TIAA

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

***Re*: Application No. D-12011 (ZRIN 1210–ZA29)**
Notification of Proposed Class Exemption - Improving Investment Advice for Workers & Retirees

Dear Sir or Madam:

Teachers Insurance and Annuity Association of America ("TIAA") appreciates the opportunity to respond to the Department of Labor's (the "Department") request for public comment on the notification of "Proposed Class Exemption – Improving Investment Advice for Workers & Retirees" (the "Proposed Exemption"). TIAA applauds the Department's efforts to create a principles-based exemption that would provide retirement investors with greater access to fiduciary investment advice while also ensuring that Financial Institutions are providing advice in the best interest of retirement investors. As such, TIAA strongly supports the overall intent and construct of the Proposed Exemption and recommends some changes below that would further promote the purpose of the exemption.[1]

[1] With regard to the discussion in the preamble concerning the Department's interpretation of the five-part test in 29 CFR § 2510.3-21 and reversal of positions previously taken in Advisory Opinion 2005–23A (the Deseret Letter), TIAA urges the Department to use the established regulatory process, as it has appropriately done with its final "Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur," to regulate in this highly important area.

About TIAA

Founded in 1918, TIAA is the leading provider of retirement services for those in academic, research, medical, and cultural fields. Over its century-long history, TIAA's mission has always been to aid and strengthen the institutions and participants it serves and to provide financial products that meet their needs. To carry out this mission, TIAA has evolved to include a range of financial services, including asset management and retail services. Today, TIAA's investment model and long-term approach serves more than 5 million retirement plan participants at more than 15,000 institutions.[2] With its strong nonprofit heritage, TIAA remains committed to its mission of serving the financial needs of those who serve the greater good.

The Proposed Exemption should cover a Financial Institution's own plans

Because the Proposed Exemption excludes in-house ERISA plans from coverage, TIAA is greatly concerned that it may not be able to provide much-needed investment advice on its own products to its current and former employees. In the preamble, the Department explains its reasoning, stating: "The Department is of the view that, to protect employees from abuse, employers generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards." This is the same concern that the Department has articulated in its now removed Best Interest Contract Exemption 2016-01. However, as TIAA has said in prior comment letters, it believes that the Department's concern is unwarranted and the restriction should be removed.

The Proposed Exemption's robust conditions, which are designed to mitigate the harmful impact of conflicts of interest, provide adequate safeguards regardless of whether the individual receiving advice is employed by the Financial Institution. As the Department itself has recognized on multiple occasions, the employer's decision to hire or retain an employee is a business decision completely separate from a fiduciary act of providing investment advice. In fact, any perceived abuse related to performing these two separate functions would be addressed by the ability of a fiduciary, who is delivering investment advice, to mitigate conflicts by complying with the robust safeguards of the Proposed Exemption. In contrast, if in-house plan participants are not eligible to receive advice on in-plan investment products, they would be foregoing a meaningful benefit. For example, the decision to select a lifetime annuity is an important decision and TIAA-plan participants would significantly benefit from the advice TIAA would be able to provide under the Impartial Conduct Standards. There is no reason that a Financial Institution that provides a fiduciary service to third-party plan participants should not be able to do

[2] As of March 31, 2020

so for its own employees. TIAA plan participants, just like third-party plan participants, should be able to receive advice on these important decisions. This is especially important given the recent passage of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act, which includes several provisions aimed directly at improving access to lifetime income products.

Accordingly, TIAA urges the Department to remove the in-house plan restriction from the final exemption.

The Proposed Exemption should extend to robo-advice arrangements that do not involve interaction with an investment professional

In the preamble to the Proposed Exemption, the Department explains its reasoning for excluding robo-advice arrangements by referring to the computer model exemption under Section 408(g) of ERISA. However, the computer model exemption requires costly third party audits, which effectively makes utilizing the exemption cost-prohibitive for many investment advice providers. Specifically, the model must be periodically certified by an eligible investment expert as meeting the requirements of the exemption and the expert must meet criteria established by the Department and have no material affiliated or contractual relationship with the fiduciary advisor. While a Financial Institution may voluntarily choose to rely on the computer model exemption as it may be feasible under its particular business model, there is no reason to preclude the majority of Financial Institutions from an opportunity to rely on the Proposed Exemption for their various investment advice arrangements, including robo-advice. Doing so would contradict the Department's intent, as it itself declared in the preamble, of providing broad and flexible relief and avoiding the complexity associated with a Financial Institution relying on multiple exemptions when providing investment advice.

Accordingly, the Proposed Exemption should be extended to all robo-advice arrangements, not just hybrid robo-advice, because it provides a range of protections that meet or exceed the protections afforded under Section 408(g) of ERISA. Such an extension would serve the public interest by providing increased access to advice that, in turn, encourages saving for retirement in a prudent manner, while also promoting the provision of cost-effective advice on retirement assets.

The requirement to acknowledge fiduciary status should be removed

The Proposed Exemption would require a "written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor." As explained below, this prescriptive requirement contradicts the Proposed Exemption's overall flexible and principles-based approach and may result in unintended consequences without any value to the Retirement Investor. As such, TIAA respectfully requests that this condition be removed.

Conflicting Federal & State Fiduciary Definitions

The term “fiduciary” is a legal term that has different meanings and ramifications under various federal and state legal and regulatory regimes. For example, a registered representative of a broker-dealer may make a recommendation to a retirement investor and not be deemed to be a fiduciary under the Securities Exchange Act of 1934 (the “Exchange Act”), but would be deemed to be a fiduciary under ERISA (assuming the five-part test is satisfied). Under these circumstances, requiring a written acknowledgement of fiduciary status under ERISA would also necessarily result in a written acknowledgement of non-fiduciary status under the Exchange Act to ensure accuracy. However, acknowledging fiduciary status under one federal regulatory regime while simultaneously denying fiduciary status under another would undoubtedly cause confusion to the retirement investor. An average Retirement Investor does not understand, and, in fact, may very well be confused by the meaning of the term “fiduciary,” especially when such a term would likely be accompanied by legal caveats of its meaning under various areas of federal and state law. As such, requiring “fiduciary” acknowledgement would counter the Department’s intent that the Proposed Exemption significantly aligns with other regulators and that the required disclosures be in plain English.

Private Right of Action

In the preamble, the Department states it “does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so.”[3]

While we applaud the Department’s intention that the fiduciary acknowledgement would not create a private right of action, TIAA is concerned that the plaintiffs’ bar may use the term as a pathway to create new legal claims and theories under state common law and contract law. Undoubtedly, such an outcome would frustrate the Department’s intent as declared multiple times in the preamble.

Accordingly, while Financial Institutions may voluntarily include a fiduciary status disclosure as may be feasible and appropriate under various circumstances, TIAA sees no valuable reason to mandate that as part of the exemptive relief.

[3] Federal Register / Vol. 85, No. 130 / 40844 Tuesday, July 7, 2020

<u>Streamline the Proposed Exemption by incorporating a review requirement as part of policies and procedures and clarify the "prudence" standard in relation to the "reasonable" standard</u>

Under the Proposed Exemption, a Financial Institution is required to conduct a retrospective review relating to its policies and procedures, and then present a written report to the CEO for certification.[4] TIAA believes that the Department can achieve its objectives by requiring a review as part of a firm's policies and procedures, which must be designed to ensure compliance with the Impartial Conduct Standards, rather than as a separate prescriptive requirement.

However, should the Department impose such a requirement, TIAA requests that the Department clarify the differences, if any, between the prudence standard under the Proposed Exemption and the reasonableness standards under the federal securities laws. Specifically, Regulation Best Interest requires Financial Institutions to have policies and procedures reasonably designed to achieve compliance with Regulation Best Interest. *See*, Section 240.15l-1(a)(2)(iv). Further, FINRA Rule 3110(a) requires that "[e]ach member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules." Moreover, FINRA Rule 3130 requires each member to certify that it has in place compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable rules and regulations. Therefore, both Regulation Best Interest and FINRA Rules 3110 and 3130 require Financial Institutions to have policies and procedures reasonably designed to achieve compliance with applicable regulations. By contrast, the Proposed Exemption requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards. While we believe there is no substantive difference between the prudence and reasonableness standards, as an ERISA fiduciary already is required to have policies and procedures to achieve compliance and to act prudently in light of all appropriate facts and circumstances, it would be helpful if the preamble to the final regulation would so state.

<u>Adopt a cure period for immaterial and unintentional omissions</u>

While TIAA supports the Proposed Exemption, it is concerned that an immaterial failure to meet some of its detailed procedural requirements (e.g., completion of a certification a few days late) can lead to draconian excise taxes and potential private remedies, which would disproportionately harm the retirement investor. Accordingly, TIAA recommends that the Department incorporates a general provision in the exemption that would excuse immaterial and unintentional errors and/or omissions that are timely and properly corrected. In this regard, both Congress and the Department have already adopted a "correction" concept in other prohibited

[4] Proposed Exemption, Section II(d)

transaction exemptions such as ERISA Section 408(b)(20), and 29 C.F.R. § 2550.408b-2. As such, TIAA recommends the Proposed Exemption be modified so that the Financial Institution, Investment Professionals, affiliates and related entities could rely on the exemption for any failure that is not material to the retirement investor, if they have acted in good faith and with reasonable diligence in complying with the exemption and there is a commitment to correct any errors within a reasonable time period after detection to the extent practicable.

Conclusion

TIAA appreciates the Department's consideration of its comments to the Proposed Exemption and welcomes the opportunity to engage further on any aspect of the foregoing.

Sincerely,

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