

January 2, 2024

Delivered electronically

Office of Regulations and Interpretations and Office of Exemption Determinations

RIN 1210-AC02

Application Nos. D-12057, D-12060 and D-12094

**Re: Proposed Definition of ERISA "Investment Advice" Fiduciary and
Related Exemptions for Conflicted Investment Advice**

Dear Ms. Gomez:

Commonwealth Financial Network ("Commonwealth") appreciates the opportunity to comment on a revised regulation defining "investment advice for a fee" under section 3(21) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and revisions to existing Prohibited Transaction Exemptions ("PTE") 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1 and 86-128 (together with the proposed regulation, the "Proposal").

For reasons discussed herein, we urge the Department to withdraw or very significantly revise the Proposal. Its broad and vague language

combined with extreme modification of multiple existing PTEs will create significant business disruptions throughout the financial services industry. In addition, we are concerned that the Department provided only a 60-day comment period and proposed an unworkable effective date for such significant rulemaking. We urge the Department to focus on addressing specific discrete concerns with aspects of certain business models or activities instead of making sweeping changes impacting the viability of cost-effective services currently offered to retail retirement investors. We invite the Department to engage with members of the industry – who are dedicated to helping American investors save for their retirement – to address our concerns that the unnecessarily broad Proposal will, in fact, hurt retirement investors.

Commonwealth's Business Model and Supervisory Structure

Commonwealth is an independent broker-dealer and an SEC-registered investment adviser with home office locations in Waltham, Massachusetts, and San Diego, California, and more than 2,500 registered representatives and investment adviser representatives who are independent contractors conducting business in all 50 states. Assistance from our investment professionals enhance the financial security of many retirement investors. Commonwealth financial advisors emphasize the importance of commencing and retaining retirement savings and encouraging employers to adopt plans and individuals to participate in those plans and/or IRAs. Our advisors act as investment advisory fiduciaries when recommending investments to plan fiduciaries and participants.

Proposal is Overbroad

First and foremost, the proposed regulation is extremely broad, impacting far more than discrete issues that may be of particular concern in certain pockets of the industry. There will undoubtedly be adverse consequences for retirement investors. We strongly believe that clients should have a choice in how they receive and pay for various financial services. The limitations on client choice as well as the scope of activities and business practices covered by the Proposal are significant. In effect, the Department is broadcasting an emergency alert that will cause widespread disruption when it is not necessary to address a limited number of situations.

Proposal is Unnecessary Given Best Interest Standards Currently in Place

The Proposal is unnecessary considering Regulation Best Interest and PTE 2020-02 that are currently in effect to protect retail retirement investors. We supported the SEC rulemaking that resulted in the adoption of Regulation Best Interest, which was effective on June 30, 2020. With respect to the adoption of PTE 2020-02, we appreciated the Department's approach to ensure that PTE 2020-02 imposed a best interest obligation on broker-dealers that both (i) aligned with Regulation Best Interest and with registered investment advisers' fiduciary duty under the Investment Advisers Act of 1940, as amended, and (ii) was faithful to ERISA. At considerable effort and expense, we already adopted a "best interest" standard of conduct that is enforced by our compliance programs as well as robust SEC and FINRA examination and enforcement.

One of our most serious concerns with the Proposal is that it neither asserts nor demonstrates that PTE 2020-02 in its current form is inadequate, and insufficient time has passed since its full effective date to make such a determination. Absent such evidence, it is unreasonable for the Department to compel firms to rebuild their compliance systems less than two years after the exemption took effect. This challenge cannot be understated. Firms have spent countless hours and significant expense implementing technology resources, creating policies and procedures, crafting appropriate disclosures, operationalizing new workflows, training home office staff and advisors on the requirements of PTE 2020-02. In short, the industry has invested mightily – only to have these rules modified just two years later? And without any evidence that the rules currently in place are ineffective? The cost/benefit analysis in the regulatory impact statement cannot quantify the benefits and grossly underestimates true costs. We project compliance costs will greatly exceed those estimated in the regulatory impact analysis.

Additional Areas of Concern

- The proposed 60-day effective date is unreasonable, impracticable, and must be changed.
- The proposed fiduciary definition is overbroad, vague and unworkable, subject to a facts and circumstances analysis. We are concerned that the preamble effectively contends that financial advisors are always fiduciaries.
- The Proposal is contradictory to Regulation Best Interest and duplicative of existing securities regulations in numerous respects. The amendments in the Proposal are more restrictive than, and oftentimes conflict with, SEC and FINRA rules.

- The simultaneous revocation of five class exemptions will be extremely disruptive to the financial services industry and limit retirement investor choice. The PTEs impacted by the Proposal have been available for decades and are relied on in many aspects. The Department has not sufficiently justified such a huge change nor effectively analyzed the costs of compliance.

Concurrence with Other Industry Comments

Commonwealth agrees and supports the comments made by the Securities Industry and Financial Markets Association (“SIFMA”) and the Financial Services Institute (“FSI”).

Conclusion

Thank you for the opportunity to comment on the Proposal. It is simply too broad and is unnecessary, in particular, in light of the recent SEC and DOL rulemaking covering retail retirement investors since 2020. The Proposal will result in unintended consequences that limit choice and harm retirement investors. We respectfully ask that it be withdrawn and urge the Department to work with firms and trade groups prior to the proposal of alternative rules. We appreciate your consideration.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michelle M. Kelley".

Michelle M. Kelley
Senior Vice President & Deputy General Counsel
Commonwealth Financial Network