

December 27, 2023

VIA ELECTRONIC SUBMISSION

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: *Retirement Security Rule: Definition of an Investment Advice Fiduciary, RIN 1210-AC02*

Dear Sir or Madam:

The Vanguard Group, Inc. (“Vanguard”)¹ appreciates the opportunity to comment on the Department of Labor’s (the “Department”) proposed regulation (“Proposal”)² re-defining who is a “fiduciary” by reason of providing investment advice to retirement investors through retirement plans and individual retirement accounts (“IRAs”).³ We agree with the Department that the current rule concerning investment advice has not kept up with significant changes in the marketplace and that the Department should update the definition of an investment advice fiduciary to reflect today’s retirement plan and IRA marketplace and better protect the interests of retirement investors.

In 1975, when the fiduciary rule was adopted, the most common type of retirement plan was a professionally managed and employer-funded defined benefit pension plan. Since then, 401(k)-type plans with individual accounts and IRAs have become the predominant way workers save for retirement. In 401(k) plans and IRAs, individual retirement investors are responsible for making important investment decisions to save for and spend in retirement. We appreciate the Department’s interest in ensuring a uniform set of standards for retirement investors and agree that investors should receive investment advice that is in their best interest.

Throughout the Department’s long process to address retirement investment advice, Vanguard has consistently voiced our strong support for a regulatory framework that ensures investors have access to investment advice that is always in their best interest in accordance with a fiduciary

¹ Vanguard is a leading provider of investment, advisory, and recordkeeping services for defined contribution retirement plans. Our core purpose is to take a stand for all investors, to treat them fairly, and to give them the best chance for investment success. Vanguard helps millions of Americans save for a secure retirement. We provide direct defined contribution recordkeeping and investment-related services to nearly 5 million participants and approximately 1,400 plan sponsors.

² Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890 (Nov. 3, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-23779.pdf>.

³ Retirement plans include those covered by the Employee Benefit Income Security Act of 1974, as amended (“ERISA”) and plans defined in the Internal Revenue Code, including IRAs.

standard.⁴ Professional investment advice and management play critical roles in retirement planning for many investors. Indeed, all investors can benefit from investment advice that helps them construct appropriately diversified portfolios with cost-effective investments and management strategies that provide the best chance for long-term investment success. To this end, we agree with the Department that (1) a retirement investor's decisions regarding whether and how to take a distribution from a plan, including whether to roll over retirement assets among different retirement accounts, can be very consequential, and (2) a recommendation in connection with a distribution or rollover should be viewed as investment advice.

We note for your consideration, however, that the Proposal's scope and breadth may unintentionally capture important communications designed to simply educate retirement investors to allow them to make informed decisions. An overly broad and unclear definition of investment advice that attaches fiduciary status to everyday communications, such as investor education, could unintentionally reduce access to information and knowledge; increase the use of highly technical, legalistic, or boiler-plate language that undermines investor understanding; and discourage firms from providing useful and understandable financial wellness programs or engaging in simple, less expensive, interactions designed to help investors truly understand their options.⁵

Although the Department acknowledges in the preamble that "whether a recommendation has been made is a threshold element in establishing the existence of fiduciary investment advice," it does not define the term "recommendation." Rather, the Department offers a description of the term in the preamble, noting that a recommendation is "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action."⁶ Such a broad description could capture communications with significant investor benefits, including communications simply informing investors about the benefits of participating in or contributing

⁴ See e.g., Letter from Mortimer J. Buckley, Chairman and Chief Executive Officer, Vanguard, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (Aug. 6, 2020), available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA29/00078.pdf>; Letter from F. William McNabb III, Chairman and Chief Executive Officer, Vanguard, to Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (Aug. 7, 2017), available at <https://www.regulations.gov/comment/EBSA-2017-0004-0522>; and Letter from Martha G. King, Managing Director, Institutional Investor Group, Vanguard, to Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor (July 21, 2015), available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB32-2/00682.pdf>.

⁵ As discussed below, advisors must meet a high bar to ensure that a recommendation is in the investor's best interest.

⁶ See Proposal at 75904. We note that the Department's description of what constitutes a "recommendation" goes well beyond the Securities and Exchange Commission's Regulation Best Interest ("Reg BI"). Under Reg BI, a communication is considered a recommendation if it could reasonably be deemed a "call to action" and "reasonably would influence an investor to trade a particular security or group of securities." Investor interactions that are deemed recommendations trigger Reg BI and require that a firm act in the best interest of the retail customer without placing financial (or other) interests of the firm ahead of the interest of the retail customer. This definition works because it appropriately balances investor protection and the ability of firms to provide useful investor educational materials and tools.

more to a retirement plan. For example, under this approach it is unclear whether these types of communications targeted at certain retirement investors would still be considered education or whether they would now constitute a recommendation subject to fiduciary standards. In contrast to the current five-part test, in which investment advice is required to be “individualized,” the Proposal does not specifically require individualized communication. Rather, a recommendation relating to securities or other investment property would be considered investment advice if, for example, the person making the communication either has discretion over other assets of the retirement investor or provides investment advice as part of its regular business and the recommendation is based on the “particular needs”⁷ of the retirement investor. To provide greater certainty as to when such communications will constitute fiduciary advice, the Department should clarify when communications will be considered to be based on the “particular needs” of the investor and that any recommendation must include a material or significant degree of individualization to be considered fiduciary.

To preserve important investor communications, we recommend the Department revise the Proposal to clarify education and personalized communications of general investment principles (e.g., suggestions to increase contributions to receive an employer match or to diversify investments) targeted to particular retirement investors are not considered recommendations in the absence of a specific call to action based on the individual needs of the investor. We provide examples of these types of communications below.

Vanguard agrees that investors should always receive investment advice that is in their best interest and investors should continue to have access to critical investment education and information.

Most retirement investors make investment and distribution decisions independently, making it critical for the Department to ensure that any new definition preserves their continued access to investment education and information. Indeed, many retirement investors do not ask for a recommendation when deciding whether to, for example, roll over a plan account to an IRA or invest in a particular fund—they simply want to understand the different choices available and complete the transaction. These retirement investors should still be able to benefit from educational materials, and information about general investment principles, to make informed decisions. We are concerned that firms will be discouraged from providing such information in these communications if these basic interactions are re-defined as fiduciary in nature.

Fiduciary standards under ERISA are considered the highest obligation known to law (and, with it, commensurate liabilities⁸) and underpin the entire ERISA compliance structure. Rules

⁷ One could reasonably interpret “particular needs” broadly to include saving for retirement or doing so effectively (e.g., getting the employer match, contributing regularly, diversifying, rebalancing). In this case, communications that broadly aim to help investors save for retirement could unintentionally be captured by the Proposal and trigger fiduciary status.

⁸ Advisors who engage in a prohibited transaction (even inadvertently) under ERISA would be exposed to significant excise tax penalties under the IRS Code (15 percent of the amount involved assessed each year the transaction is not corrected), lawsuits under ERISA for losses to plans and equitable relief, and potential lawsuits for breach of contract.

governing this obligation, however, must provide certainty about who is and who is not a fiduciary. In a genuine fiduciary relationship, for example, advisors generally must obtain, among other things, significant data regarding an investor's goals, risk tolerance, investment horizon, other assets, and potential accounts or investments that may be used to satisfy the investor's needs.

These efforts are warranted where advisors provide individualized recommendations including a call to action, such as statements that the retirement investor should roll over a plan account to an IRA or invest in a particular fund. However, such detailed conversations are not warranted when firms simply encourage basic financial wellness (e.g., contributing to retirement accounts, obtaining employer matches, lowering costs, or considering the value of diversification). Given the breadth of the language in the Proposal, without further clarification, these communications could be regarded as "recommendations," trigger fiduciary status under the Proposal, and risk a prohibited transaction. This could make meaningful information and education prohibitively risky and expensive, leaving retirement investors with less access to many pro-investor communications offered by firms like Vanguard. Accordingly, we ask the Department to confirm that these types of communications would not be considered a fiduciary recommendation, absent a specific, individualized call to action.

Consistent with our mission to take a stand for all investors and give them the best chance for investment success, Vanguard engages with retirement investors in various ways to help them understand financial products and take an active role in their retirement success. We provide three examples below to illustrate how Vanguard uses education and information to improve retirement outcomes. Each could potentially be deemed a recommendation that triggers fiduciary status under the Proposal.

Call center inquiries. Vanguard often receives unsolicited investment inquiries from retirement investors—who may also receive discretionary investment management through collective investment trusts or advisory services⁹—seeking information about our products and services. For example, an investor may call Vanguard after separating from her employer to ask for information about options for her plan assets, including options relating to rolling her plan assets into an IRA. In such a situation, the retirement investor does not reasonably expect the call center representative to provide information about other firms' products or advice about the universe of potential services available to the investor. Instead, investors expect, and our call center representatives provide, simple and balanced information about the options available, including staying in a plan, rolling over to an IRA or a new employer's plan, or cashing out. Investors may also ask questions about investment alternatives available under a plan or, for example, the implications of investing in Roth versus pre-tax accounts. These interactions typically do not require the call center representative to collect significant data about the retirement investor because the representative does not make an individualized recommendation or suggest a specific course of action. In these cases, our representatives do not make individualized recommendations to use Vanguard advice offerings or roll over to an IRA. Instead, they

⁹ The Proposal applies a fiduciary standard to almost any engagement with a retirement investor who also receives discretionary management services from a provider or its affiliates.

generally provide basic information and education anchored to sound investment principles. The goal of these call center communications is to meet investors where they are, answer their factual questions, and present their options so the *investor* can make an educated and informed decision about what is in their best interest *when they are ready* to do so. On the other hand, if an investor seeks advice, we have high-quality advice professionals who provide that advice pursuant to a fiduciary duty and in the investors' best interest.¹⁰ However, for retirement investors not seeking advice, we believe losing access to these routine and informational communications would be a mistake.

Digital inquiries. Retirement investors seeking information about our products and services, including their options after separating from their employer, may choose to visit Vanguard's website for this information. Our website provides information and education about the options available (including the pros and cons) to retirement investors considering what they should do with the money in their former employer's retirement plan. Like a call center inquiry, the website provides basic information about staying in a plan, rolling over to an IRA or a new employer's plan, or cashing out.¹¹ If the retirement investor wants information beyond the information presented, our website provides additional educational links to view more detailed information about the available options, such as the differences between traditional versus Roth IRAs, conversions, advice, or money management services. Like call center inquiries, the goal is to provide information that is relevant to an investor's circumstances so the *investor* can make an educated and informed decision about what is in their best interest *when they are ready* to do so. Similarly, we do offer digital advice for investors who are seeking it and provide that advice pursuant to a fiduciary duty and in the investors' best interest.

"Nudges" designed to boost retirement success. Vanguard has developed a series of communications (or "nudges") designed to educate retirement investors about opportunities to improve their financial outcomes, consistent with well-recognized principles of financial wellness. For example, our 401(k)-recordkeeping business uses individualized client data to identify retirement investors whose employer offers to match retirement contributions and send communications to encourage them to increase their contributions to take full advantage of this match to boost their savings and increase the odds of achieving a successful retirement. We also deploy nudges to encourage retirement investors to consider boosting their retirement savings more generally. For our self-directed retirement investors who rely on IRAs to save for retirement, we review individualized contribution data and encourage clients to contribute earlier in the year to benefit from compounding and potentially maximize returns. We also nudge non-contributors to make at least one contribution per year because even one contribution annually can build momentum and returns that compound over time. Our retirement investors are undeniably better off as a result of these prompts. Approximately 60 percent of 401(k) plan

¹⁰ Vanguard financial advisors are fiduciaries and do not make commissions—so they make recommendations based on what is best for the investor and their goals. See more information about Vanguard's investment advice services, available at <https://investor.vanguard.com/advice/compare-investment-advice>.

¹¹ See article by Vanguard titled "I left my job. What happens to my savings?" available at <https://ownyourfuture.vanguard.com/content/en/learn/financial-planning/i-left-my-job-what-happens-to-my-savings.html>.

participants took positive action after receiving a nudge from Vanguard,¹² and 14,000 IRA clients acted after Vanguard nudged them, boosting their retirement savings by \$50 million.

The examples above illustrate just a few ways we help retirement investors, especially those who are not covered by default provisions¹³ or do not use or have access to investment advice, to save for retirement. We want to continue these practices in the future but are concerned they could be unintentionally re-defined as “advice” under the Proposal, creating unintended consequences for investors. An overly broad definition of investment advice that subjects education and information to fiduciary obligations would raise costs—and potentially chill—a wide range of beneficial investor communications, reducing basic education that can improve investor outcomes, especially for individual retirement investors.¹⁴ Accordingly, we encourage the Department to clarify any final rule text to ensure that it preserves these important, investor-focused communications, particularly when the retirement investor is not seeking, and the provider is not offering, a specific recommendation or call to action based on the individual needs of the investor, but promoting healthy investment behaviors that correlate to improved retirement outcomes.

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Vanguard appreciates the opportunity to comment on the Proposal. If you have any questions or would like to discuss our views further, please contact Stephanie Napier, Principal and Deputy General Counsel, at stephanie_1_napier@vanguard.com or Jane Heinrichs, Senior Policy Advisor, at jane_heinrichs@vanguard.com.

Sincerely,

/s/ John James

John James
Managing Director, Institutional Investor Group
The Vanguard Group, Inc.

¹² See webcast by Vanguard titled “A Look Ahead with Vanguard,” (Jan. 27, 2023), at 41:10 – 41:25, available at <https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/a-look-ahead-2023.html>.

¹³ For an automatic enrollment plan, such as a 401(k), the plan fiduciary selects the investments for employees’ automatic contributions if the employees do not provide direction. When selecting default investment alternatives for participants, the plan fiduciary is required to use certain default investments that generally minimize the risk of large losses and provide long-term growth and to provide notice of the plan’s automatic enrollment process. See “FAQs about Retirement Plans and ERISA,” U.S. Department of Labor, Employee Benefits Security Administration, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf>.

¹⁴ Our research shows that there is a critical need to connect low-income workers with the capital markets so they can reduce their projected retirement readiness gap. See “The Vanguard Retirement Outlook: A national perspective on retirement readiness,” available at https://corporate.vanguard.com/content/dam/corp/research/pdf/the_vanguard_retirement_outlook.pdf.