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, DC 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:

TruChoice Financial Group, LLC, ("TruChoice") appreciates the opportunity to submit comments on the Department of Labor's ("Department") notice of proposed class exemption ("Proposed Exemption") permitting reasonable compensation for fiduciary investment advice and certain principal transactions in connection with Employee Retirement Income Security Act ("ERISA") plans and Individual Retirement Accounts or Individual Retirement Annuities ("IRA"). Additionally, we appreciate the opportunity to offer comment on the Department's new guidance announced in the preamble to the Proposed Exemption that rescinds Advisory Opinion 2005-23A and provides new interpretations relating to the five-part test for fiduciary investment advice.

TruChoice Financial Group

TruChoice Financial Group, LLC, a national distributor of insurance products and services is headquartered in Minneapolis, Minnesota, with additional offices in Ann Arbor, Michigan, Atlanta, Georgia, and Sacramento, California. TruChoice is a wholly owned subsidiary of Allianz Life Insurance Company of North America, Inc. ("Allianz") with 2019 annual annuity sales exceeding $2.8 billion and over $23 million in life insurance product sales.

TruChoice is licensed to operate as an insurance agency in all 50 states. TruChoice offers financial products on behalf of dozens of insurance carriers, and has numerous distribution agreements with many of the largest financial services entities in the country. Through these relationships, TruChoice supports many broker-dealer and registered investment advisor relationships, as well as independent insurance-only licensed individuals.

I. General Comments

- **Protecting Americans' Retirement Security**

The Department's new interpretations relating to the five part test and the Proposed Exemption will have a significant impact on whether consumers will continue to have access to, and information about, annuities. Annuities play a key role in today's retirement savings marketplace, particularly in the retail IRA market. An annuity is the only form of longevity protection in the market. An annuity allows a consumer to convert retirement savings into a stream of monthly income that is guaranteed for life. With the recent shift away from defined benefit plans, a retiree now bears the risk of outliving his or her savings. This risk is even greater as Americans live longer. An annuity enables a consumer to transfer the longevity risk to the insurer.

Confusing and overlapping regulation is a burden on the economy and can result in less information about, and access to, insurance and financial products, which will ultimately harm consumers. ERISA fiduciary investment advisors are not limited to one type of license or product—they can be investment advisors, representatives of broker-dealers, insurance producers and/or other types of financial professionals. In fact, many of the independent financial professionals TruChoice works with hold two or more of these licenses. In addition to complying with their own particular regulatory requirements, these professionals must also comply with ERISA's specific rules. As a result of these simultaneously applicable regulatory regimes, compliance when advising plans and participants can be difficult and burdensome, increasing expenses that are passed on to retirement investors.

We appreciate that the Department has worked to fit its Proposed Exemption with the Securities and Exchange Commission's (SEC) Regulation Best Interest ("Reg BI"). This will help harmonize many ERISA and securities requirements and reduce compliance burdens without sacrificing consumer protections. Uniformity across different regulations and regulatory bodies benefits consumers by meeting their service expectations as well as by reducing the costs they ultimately bear. We believe consumers would be best protected by a close regulatory alignment not only with Reg BI, but with the best interest and related standards promoted by the National Association of Insurance Commissioners ("NAIC") and the Financial Industry Regulatory Authority ("FINRA").

- **New Guidance Interpreting the "Five Part Test"**

We are concerned the new guidance interpreting the "five part test" creates confusion for both consumers and financial professionals. As we explain in more detail below, the new guidance removes vital clarity the five part test has provided for 45 years, making it very difficult to know when a particular recommendation would be ERISA fiduciary advice, especially with respect to transactions involving insurance products. Accordingly, we ask the Department to withdraw the new guidance and reinstate Advisory Opinion 2005-23A. We hope our additional comments below will be helpful in understanding our concerns about the guidance.

- **The Proposed Exemption**

The modern financial services marketplace provides many avenues for plans and participants to receive financial assistance and advice, each of which may be subject to different laws and requirements. We appreciate the Department has developed an approach in the Proposed Exemption that recognizes different business models while providing a uniform degree of protection for plans, participants and beneficiaries, and IRA owners.

We also appreciate the Department has recognized the growing and significant role of Independent Marketing Organizations ("IMOs") and other insurance intermediaries and has specifically asked for input and comment from this segment of the industry. Including this group in this discussion is important and recognizes the variety of ways that insurance products are distributed through financial professionals.

At the same time, the Department has recognized that not all financial professionals assisting plan participants and IRA owners are securities professionals. Insurance, banking and other financial professionals provide essential products and services subject to different regulatory requirements. Accordingly, we support the Department's decision to leave other existing class exemptions in place, ensuring these different types of financial professionals may continue to rely on an exemption that is designed for their specific business model (such as PTE 84-24 for insurance products). Having the option of accessing the new Proposed Exemption or of using an existing exemption provides flexibility essential to efficient regulation that enhances consumer protections rather than increasing administrative costs.

We offer below some modifications that we believe are necessary to improve the utility of the Proposed Exemption.

II. Comments on the New Guidance and Interpretations in the Preamble concerning the Five-Part Test

While we appreciate the Department provides sub-regulatory guidance to assist in interpreting ERISA regulations, the new guidance announced in the preamble to the Proposed Exemption raises a number of concerns which is atypical. These changes are not appropriate for sub-regulatory guidance given the potential magnitude of their effect, and the fact that the Department is effectively reversing its fundamental understanding of how to apply the rule that has been in place for 45 years.

- **New Interpretations of this Magnitude Should be the Product of Notice and Comment Rulemaking**

The Department has traditionally used a number of mechanisms to provide guidance and/or new interpretations: Advisory Opinions, Information Letters, Field Assistance Bulletins, and Interpretive Bulletins. These typically address certain specific issues to assist in applying the general requirements in the statute or the regulations to specific instances.

The new guidance would interpret the five-part test in a completely new way, reversing 45 years of the prior interpretation, and would significantly expand the scope of ERISA's fiduciary definition. These changes would make it very difficult for a financial professional to know at the time of a sale whether or not they are a fiduciary. The confusion created is a material problem because of the serious consequences which may result from being an ERISA fiduciary. For example, commissions and other common forms of transaction-based compensation are prohibited under ERISA, limiting options for consumers to access valuable financial assistance. The SEC specifically cited the effect of the Department's 2016 fiduciary rule on transaction-based services, writing that "with the adoption of the now vacated Department of Labor Fiduciary Rule, there was a significant reduction in retail investor access to brokerage services, and we believe that the available alternative services were higher priced in many circumstances." [1] Financial professionals, insurance carriers and intermediaries need to be able to determine whether they are ERISA fiduciaries in connection with a rollover recommendation —the new guidance makes this very difficult to do.

- **The New Interpretations are Inconsistent with the Fifth Circuit Ruling**

While we believe consumers need access to quality financial assistance in making decisions to rollover assets from an ERISA plan, Congress never intended ERISA's fiduciary structure—the highest duty known to law[2]—to apply to all recommendations. This was one of the primary reasons the 2016 rule was vacated by the Fifth Circuit.[3]

The Fifth Circuit specifically identified the 1975 rule as striking the right balance in capturing Congressional intent, writing, "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."[4] Essential to the court's favorable view of the 1975 regulation was the "regular basis" prong of the five-part test.

The Department contradicts the 5th Circuit by fundamentally changing its interpretation of what the words "regular basis" mean to reach a new conclusion after so many years of the prior interpretation. In *Chamber*, the Court specifically expressed skepticism of such newfound interpretations, writing, "Moreover, that it took DOL forty years to "discover" its novel interpretation further highlights the Rule's unreasonableness."[5]

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[1] *84 Fed Reg 33,322 (July 12, 2019)*

[2] See, e.g., *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d. Cir. 1982), and *Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016).

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

[4] *Chamber v. DOL, at 365.*

[5] Id at 380.

- **The New Interpretations make Fiduciary Status Speculative and Unclear**

The Department's interpretation of the five part test would capture sales activities in which recommendations are solely incidental to the sales activities. For example, even though the consumer and the financial professional have met only once, the new interpretation finds that the "regular basis" prong could be satisfied because, "the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances." [emphasis added][6] This awkward change equates "regular basis" with the concept of an "anticipated ongoing relationship." However, it is not at all clear what future activity "may" occur that "could," depending on the facts and circumstances, constitute an ongoing relationship that will rise to the level of a common-law fiduciary relationship.

While the Department allows 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,"[7] the new standard nonetheless creates confusion for sales of insurance. The new interpretations err further by conflating the receipt of compensation as part of the execution of a recommended sale with a payment for advice, 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."[8]

Trailing compensation is not an indicator of whether or not ongoing advice is being provided. There are many economic reasons why insurance carriers, insurance brokers and financial professionals may wish to structure that certain compensation be paid over a period of time. Regardless of the timing or structure, trail commissions are just a payment for the sale of an insurance product, not an indicator of an ongoing relationship as required in the 1975 regulation.

We also do not believe that providing "ongoing recommendations or services" related to an annuity mean that fiduciary advice is being provided on a "regular basis." These services and recommendations do not involve activities that are considered investment advice, such as helping a client complete a change of address request or forms to start income payments or to request a withdrawal. A sales or service relationship with a client cannot be transformed into a fiduciary relationship simply because it is ongoing.

The effect of the new interpretations in the preamble with respect to rollover advice is to transform the five part test from a clear indicator of fiduciary status to a confusing and speculative presumption that a financial professional may be a fiduciary depending on the future course of dealings. This ambiguity is contrary to providing the clarity to a consumer on what they should expect at the time of a recommendation and for the financial professional to

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[6] 85 Fed. Reg. 40,840 (July 7, 2020).

[7] Id.

[8] Id.

understand which regulations require compliance. We urge the Department to rescind the guidance and to reinstate Advisory Opinion 2005-23A.

III. Comments on the Proposed Exemption

We urge the Department to consider the following modifications in the final exemption conditions.

- **The Department should Expand the Definition of Financial Institution to include IMOs and other Insurance Intermediaries**

The Proposed Exemption requires financial institutions and financial professionals to work together. However, the definition of financial institution is limited to banks, insurance carriers, broker-dealers and registered investment advisors. The Department has specifically requested comment about this definition and whether the proposed definition is broad enough to capture the full scope of arrangements among insurance carriers, financial professionals and intermediaries. We believe such an expansion would be helpful and ask the Department to expand the definition of financial institution to include insurance intermediaries such as IMOs, field marketing organizations and brokerage general agencies.

Certain insurance intermediaries are positioned to oversee the business of insurance agents. They are licensed insurance agencies regulated by the insurance departments of each state in which they operate. They typically have distribution agreements with several insurance carriers, and through these relationships support independent licensed insurance agents, often including support for the insurance agent's broker-dealer and registered investment advisor relationships. The services provided by insurance intermediaries can range from back-office administration to suitability, compliance and advertising and marketing support, all of which are offered by TruChoice Financial Group. As a financial institution, an insurance intermediary would have the ability to engage in a contractual relationship with the financial professional and implement controls to monitor conduct, provide more targeted training, and take a more active role in protecting the consumer. Currently, there is no one regulatory body or other entity that could have this type holistic oversight of an independent insurance agent's business and conduct. Therefore, we ask that insurance intermediaries be provided the option to utilize the Proposed Exemption by including them in the definition of financial institution.

- **Fiduciary Status**

Section II of the Proposed Exemption states that "the exemption requires Financial Institutions to acknowledge fiduciary status under ERISA and/or the Code." Section II(b)(1) of the Proposed Exemption requires, "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."

We urge the Department to clarify the application of this requirement. As discussed above regarding the new guidance reinterpreting the five part test, it may not be clear when a recommendation to a retirement investor is subject to ERISA's fiduciary standard, especially with regard to rollover recommendations. Requiring an affirmative statement acknowledging fiduciary status forces financial professionals to accept a status that may not be applicable, and it prevents such financial professionals from using the Exemption in good faith when their fiduciary status is not clear. We do not believe the Department has provided a justification for why such acknowledgment is needed, especially as this information could be misleading to participants. We do not think an affirmative statement of fiduciary status is necessary for the Department to achieve its goals in the Proposed Exemption, and we think it could be used in a manner contrary to the Department's stated intention that it "…does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action..."[9]

- **Ongoing Monitoring**

We support the Department's conclusion that the Impartial Conduct Standards do not require ongoing monitoring. We agree that whether monitoring services are provided should be a matter decided between the parties involved. However, we are concerned about the vague standard created by the statement in the preamble that, "Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests."[10] There is no guidance to suggest what an unusually complex or risky investment might be. This puts financial professionals at risk of potentially breaching their fiduciary duty for failing to provide ongoing monitoring in connection with a particular investment. Absent further guidance on what constitutes a "complex investment", we urge the Department to clarify that monitoring is not required.

- **Documenting Best Interest in Rollovers**

Section II(c)(3) requires that, "The Financial Institution documents the specific reasons that any recommendation to roll over assets…is in the Best Interest of the Retirement Investor." We read this to mean that the financial institution must adopt policies and procedures that ensure the relevant information and analysis is to be gathered, analyzed and retained. Indeed, this appears to be one of the primary purposes of the annual retrospective review: to assist in evaluating the effectiveness of policies and procedures and modifying them as needed.

However, we do not read Section II(c)(3) to require the financial institution to review and approve each transaction to determine best interest on a case by case basis and ask the Department to make this clear.

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[9] Id. at 844.

[10] 85 Fed. Reg. 40,843 (July 7, 2020).

- **Review and Certification**

We do not believe that the retrospective review, report and certification by the financial institution's chief executive officer required in Section II(d) is necessary for the Proposed Exemption to function as intended. This is a very atypical requirement for a class exemption because it is unnecessary—one is either in compliance with the requirements or not. If not, the exemption is simply not available, and the transaction is prohibited. As you know, there is no analogous report in the SEC's Regulation Best Interest.

We urge the Department to remove the requirement to review, report and certify entirely. However, if it retains the provisions, they should be modified to permit the report to be certified instead by the chief compliance officer or equivalent official in an institution. Given the Department's purpose in having the report inform improvement to the policies and procedures, requiring the chief compliance officer to fill this role will ensure that the information is reviewed by the officer best positioned to act on it.

IV. Conclusion

We appreciate the opportunity to provide the Department with our suggested modifications to the Proposed Exemption, which we believe will improve its utility. However, we have significant concerns with the new guidance to the five part test. Accordingly, we urge the Department to withdraw the guidance and reinstate Advisory Opinion 2005-23A.

Thank you for your consideration of these comments. We welcome the opportunity to continue this discussion.

Sincerely,

Brian Peterson
Chief Executive Officer
TruChoice Financial Group, LLC