August 6, 2020

The Office of Exemption Determinations
Employee Benefits Security Administration
Attention: Application No. D-12011
Suite 400
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Submitted Electronically via Federal eRulemaking Portal: www.regulations.gov

Re: Application No. D-12011, ZRIN 1210-ZA29 – Improving Investment Advice for Workers and Retirees

Ladies and Gentlemen:

AALU/GAMA and NAILBA, appreciate the opportunity to submit comments on the Department of Labor's ("Department") notice of proposed class exemption ("Proposed Exemption") regarding the provision of non-discretionary investment advice to Employee Retirement Income Security Act ("ERISA") retirement plans and participants, Individual Retirement Accounts or Individual Retirement Annuities ("IRA") and other types of tax-preferred accounts subject to IRC Sec. 4975.

In addition to the Proposed Exemption, the Department announced new guidance reinterpreting the regulation defining fiduciary investment advice. While that guidance appears to be separate from the Proposed Exemption, we nonetheless wish to take this opportunity to express our significant concerns regarding the effects of the guidance.

<u>Who We Are:</u>

AALU/GAMA is the leading organization of life insurance professionals who provide life insurance and retirement planning solutions for individuals, families, and businesses. We are dedicated to promoting the professional development needs and leadership skills of first-line and front-line leaders in the insurance, investment, and financial services industry. Our more than 6,000 members are Financial Security Professionals engaged in providing life insurance planning and annuity solutions for individuals, families, and businesses nationwide. As life insurance professionals, they put their clients first every day, enabling individuals and families to maintain independence in the face of potential financial catastrophe and to build and guarantee retirement income.

NAILBA (National Association of Independent Life Brokerage Agencies) is the leading insurance industry organization promoting retirement security and consumer choice in the insurance and financial services marketplace through the use of independent wholesale brokerage distribution channels. Reaching over 1,400 Brokerage General Agencies and 332,000 Independent Advisors, NAILBA is the voice of independent brokerage distribution.

Executive Summary:

We are very supportive of the approach taken by the Department in the Proposed Exemption. We believe the Proposed Exemption will benefit ERISA participants, plans, and IRA owners by providing increased access and choice for financial assistance, as well as reducing cost through greater regulatory efficiency.

Our producer members are subject to multiple regulatory regimes. They sell insurance products under state law, they sell securities as representatives of broker-dealers, and some provide investment advice as representatives of Registered Investment Advisors. As a result, AALU/GAMA and NAILBA are especially cognizant of the different requirements that can simultaneously apply to producers under these different regimes, and how uncoordinated regulation can increase costs borne by consumers and in some cases result in limited access to professional advice.

After the Fifth Circuit Court of Appeals decision to vacate the 2016 fiduciary regulation,[1] a rule that we believe harmed our clients' interests and caused significant disruption and expense in the marketplace, we have been waiting for the Department to take the next step and replace the temporary enforcement policy[2] adopted after the rule was vacated with a new, permanent class exemption.

- *The Proposed Class Exemption is an Important Step Forward*

We applaud the Department for structuring the Proposed Exemption to harmonize requirements under securities law and ERISA. By modeling the Proposed Exemption on the Securities and Exchange Commission's ("SEC") Regulation Best Interest ("Reg BI"), the Department will make it easier for our members who are operating through broker-dealers to comply with ERISA when making recommendations involving plans and IRAs. The uniformity provided by a very similar set of standards will facilitate compliance with the requirements of the Department, the SEC and FINRA. This reduction in unnecessary compliance costs is ultimately in the best interest of the plan participants and beneficiaries. Two separate regulatory regimes that achieve

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[1] *Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).

[2] Field Assistance Bulletin 2018-02

the same goal, but require separate methods are duplicative—for example, by recognizing that Form CRS and Reg BI disclosures can be used to meet the disclosure requirements of the Proposed Exemption, the Department is saving consumers the expense related to preparing separate but similar disclosure documents that add cost, not content or protection.

It also very important that the Department retained and did not modify the traditional exemptions that currently apply to insurance transactions, such as PTE 84-24. While the new Proposed Exemption is very similar to Reg BI, and thus is well-positioned for some of our members, the Proposed Exemption would present a much more significant compliance challenge for producers selling state-regulated insurance products who are not subject to Reg BI. The result of this decision to preserve proven compliance alternatives is greater choice and regulatory efficiency—producers and financial institutions may elect to use the new Proposed Exemption or to abide by PTE 84-24. This choice benefits consumers by providing greater access to quality, cost-effective financial assistance.

As described in more detail below, we offer suggestions on further improvements to the Proposed Exemption, including allowing insurance intermediaries to be financial institutions, clarifying the disclosure requirements related to fiduciary status, and clarifying monitoring obligations.

- *The New Guidance Reinterpreting the Five Part Test Raises Significant Concerns*

While we support the Proposed Exemption, we are very concerned about the new guidance interpreting the five part test discussed in the preamble to the Proposed Exemption. Insurance producers, carriers and intermediaries relied on the clear guidance Advisory Opinion 2005-23A (the Deseret Opinion) provided regarding the ERISA fiduciary status of rollover recommendations. That Advisory Opinion summarized the Department's long-held opinion that rollover recommendations typically were not ERISA fiduciary recommendations under the 1975 regulation's five part test (unless the investment professional recommending the rollover was already a fiduciary to the plan).

This clarity was essential to our compliance efforts, because one of the primary effects of ERISA fiduciary status is that traditional forms of insurance product compensation are prohibited. The new guidance effectively reverses this long-held position, and replaces it with a vague standard that raises more questions than it answers. In our view, the new guidance:

- Makes it very difficult to know when fiduciary status applies;
- Unreasonably interprets the plain words of the regulation;
- Is inconsistent with the legal reasoning of the Fifth Circuit decision.

Accordingly, we ask that the Department rescind the new guidance. We believe it would be beneficial to meet with the Department to discuss how insurance sales take place in the context of rollovers and distributions, as the guidance suggests some misunderstanding about these non-fiduciary sales transactions. We met with the SEC on several occasions to address similar issues in the development of Reg BI, and we believe it would be helpful for the Department as well.

We urge the Department to proceed to a final grant of the Proposed Exemption with the modifications we recommend. The Proposed Exemption may proceed without the new fiduciary guidance, as it is not essential to the operation of the Proposal Exemption.

Improving the Proposed Exemption:

Regardless of the Department's resolution of the guidance issue, we urge the Department to move forward expeditiously to grant the final Exemption. That said, we do believe several modifications would improve the Proposed Exemption.

- Definition of Financial Institution

We urge the Department to expand the definition of financial institution to include insurance intermediaries. As the Department noted in the preamble, insurance products are distributed through a wide array of different relationships with quite different interactions between producers and insurance carriers. The preamble noted that insurance carriers may contract with intermediaries such as independent marketing organizations ("IMO"), field marketing organizations ("FMO") or brokerage general agencies ("BGA") to provide supervision and oversight on behalf of carriers who are acting as financial institutions. However, just as keeping PTE 84-24 available is important to provide choice, some intermediaries may wish to have the option to take on the responsibility of financial institutions, and that flexibility would be of benefit to participants and beneficiaries.

- Fiduciary Disclosure

Section II(b)(1) requires that financial institutions and investment professionals acknowledge fiduciary status in writing as a condition of the Proposed Exemption. We urge the Department to remove this provision for several reasons.

Given the ambiguities about fiduciary status discussed in more detail below, it may not be possible to know whether a recommendation is fiduciary investment advice at the time the recommendation is made. This is especially true where the recommendation involves a rollover or distribution, and is being provided to a new client. While we do not believe this situation would meet the "regular basis" test, the Department suggests that it could, depending on future events and facts and circumstances. In such a situation, the Proposed Exemption should be available for use without requiring the assertion of a fiduciary status that may not be correct.

In addition, the fiduciary status of the investment professional and financial intuition are irrelevant to compliance with the Proposed Exemption. Regardless of fiduciary status, the Proposed Exemption would require meeting the Impartial Conduct Standards. The fiduciary declaration is not needed for the Proposed Exemption to function in exactly the same manner.

- Ongoing Monitoring

Just as the SEC decided that no ongoing monitoring obligation was created by Reg BI, the Department should not require any monitoring obligation under the Proposed Exemption. This is especially true given that the monitoring obligation articulated in the preamble would apply only to "investments that possess unusual complexity and risk…" because these "…may require ongoing monitoring to protect the investor's interests,"[3] The Department does not provide any additional analysis to explain what is an unusually complex or unusually risky investment. The result is a vague standard that is open to significant interpretation. We also don't believe the Department should attempt to identify and list such investments. Instead, it would be best to allow the parties to agree to ongoing monitoring between themselves, but to not require it.

- Retrospective Review and Certification

Finally, the Proposed Exemption should not require the retrospective review described in Section II(d). Such a review is not necessary for the operation of the Proposed Exemption—as with all class exemptions, the conditions are met or the exemption is not available. Such a retrospective compliance review and certification is also not part of Reg BI. If the review is retained nonetheless, it should not require the CEO of the financial institution to certify the report. We believe a compliance officer will be in the best position to conduct the review, as well as to modify policies and procedures based on the information in the report.

Significant Concerns Regarding the New Guidance Interpreting the 1975 Five-Part Test:

As indicated above, our members are very concerned by the Department's new guidance reinterpreting interpreting the "five part test" in 29 CFR § 2510.3-21 included in the preamble to the Proposed Exemption. The substance of the guidance is tantamount to a new regulation. While the guidance doesn't technically change the words of the 1975 regulation, it concludes that they mean nearly the opposite of what they've meant since 1975. The effect is to make it very difficult for our members to know whether their interactions with clients relating to rollovers and distributions are subject to the ERISA fiduciary standard or not. This lack of clarity is a significant problem, making it very difficult to comply in good faith.

The reality is that many insurance transactions are not fiduciary advice because they are sales transactions that Congress never intended to be considered "advice for a fee." While the new interpretation acknowledges that sales are not advice, the specific examples illustrating the new guidance undermine this clear principle, creating significant doubt.

- *The New Guidance is Not Consistent with the Fifth Circuit's Decision*

It is important to note that the five part test (as the Department has previously interpreted it) was specifically acknowledged to be a valid standard by the Fifth Circuit Court of Appeals. A key part of that conclusion was the requirement that advice be provided on a "regular basis."

[3] Id at 40,843.

Specifically, the court wrote, "The 1975 regulation captured the essence of a fiduciary relationship known to the common law as a special relationship of trust and confidence between the fiduciary and his client…the DOL's original regulation specified that a fiduciary relationship would exist only if, *inter alia,* the adviser's services were furnished 'regularly' and were the 'primary basis' for the client's investment decisions."[4]

As the new guidance now interprets those words, providing ERISA fiduciary advice on a "regular basis" no longer means actually having to meet regularly, or having to provide advice in connection with an ERISA plan or IRA. Applying these new meanings to the long-standing regulatory text may not be consistent with the Fifth Circuit's ruling. The court criticized the 2016 fiduciary rule for a similar flaw, writing, "Moreover, that it took DOL forty years to 'discover' its novel interpretation further highlights the Rule's unreasonableness."[5] The new guidance provides some very novel interpretations of a 45-year old rule.

- *Advice Provided on a "Regular Basis" Doesn't Have to Involve ERISA Assets*

Under the new guidance, an "ongoing relationship" that does not involve ERISA assets prior to the rollover recommendation may meet the test. The guidance explains that, "…in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the 'regular basis' requirement."[6] Under this expansive view, a prior relationship unrelated to ERISA would be enough to make a single recommendation regarding ERISA count as if ERISA advice had been provided on a regular basis. Having sold insurance policies to an individual on several previous occasions should be viewed as unrelated to whether a single rollover recommendation meets the regular basis test.

- *"Regular Basis" Can Mean Once*

In a more expansive and conditional interpretation, the guidance suggests that "regular basis" could be satisfied by an "anticipated ongoing relationship"—i.e., a relationship that hasn't happened yet, but that is expected.

Specifically, the guidance explains this with the following scenario. A participant receives a rollover recommendation from a financial professional. It is their first meeting. This satisfies the test because "the rollover recommendation <u>may</u> be seen as the first step in an ongoing advice relationship that <u>could</u> satisfy the regular basis prong of the five-part test <u>depending</u> on the facts and circumstances." [emphasis added][7] In other words, because the financial professional and the participant expect to meet again, and because they think they probably will talk about investments if they do, ERISA fiduciary advice has been provided on a regular basis. Again, the

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[4] *Chamber of Commerce of the United States v. U.S. Department of Labor*, 885 F.3d at 365.

[5] Id. at 380.

[6] 85 Fed. Reg. 40,839 (July 7, 2020).

[7] Id. at 40,840.

hope of future meetings should not qualify as meeting on a "regular basis" after only meeting once.

- *Unclear When a Sales Transaction Becomes Advice*

The guidance does clearly adhere to the Fifth Circuit decision by acknowledging that "a one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase."[8] This is a very important point, as it goes to the core of the Fifth Circuit ruling—that a fiduciary relationship was intended to be a special relationship of trust, not a mere sales transaction.

However, the guidance then makes it very difficult to discern what the Department believes constitutes such a sales transaction. The guidance specifically addresses an annuity transaction, writing, "…insurance agents may have or contemplate an ongoing advice relationship with a customer. For example, agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity."[9]

The guidance suggests that this may be a fiduciary scenario, but it is not clear why. Trailing compensation by itself suggests nothing about the nature of the relationship. A commission, whether paid immediately or over time, is simply compensation for a transaction. It is paid by the insurance carrier to the producer and may be structured to be paid over time for a variety of economic reasons unrelated to the purchaser. If any services or recommendations are provided to the purchaser at a later time, there is nothing to suggest that they rise to the level of fiduciary advice. Finally, the reality is that an ongoing sales relationship is not a fiduciary relationship merely because it is ongoing.

The Guidance Attempts Too Much

There is a valuable role for sub-regulatory guidance to address certain discrete issues or to apply broad principles to specific issues. Guidance documents can also take on too much, and attempt to function as regulations, but without the benefit of public notice and comment. President Trump addressed the latter concern in Executive Order 13891 that prohibits guidance documents from implementing requirements that should be adopted through notice and comment rulemaking.[10] We strongly urge the Department to view this guidance as having attempted to do more than the Executive Order permits.

Conclusion:

We thank the Department for providing strong retirement investor protections without duplicative regulatory requirements, and urge the rapid adoption of the Proposed Exemption,

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[8] Id.

[9] Id.

[10] See., Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents, 84 Fed. Reg. 55,235 (October 15, 2019).

modified as we suggest. However, we ask the Department to recognize that the new fiduciary guidance will cause significant problems, and rescind the guidance while it decides how to proceed.

Thank you for your consideration, and please don't hesitate to contact us with any questions or concerns.

Sincerely,

Marc Cadin	Daniel LaBert
CEO	CEO
AALU/GAMA	NAILBA