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

William Francis Galvin
Secretary of the Commonwealth

August 5, 2020

Submitted electronically to: www.regulations.gov

The Honorable Eugene Scalia
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

U.S. Department of Labor
Employee Benefits Security Administration
Office of Exemption Determinations
200 Constitution Avenue N.W.
Suite 400
Washington, DC 20210

RE: ZRIN 1210–ZA29: Notice of Proposed Class Exemption Improving Investment Advice for Workers & Retirees

Dear Secretary Scalia:

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 object to the Department of Labor's proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended (the Code) for advice provided by financial institutions and professionals. The proposed class exemption will subject the retirement savings of millions of working Americans to unacceptable conflicts, costs, and risks.

Through the regulatory and enforcement work conducted by my Securities Division, I have seen the great harm that retail investors and savers suffer as a result of conflicted investment advice. Significant conflicts of interest are built into the relationships between many financial professionals and their customers. Furthermore, conflicts are built into many investment products, especially since complex and high-cost products often carry high selling commissions and ongoing fees.

Retirement assets should be subject to the highest legal protections. The fiduciary duties that Congress adopted under ERISA are among the strictest in any body of law, which has helped to shield retirement assets against many kinds of conflicts. When ERISA fiduciaries make decisions regarding plan assets, they must act solely in the interest of participants and beneficiaries and with the exclusive purpose of providing benefits and defraying reasonable expenses. This traditional, strict standard is appropriate because retirement assets usually cannot be replaced. Retirement investors and savers can suffer devastating and irreversible harm when their retirement savings are lost.

The Duty of Loyalty under the Proposal is Inadequate to Protect Retirement Savers Receiving Advice from Financial Institutions and their Personnel

The duty of loyalty under the proposal falls far short of what is needed to protect retirement investors when they receive advice from financial institutions and professionals. The proposal adopts the same kind of sub-fiduciary standard that the SEC adopted in Regulation BI. A true fiduciary standard would require that the interests of investors must come first and that advice and recommendations must be provided without regard to the interests of any person other than the customer. I urge the Department of Labor to revise the proposal and adopt this higher standard. Typical forms of compensation paid to broker-dealers and agents are fundamentally conflicted. Such conflicted compensation includes: sales commissions; mark-ups and mark-downs; and revenue sharing arrangements with the sponsors of financial products and third parties. The proposal would bless such forms of compensation and would allow conflicts that are now prohibited under ERISA.

The history of broker-dealer conduct rule violations demonstrates that the conduct of brokers is shaped by the incentives and conflicts arising from their compensation. Such violations include: unauthorized transactions; churning; unsuitable recommendations; and sales of high-cost products, particularly many "alternative investments." To protect retirement assets, the Department of Labor should eliminate and restrict conflicts, rather than designing rules that diminish traditional protections by allowing conflicted advice.

The lower duty of loyalty in the proposal will allow broker-dealers to defend conflicted advice as "reasonable" and to argue that the advice did not put the brokerage's interest *ahead* of the customer's. The end result will be the same kind of legal tug of war that has taken place in FINRA arbitrations and enforcement proceedings when brokerages have defended problematic advice and recommendations under the suitability standard.

The Proposed Rule Is Likely to Confuse Investors and Foster Unwarranted Trust in Financial Institutions and Professionals

The proposal requires financial institutions and professionals to provide written disclosures to retirement investors that they are fiduciaries under ERISA and the Internal Revenue Code, along with a descriptions of services to be provided and material conflicts. At best, these disclosures create the risk of fundamentally confusing investors about the sub-fiduciary standard that applies under the proposal. These disclosures will also create a significant risk that investors will drop their guard and place unwarranted trust in an institution or professional whose compensation creates incentives to provide advice and recommendations that are not in the true best interest of investors.

Investors Must Have the Right to Enforce the Fiduciary Standard Promised to Them

While the proposed Labor regulation may appear to include some features of the 2016 Labor Fiduciary Rule, it does not provide key protections that would have been provided under the Best Interest Contract Exemption. In particular, the proposal fails to give investors the right to sue if their financial institution or professional advisor violates the terms of the fiduciary agreement. Enforcement, including civil enforcement by retirement investors, is key to the effectiveness of a protective conduct standard. To make the promised fiduciary standard meaningful, investors need to be able to seek redress in court for violations of that standard.

ERISA has for decades kept the low conduct standards of the broker-dealer industry separate from the management of retirement assets. We urge the Department of Labor to uphold ERISA's tradition of stringently protecting retirement savings by withdrawing its proposed rule and replacing it with a stronger proposal that incorporates a true fiduciary standard and gives investors the legal tools to enforce that standard.

I also object to the 30 day comment period that the Department of Labor has provided for this proposal. Thirty days is too short for a rulemaking that the Department of Labor has designated a "significant regulatory action," particularly in light of the disruptions caused by the COVID-19 pandemic. The complexity of the proposal and its far-reaching implications for retirement savers and investors warrant a comment period of at least 90 days. I request that the comment period be extended or re-opened to provide a meaningful opportunity for all interested parties to comment.

Thank you for the opportunity to comment on this proposal. If you have questions relating to these comments or we can otherwise provide assistance, please contact me or Diane Young-Spitzer, Acting Director, Massachusetts Securities Division at diane.young-spitzer@sec.state.ma.us or (617) 727-3548.

Sincerely,

William F. Galvin
Secretary of the Commonwealth
Commonwealth of Massachusetts