



The Commonwealth of Massachusetts
Secretary of the Commonwealth
State House, Boston, Massachusetts 02133

William Francis Galvin
Secretary of the Commonwealth

December 29, 2023

Submitted electronically via: www.regulations.gov

Office of Regulations and Interpretations
Employee Benefit Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

**RE: RIN 1210-AC02: Retirement Security Rule: Definition of Investment Advice
Fiduciary; ZRIN 1210-ZA32: Proposed Amendment to Prohibited Transaction Exemption
2020-02; ZRIN 1210-ZA33: Proposed Amendment to Prohibited Transaction Exemption
84-24**

Dear Assistant Secretary Gomez:

I write in my capacity as the chief securities regulator for Massachusetts. The Office of the Secretary of the Commonwealth administers and enforces the Massachusetts Securities Act, M.G.L. c. 110A, through the Massachusetts Securities Division.

I strongly support the U.S. Department of Labor's (the "Department") proposed definition of Investment Advice Fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and the related proposed updates to Prohibited Transaction Exemptions (together, the "Proposals"). Adoption of the Proposals will bring long-needed protections to the provision of retirement investment advice and will help safeguard millions of working Americans' hard-earned retirement assets. It is clearly in the public interest to protect these assets from the harm caused by conflicts of interest, unreasonable expenses, and abusive practices and it is fully consistent with the policy objectives set forth in ERISA¹.

¹ I note that the Department makes clear that the Proposals acknowledge that ERISA Section 514 expressly saves state securities laws from ERISA's express preemption provision and support the inclusion of such statement in any final rule. Section 514(b) in relevant part, makes clear that there was no intent to "exempt or relieve any person from any law of any State which regulates . . . securities." *See* 88 Fed. Reg. 75890 at 75912.

I. Modernizing the Definition of Investment Advice Fiduciary

The Proposals provide sound support for the fact that the 1975 “five-part test” regulation, which determines whether a provider of retirement investment advice is a fiduciary under ERISA, is far too narrow and fails to reflect decades of changes in how American workers save for retirement and the vehicles that they use. In particular, the five-part test too often limits ERISA fiduciary status based on an increasingly outdated relationship between traditional advisory firms providing advice to traditional defined benefit retirement plans. Instead, today many employees must rely on “do-it-yourself” IRAs and 401(k) plans to save for retirement. As a result, the regulatory gaps created by the five-part test make retirement savers dangerously vulnerable.

II. Protecting Investors against Abusive Recommendations to Roll-Over Retirement Accounts

I applaud the Proposals for making advice to roll over a retirement account subject to a fiduciary standard if that advice is given by a person that provides investment recommendations as a regular part of its business. This is a sensible reform that will close a gap that currently allows for dangerous abuses in the provision of retirement investment advice.

I strongly support the removal of the requirement under the five-part test that the advice needs to serve as the “primary basis” for an investment decision to be subject to a fiduciary standard under ERISA. I also strongly support the Proposals’ focus on whether the recommendation “may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.” This addresses fundamental issues in abusive retirement advice. All too often, unscrupulous salespeople and advisers entice retirement savers to move their savings into high-commission and high-fee accounts based on claims that they are trustworthy and will put the interests of their customers first.

III. The Proposals are Necessary to Curb Continued Abuse in the Retirement Asset Space

My Securities Division receives numerous complaints and has taken action against fraud and abuse related to retirement funds. These cases demonstrate the need for greater protections for retirement accounts in general, and IRA and 401(k) accounts in particular. As I have repeatedly noted², these problems have not—and are not—going away without further action. We have seen repeated instances of abuse, including those outlined below:

Alternative products	Aggressive marketing and sale of risky alternative investments	<i>My office carried out an extensive investigation concerning the sale of speculative investment notes to retail investors, most of them at or close to retirement age, by a major independent brokerage firm. A majority of the customers held the notes in their IRA accounts. The Securities Division sued the registered</i>
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² See e.g., *Comments from Secretary of the Commonwealth of Massachusetts, William F. Galvin*, dated July 21, 2015 and March 13, 2017, respectively (RIN 1210-AB32; 1210-ZA25 and RIN 1210-AB79)

		<i>entity and subsequently conducted a lengthy administrative hearing. Investors described their relationship with the brokerage firm and their individual brokers as a relationship built on trust—whereby they expected the brokerage and agent to make recommendations in their best interest. At the hearing, the brokerage firm specifically disavowed any notion that it was obliged to act in the best interests of its customers. After substantial customer testimony, the firm ultimately agreed to repay the losses its customers suffered by investing in the notes.</i>
Alternative Products	Sale of Illiquid Products Held through an IRA	<i>My office filed and settled an action concerning a brokerage firm and one of its agents who were alleged to have engaged in dishonest and unethical conduct when servicing a client's IRA. In this matter the broker convinced his client, a widow in her 60s, to purchase \$150,000 worth of Non-Traded REITs. The complaint asserted that the broker earned commissions on the sales of the Non-Traded REITs but failed to explain the nature of these alternative investments to the client. The client was later unable to sell one of the Non-Traded REITs for which she had paid \$50,000, as it was illiquid. The alleged violations included that the same broker also traded excessively in the client's IRA to generate substantial commissions on the trades for both himself and the firm.</i>
Alternative Products	Misappropriation of Retirement Assets	<i>My office filed and settled an action involving a registered representative of a large brokerage firm who devised a scheme to take advantage of customer's hard-earned retirement savings held in an IRA, using the investment money for his own personal use and benefit, resulting in an order of restitution, permanent bar, and administrative penalty.</i>
Alternative Products	Misrepresentations in Sales	<i>My office initiated legal action against a precious metals operator who induced Massachusetts residents to invest millions, including through IRA accounts, ultimately resulting in appointment of a receiver to distribute funds to harmed customers.</i>
Annuity Sales	High Commission Sales Practices	<i>My office filed and settled allegations of sale of illiquid and high commission variable annuities and improper switching involving retirement funds of former hospital employees, resulting in a fine, disgorged commissions and payment of customer surrender fees and losses.</i>
Annuity Sales	Abusive Sales Practices	<i>My office filed and settled allegations concerning a financial professional who recommended that an elderly customer withdraw funds from two IRAs and purchase high-commission variable annuity products without explaining the fees and potential taxes associated with these products—including surrender charges, additional riders, and annual fees.</i>
Sales Contests	Training of Agents	<i>My office pursued aggressive sales contests directed by a broker-dealer whereby the Securities Division alleged the continuation of sales contests following the implementation of the DOL's fiduciary rule. The broker-dealer settled charges, consented to the payment of an administrative penalty, and neither admitted</i>

		<i>nor denied that certain agents did not receive fiduciary duty training concerning the DOL rule.</i>
Self-directed IRAs	IRA Roll-over Abuse	<i>My office investigated and pursued an action concerning a registered agent who obtained a list of retirees and aggressively cold called individuals, ultimately convincing individuals to take lump sum retirement distributions and open IRA accounts. The agent made false promises and guarantees as well as misrepresentations about the safety of investing in the stock market and the expected returns. The agent went on to abuse customers through excessive trading, purchasing high cost share classes, and recommending high-risk securities.</i>
Self-directed IRAs	Churning Retiree Assets through an IRA	<i>My office commenced action against a brokerage firm and one of its agents for engaging in abusive sales practices in the accounts of one retired Massachusetts resident. The complaint alleged that one of the firm's agents churned the client's IRA, generating over \$100,000 in commissions to himself and the firm. The complaint described that the assets that the retired investor entrusted to the firm constituted substantially all of his retirement assets. The commissions and fees caused by the agent's excessive trading activity ultimately negated any gains in the investor's account and the client's IRA suffered a significant loss in value, the complaint alleged. The complaint further detailed that another agent in the firm later over-concentrated the retired investor's IRA in an oil and gas investment resulting in significant losses.</i>


IV. A Broad Regulatory Response to Industry Practices is Needed

I support the Department's application of the ERISA fiduciary standard to sellers of financial products of all kinds. This approach is an urgently needed modernization because it addresses the different conduct standards for advice across various categories of investments and the growing number of investment assets that are pitched to retirement investors. I support the proposal to make a fiduciary duty applicable to insurance companies for recommendations made through their agents. I also support the proposal to make "independent producer"-type insurance agents fiduciaries to their customers when such independent agents are providing advice related to retirement planning.

Because the Proposals will substantially modernize the standards for retirement investor advice, I urge the Department to adopt the proposals expeditiously. For too many years, investors have been vulnerable to conflicted advice, abusive practices, and dishonest conduct with respect to their retirement savings. The time to protect these investors is now.

If you have questions relating to the letter or my Office can assist in any way, please contact me or Anthony R. Leone, Deputy Secretary for the Massachusetts Securities Division, at 617-727-3548.

Sincerely,

A handwritten signature in blue ink, appearing to read "William F. Galvin". The signature is fluid and cursive, with the first name "William" and last name "Galvin" clearly legible.

William F. Galvin
Secretary of the Commonwealth
Commonwealth of Massachusetts