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August 5, 2020

The Honorable Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Application No. D-12011
ZRIN 1210-ZA29
Improving Investment Advice for Workers & Retirees
Docket ID #: EBSA-2020-0003

Dear Acting Assistant Secretary Wilson:

I am writing to express opposition to the Proposed Class Exemption and related rulemaking on investment advice. I commend the Secretary for embarking on a path to provide greater protection for American workers and retirees. But the current proposal puts individuals at risk by exposing them to conflicted retirement investment advice without sufficient protection. The proposed rules should be put to rest and instead a new rule making process that offers real protection should.

Wealth advisors provide important services to certain individuals but not everyone. The age-old argument had been without being able to charge sufficient fees, wealth advisors would not service individuals with modest sums of money. Now that low cost and no cost mutual funds are accessible to everyone, retirees and future retirees who have modest sums of money have access to quality investment opportunities. There is no need for these individuals to pay expensive fees to secure investment advice from wealth advisors. In summary the proposed rules undermine ERISA and put more Americans at-risk for financial losses.

For almost 30 years, I have represented individuals in ERISA claims and litigation. I have seen how a law passed by Congress with good intentions has turned into a sword against ERISA plan beneficiaries and a shield for wrongdoers. As one Massachusetts court remarked, "the insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ("ERISA")." *United States v. Aegerion Pharmaceuticals, Inc.*, 280 F.Supp.3d 217, 226 (D. Mass. 2017). The welfare-benefits side of ERISA has suffered greatly since Congress passed the statute. The proposed rules would diminish protection still afforded under the pension side of ERISA.

Given the evaporation of traditional defined benefit plans, 401(k) plans, or the equivalent for other sectors of employers and Individual Retirement Account (IRA) are the primary retirements savings methods for most workers. Ensuring that they keep as much as their hard-earned money as possible is crucial for their retirement security.

Long-ago Congress recognized that self-dealing always injures participants and beneficiaries and prohibited such transactions. *Comm'r v. Keystone Consol. Indus*., 508 U.S. 152, 160 (1993); s*ee also Marshall v. Kelly*, 465 F, Supp. 341, 354 (W.D.Okla.978) ("Congress was concerned in ERISA to prevent transactions which offered a high potential for loss of plan assets *or for insider abuse"*) (emphasis added),

Conflicted investment advice is conflicted financial opportunism. For this reason, Congress prohibited such advice through the prohibited transaction rules because of the damage that may be inflicted on participants and beneficiaries. The proposed rules run afoul of existing laws and Congresses goals.

The history of ERISA is well-known following the collapse of a pension trust at Studebaker motors. Congress, private business and other interest groups negotiated for more than 10 years, before enacting ERISA in 1974. When passed, Congress considered the common law of trusts and other federal and state regulatory schemes. Congress determined that these regulatory schemes were inadequate to protect pension plan participants. Securities laws had existed at that time for more than 40 years. ERISA's standards are far higher than securities laws or insurance laws because ERISA's role is to protect a participant's retirement. Congress enacted ERISA to afford better protections than existing statutes offered. *See POM Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.”).

The proposed rule exemption is deferential to the Securities and Exchange Commission’s (SEC’s) Regulation Best Interest (Regulation B-I). That rule is not protective but has a purpose to assist the securities businesses to engage in many practices that are profitable for investment advisors but harmful for investors. The SEC acknowledged that B-I is not a fiduciary standard. ERISA abounds with trust law in stark contrast. *See e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84-85 (1995) (holding that ERISA follows trust law by binding a company to the chosen specificity of its amendment procedures for reservation clauses). Given this background, diluting ERISA must be avoided.

The Secretary’s “best interest” standard for investment advice undermines fiduciary standards of ERISA. In addition, this “best interest” standard applies to all types of investment advisers and products, including insurance and complicated investments including variable annuities. The purpose of ERISA is to provide more protection for participants than state and federal law did at the time of ERISA’s enactment. See generally 29 U.S.C. § 1001(a) (“The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans;…”)

In addition, the proposed rules offer no meaningful enforcement mechanism for IRA holders. IRA investors who are financially harmed by conflicted investment advice would have no recourse and no ability to recover their losses.

The proposed rules fail to protect participants. The wealth adviser is not incentivized or mandated to offer low fee investments. The rules put too much faith in self-regulation. Self-regulation, as we see now in other businesses, sometimes is a failure. Think about the Boeing challenges and the 737 Max jet. Remember the underlying causes of financial calamity that gave rise to the Great Recession that rose from lax regulation of mortgages. History has shown that those in the financial services world will most often sell products that provide for the highest return for the advisor but not necessarily the retirees or future retirees. History tells us strong regulation is necessary to protect workers. And when workers lose their savings, often the taxpayer picks-up the bill as those individuals become more dependent on public benefit programs.

If you have any questions, please feel free to contact me by email.

Thank you for your consideration

Very truly yours,

/s/ Jonathan M. Feigenbaum