January 2, 2024

Via Federal eRulemaking Portal

Office of Exemption Determinations
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Ave, N.W.
Washington, D.C. 20210

RE: Proposed Rule: Definition of an Investment Advice Fiduciary - Fed. Reg. 88-758902023-

Proposed Amendment to Class Exemption PTE 2020–02 – Fed. Reg. 2023-23780

Proposed Amendment to Prohibited Transaction Exemption 84–24 – Fed. Reg. 2023-23781

Proposed Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128 – Fed Reg. 2023-23782

To Whom It May Concern:

This letter is submitted in response to the November 3, 2023 Department of Labor ("DOL") notice of proposed rulemaking regarding the third version of a regulation defining "investment advice for a fee" under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Additionally, the DOL seeks comment regarding proposed revisions to the existing Prohibited Transaction Exemptions ("PTE") 2020-02, 84-24, 75-1, 77-4, 80-83, 83-1 and 86-128. These matters are collectively referred to herein as the "Proposal."

I. INTRODUCTION

Cambridge Investment Research, Inc. and Cambridge Investment Research Advisors, Inc. (collectively "Cambridge") appreciate the opportunity to comment on the DOL's Proposal.

A. CAMBRIDGE

Cambridge is a privately controlled, financial solutions firm located in Fairfield, Iowa, focused on serving independent financial professionals and their investing clients. Cambridge's national reach includes, Cambridge Investment Research, Inc., an independent broker-dealer, member FINRA/SIPC, and Cambridge Investment Research Advisors, Inc., a corporate Registered Investment Advisor ("RIA") federally registered with the Securities and Exchange Commission ("SEC"). Cambridge supports almost 4,000 financial professionals nationwide, who serve more than 550,000 individual retirement accounts and over 7,000 retirement plans.

II. SUMMARY OF POSITION

While the intent to protect consumers and ensure that financial professionals act in their clients' best interests is commendable, the proposed fiduciary duty rule oversimplifies the complex landscape of financial advice and services. The potential ramifications of this rule outweigh the perceived benefits, creating undue burdens on financial professionals and potentially limiting access to crucial financial guidance for many Americans.

Of significant concern, the Proposed Rule significantly expands the universe of activities characterized as "fiduciary" for purposes of ERISA and the Internal Revenue Code of 1986 (the "Code"). The consequence of this expansion potentially significantly limits the availability of retirement advice for lower and middle-income individuals. Specifically, by imposing a stricter fiduciary standard, many financial professionals may opt to discontinue certain services or increase fees, making it financially infeasible for individuals with modest portfolios to access professional advice. This inadvertently exacerbates the existing wealth gap by limiting financial guidance to those who can afford premium services.

Moreover, the compliance costs associated with adhering to the proposed rule could force smaller financial services firms to eliminate services or go out of business. This would not only reduce competition but also limit the choices available to consumers seeking financial guidance. The Proposal, as drafted, could create a one-size-fits-all approach that fails to consider the diverse needs and circumstances of clients.

Contrary to the current Proposal, the better approach is to balance consumer protection with the practical and economic realities of the industry associated with providing quality, tailored retirement advice.

III. RELEVANT PRIOR RULEMAKING HISTORY

In 2016, a six-year effort by the DOL to establish a broad fiduciary standard for advisers to ERISA plans and Individual Retirement Accounts ("IRAs") culminated with the DOL replacing the five-part test for determining whether a financial professional is acting in a fiduciary capacity. Additionally, the DOL created two new PTEs (the Best Interest Contract ("BIC") and Principal Transactions exemptions); and amended several existing class exemptions.

On June 21, 2018, the United States Court of Appeals for the Fifth Circuit issued its mandate making permanent its March 15, 2018 decision vacating the DOL's 2016 fiduciary rule making effort.

On December 15, 2020, the DOL issued a prohibited transaction class exemption for fiduciary investment advice, PTE 2020-02, as a replacement for the BIC and Principal Transactions exemptions vacated by the Fifth Circuit.

Approximately two months later, on February 12, 2021, the DOL announced that PTE 2020-02 would become effective five (5) days later, on February 16, 2021. The DOL promised that additional information would be forthcoming.

That "additional information" came in April 2021 in the form of two sets of Questions and Answers ("Q&As") related to PTE 2020-02. One Q&A appears directed to industry participants and focuses on areas proposed for additional regulation. The other Q&A seems suited for consumers of financial services and articulates questions a consumer might ask of a prospective financial professional, as well as additional background of the rule.

IV. OVERVIEW OF THE PROPOSAL

The Proposal represents the latest effort to revamp and expand the definition of who is a fiduciary in connection with providing investment advice. In this regard, the Proposal abandons well-settled, reliable standards in exchange for a broader, less predictable standard that exposes a much larger number of financial professionals to potential liability and thereby disincentivizes them from serving the investing public in the manner that professionals may have done so in the past.

Specifically, the Proposal reiterates the DOL's efforts to replace the "Five-Part Test" for determining fiduciary status that has been in effect since 1975 with a new definition of a "fiduciary." If adopted, the Proposal subjects to oversight a broader swath of investment professionals' client communications and activities, including:

- IRA rollovers and transfers;
- Account types;
- Plan and IRA distributions;
- Plan investment line-ups;
- Investment strategies and policies; and
- Asset manager selection.

In addition to capturing a larger range of communications and activities within ERISA and the Codes' fiduciary duty framework, the Proposal subjects a larger number of professionals to that framework. The consequence of this change is that more parties will be deemed to be providing investment advice and thus subject to the pervasive regulatory framework contemplated by ERISA and the Code.

With respect to the prohibited transaction provisions of ERISA and the Code, they generally prohibit fiduciaries with respect to an ERISA plan or IRA from self-dealing and receiving compensation from third parties. The DOL issues various PTEs to permit transactions that otherwise would be prohibited under ERISA and the Code.

Specifically, a PTE allows investment advice fiduciaries under both ERISA and the Code to receive both transaction-based and fee-based compensation, including compensation for advice to roll over assets from an ERISA plan to an IRA, and to engage in principal transactions, that would otherwise constitute "prohibited transactions."

While efforts to safeguard the interests of plans, participants, and beneficiaries is laudable, the scope and breadth of the Proposal goes too far.

V. CAMBRIDGE'S COMMENTS

A. INTRODUCTION

Cambridge consistently supports implementation of a thoughtful, well-crafted, and effective rulemaking, such as that reflected by efforts to craft a best interest standard that aligns with other industry regulations. Cambridge originally supported adoption of PTEs because they appeared to satisfy these criteria while aligning better with the existing regulatory framework than does the Proposal.

Unnecessary expansion of the universe subject to the Proposal's definition of fiduciary is not in the interest of the investing public and likely will limit product, service, and strategy offerings. Furthermore, the uncertainty created by abandonment of the traditional five-part fiduciary duty test will lead to increased costs to industry participants and necessarily thereby limit offerings or benefits to investors, absent other sources of industry revenue to offset increased costs.

Alignment of the PTEs with other regulatory standards harmonizes regulatory requirements placed on financial industry participants, which in turn permits an efficient allocation of resources; allows compliance associates to focus on clear and common regulatory standards; reduces costs to retirement investors; and eliminates regulatory confusion. Notably, many financial solutions firms have developed compliance regimes, policies, and procedures to comply with the best interest standards of other regulatory agencies. As such, the PTE regime, if created and executed properly, actually could complement established compliance practices.

In addition to promoting regulatory efficiencies, the previously promulgated PTEs provide a degree of certainty regarding covered compensation arrangements and avoid the complexity associated with reliance on multiple exemptions. Maintaining the balance between the need to provide fiduciaries with flexible transaction relief while safeguarding the interests of retirement investors is critical.

Cambridge also supports a “reasonable compensation” requirement where compensation is not excessive when viewed in the light of the market value of services, rights, and benefits, as well as considering the complexity of the product and the scope of monitoring. The current PTE reflects historic recognition of reasonable compensation as articulated under ERISA and the Code. The Proposal abandons this recognition.

Cambridge also takes no issue with the Impartial Conduct Standards, including provisions requiring written policies and procedures, documentation of rollover recommendations and a retrospective annual review. All are well suited to investor protection.

However, more comprehensive exemption relief expanding the range of products and transaction arrangements available to the retirement investor is important to enhance investor protection while expanding investment choices and arrangements.

Finally, the staggering cost associated with compliance with the Proposal is not justified by even what the DOL claims to be the anticipated outcome of implementation of the Proposal.

B. Definition Of Fiduciary “Investment Advice”

The DOL proposes to expand the scope of those who constitute an investment advice fiduciary. Such an expansion would encompass a wider range of financial professionals, potentially subjecting them to fiduciary standards and increased regulatory obligations. This will translate into increased compliance costs and regulatory burdens. Notably, Cambridge sees numerous issues with the DOL’s plan to eliminate the current 5-part test to determine who is an investment advice fiduciary in favor of a revised standard.

The broadened definition of recommendation raises several issues. First, the new definition adds “strategies” even if there is no reference to a specific security. Similarly, the overly broad definition includes recommendations on how to invest after a rollover occurs. Cambridge believes will could render a financial professional a fiduciary merely by providing general education regarding a rollover solely because the professional will manage the funds after a rollover occurs. For example, if an investor requests general information on how to affect a rollover to avoid violating complex rules, once the investor makes their own rollover decision and then looks to the professional for advice, that subsequent advice most likely, under the Proposal, renders the professional a fiduciary with respect to even the rollover decision, even though the professional played only an educational role in that regard.

Second, tying fiduciary status to the investor’s “reason to believe” that the financial professional intends to act as a fiduciary is far too vague and subjective to constitute a meaningful standard against which to assess a person’s conduct. In this regard, the Proposal suggests that a financial professional is an investment advice fiduciary based on a single, individualized recommendation because it could be construed as “regular basis” advice.

Similarly, the proposal replaces the 5-part test’s condition that advice serve “as a primary basis” for investment decisions with a far less restrictive condition: that the advice “may be

relied upon." These revisions, combined with the presumption that a financial professional by virtue of his or her title is acting in a fiduciary capacity, will result in subjecting individuals to fiduciary status when they have not acted in a fiduciary capacity whatsoever. Cambridge urges the DOL to retain the "mutual understanding" component of the 5-part test rather than a standard focused on the retirement investor's subjective beliefs. Additionally, Cambridge urges the DOL to eliminate the proposed language "may be relied upon" in favor of the current "primary basis" language.

The proposal also would adopt an extremely broad and all-encompassing definition of what is considered compensation. A common scenario in the financial services industry involves financial professionals changing firms, often accompanied by the receipt of a forgivable loan as an incentive to join the new firm. As part of this transition process, the financial professional will solicit customers from the existing firm to join the new firm. If customers agree to move their qualified account to the new firm, often the only change that is made is to revise the name of the firm at the sponsor company to the new firm. None of the investments or holdings change. Cambridge specifically requests that the DOL provide guidance on whether this specific instance, which results in a retirement investor moving an account with no corresponding change of investment holdings, would be viewed as a fiduciary act.

Moreover, the Proposal rejects efforts to expressly disclaim fiduciary status, which unnecessarily limits the participants' freedom to contract and ability to define the scope, nature and extent of their own, unique and personal relationship.

Additionally, a proposed expansion of the definition of Fiduciary Investment Advice leads to uncertainty among professionals left to interpret and apply a new standard. The ultimate result may be that some of these individuals simply pull back from servicing clients, thus harming investors.

C. PTE 2020-02

1. Summary of proposed change

PTE 2020-02 allows investment advice fiduciaries to make rollover recommendations and sell a wide range of investment products, including proprietary products, to retirement investors. It also provides relief for certain principal transactions. It is unclear what is inadequate about the current exemption. Moreover, as now proposed, 2020-02 is onerous in requiring compliance with enhanced impartial conducts standards, imposing significant, additional disclosure requirements, along with maintenance of policies and procedures, and retrospective compliance reviews without clear guidance what should be included and how to measure compliance with the new standards.

Further, the Proposal expands PTE 2020-02 to automated advice (robo-advisor services), even though there is no human intervention. The proposal also would extend to advice provided pooled employer plans. Additionally, the Proposal modifies PTE2020-02 to include additional

disclosure requirements; to expand the circumstances under which a financial institution could be disqualified from reliance on PTE 2020-02; and to require affirmative correction of any non-exempt prohibited transaction.

Th numerous, new disclosures contemplated by the Proposal encompass the following:

- Providing written acknowledgement of fiduciary status;
- Providing a statement of the best interest standard of care;
- Providing a written description of the services and associated conflicts;
- Disclosure of the right to request additional information;
- Disclosure of specific justification for rollover recommendation;
- Revised policies and procedures governing financial professional compensation;
- Expanded retrospective compliance review;
- Enlarged disqualification provisions;
- Amended self-correction procedures;
- Amended riskless principal transaction handling; and
- Amended recordkeeping requirements.

The DOL also seems to adopt an almost strict liability standard with respect to the accuracy and adequacy of firm disclosures, especially those related to conflicts of interest. In this regard, the DOL proposes to impose liability if the firm disclosure is misleading in "any" material respect, a standard so impossibly high that a firm could be subject to liability for inaccurate disclosures that had no bearing whatsoever to a retirement investor's decision to invest. For example, if a firm inaccurately states the amount of revenue sharing payments it receives from a product sponsor, a retirement investor could have a cause of action against the firm even though the investor may not have even seen the disclosure, much less relied upon it. Cambridge urges reconsideration of this standard in favor of one that requires some semblance of reliance upon the misstatement.

The DOL proposes to clarify the requisite disclosures required for rollover recommendations and indicates that firms may charge a reasonable fee for conducting the necessary analysis that would have to be conducted as part of the new proposal. In Cambridge's view, charging a fee to evaluate rollover options falls squarely within the scope of financial planning, which could only be performed by Investment Adviser Representatives (IAR) of Registered Investment Advisers (RIA). This would seemingly eliminate the ability of any financial professional who is not an IAR from conducting and charging for such an analysis. This puts broker-dealers and insurance agents at a competitive disadvantage and more important will dramatically curtail the ability for retirement investors to find a financial professional willing to provide such services.

Contrary to the DOL's apparent position, the Proposal does not clarify the roles of participants in the retirement space, much less does it provide any certainty. In fact, instead of clarity and certainty, the Proposal brings higher costs, more complexity and associated uncertainty.

Beyond these clear, practical impediments to the Proposal, it also likely conflicts with the existing regulatory framework imposed by those entities *primarily* charged with regulating the conduct of securities business.

D. PTE 84-24 SIGNIFICANTLY IMPACTS THE ANNUITY BUSINESS

The Proposal, if finalized, will mandate dramatic changes to how annuities are sold to several categories of consumers, including ERISA-covered plans, participants in such plans and individual retirement accounts. Beyond the annuity sales transaction, the Proposal likely impacts, unnecessarily, the framework for distributing fixed annuity products to the marketplace and ultimately consumers. Neither outcome benefits investors, much less protects their interests in any manner reasonably justified by the associated disruption.

Under the Proposal, the exemption provided pursuant to PTE 84-24 is limited to transactions provided by an Independent Producer (licensed to sell, solicit, or negotiate insurance contracts of multiple, unaffiliated insurance companies and not employed by the insurance company) to invest in a fixed (or other "non-security") annuity contract. Insurance companies and their employees are *not* deemed "Independent Producers" and thus are excluded from the exemption, driving a dramatic shift in the channels through which fixed annuity products are sold. This encompasses rollover recommendations associated with such products.

Further, the 84-24 exemption extends only to fixed products (non-securities) and those products outside the SEC's jurisdiction. All others that fall outside the scope of 84-24 would default to PTE 2020-02 to secure a PTE for a fiduciary recommendation.

Finally, the Proposal severely limits the forms of compensation that can be paid while remaining eligible for relief under 84-24. Specifically, the Proposal related to 84-24 excludes a wide range of traditional compensation mechanisms, such as incentive programs based on sales volume. This proposed change impacts not only how products are sold but also how they are distributed, resulting in additional disruption to the marketplace.

1. Impartial Conduct Standard

The Impartial Conduct Standard contemplated by 84-24 applies to insurance sales and is comprised of three components: a best interest standard; a reasonable compensation standard; and a requirement to avoid misleading statements about investment transactions or other relevant matters. This aligns with the same standard articulated in PTE 2020-02. In practical effect, this standard precludes an Independent Producer from recommending a product that is "worse" for the investor, while better (more profitable) for the Producer.

Compliance with this standard requires, among other things, a written disclosure containing several, specified pieces of information. Further, the Independent Producer must document considered alternatives and why the ultimate recommendation is "best."

The requirements contemplated hereunder are unnecessarily burdensome, render mechanical a process that is much more individualized and thoughtful than inferred from the language of the rule. Finally, as proposed the changes to 84-24 create a real risk of rendering the disclosures meaningless to investors who deem them merely boilerplate to comply with a regulatory scheme that the investor does not understand.

E. AMENDMENTS TO PTES 77-4, 75-1, 80-83, 83-1 AND 86-128 RESTRICT OR ELIMINATE THE AVAILABILITY OF CERTAIN EXEMPTIONS

Similarly, with proposed limits on the application of 84-23, the Proposal seeks to amend PTEs 77-4, 75-1, 80-83, 83-1, and 86-128 to preclude expressly their application to "fiduciaries providing investment advice." Stated differently, investment advice fiduciaries could not rely on these exemptions under the Proposal, leaving 2020-02 as the only option.

These changes are likely to drive adoption of new compliance structures for certain types of advice. Additionally, specifically with respect to recommending participation in a particular program, that would fall under PTE 2020-02, while the management of those assets once in the program would need to be covered by PTE 77-4. There is no apparent need for such complexity and overlapping application of different PTEs.

F. ADDITIONAL OBSERVATIONS

In addition to the considerations addressed above, Cambridge joins in the letter submitted by the Financial Services Institute ("FSI") in connection with the Proposal. In particular, the comment period is entirely inadequate and impairs more robust, thoughtful industry input.

Also, the Proposal lacks any substantive, empirical justification. In particular, the DOL fails to advance a compelling, defensible cost-benefits analysis that might justify the extraordinary costs to industry participants in complying with the Proposal. In contrast to the DOL's lacking analysis, FSI proffers a detailed cost study that militates against adoption of the Proposal.

VI. CONCLUSION

Cambridge appreciates the DOLs efforts related to the proposed rulemaking and the opportunity to provide comments on the Proposed Exemption. However, Cambridge does not believe the Proposal should be implemented absent significant changes.

We look forward to working collaboratively with the DOL during this comment period to bring the process to a successful conclusion and ensure that all retirement investors are provided

access to high quality, affordable, personalized advice. Cambridge would be happy to further discuss any of our comments or recommendations in this letter with the Department.

Respectfully,

/s/ Seth A. Miller

Seth A. Miller
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