companies, asset managers, and banks, our firm is writing to request the opportunity to testify at the virtual hearing scheduled for September 3 and, if necessary, September 4 regarding the proposed exemption, entitled “Improving Investment Advice for Workers & Retirees,” RIN 1210-ZA29.

I would present the following testimony at the hearing, as more fully discussed in our comment letter dated July 30, 2020. Please see our prior request for a hearing and for the opportunity to testify at the hearing, also dated July 30. This request for a hearing updates that prior one.

- **Aspects of proposal not in participants’ interest, contrary to ERISA.** In brief, our testimony will focus on how certain aspects of the proposed exemption should be modified because they are not “in the interests of the plan and of its participants and beneficiaries,” as required by section 408(a)(2).
- **Two-part presentation.** In general, the testimony would show that (1) certain aspects of the proposal are an attempt to recreate the invalidated 2016 fiduciary rule, and (2) factually, any type of resurrection of the 2016 fiduciary rule would do great harm to participants and beneficiaries, as documented in our comment letter.
- **Attempt to recreate 2016 rule.**
 - The preamble to the proposed exemption attempts to rewrite the five-part test for determining fiduciary investment advice by (1) effectively eliminating three core parts of the test – the mutual understanding, primary basis, and regular basis tests, and (2) thus effectively reinstating the invalidated 2016 fiduciary definition.

Moreover, because the preamble purports to be interpreting present law, these changes are fully retroactive for all past years back to the 1970s.

- Contrary to the preamble statement, the exemption requirement to acknowledge fiduciary status would unnecessarily trigger new liabilities and private rights of action, which were a core reason for the failure of the 2016 rule.
- In addition to the resurrection of the 2016 rule, retroactive revocation of Advisory Opinion 2005-23A will also lead to increased litigation, which would be unfair to retirement service providers that relied on the existing legal framework in conducting their business.
- **Factual discussion of damage that would be done unless proposal is modified.** The attempted reinstatement of the 2016 rule could trigger the same widespread damage done by the 2016 rule, as documented in our comment letter. Our testimony will include a discussion of certain key studies demonstrating this damage.
- **Our request.** We intend to ask that the final exemption (1) repudiate the preamble language in the proposed exemption regarding the interpretation of the five-part test, (2) clarify that solicitations to be hired are not fiduciary advice, (3) remove the requirement that fiduciary status must be acknowledged, and (4) make any modification of the position taken in Advisory Opinion 2005-23A prospective.

Sincerely,



Kent A. Mason