feinberg
jackson
worthman
& wasow

2030 Addison Street, Suite 500, Berkeley, CA 94704
tel: 510/269.7998 • fax: 510/269.7994
www.feinbergjackson.com

August 6, 2020

Via: https://www.regulations.gov and e-mail

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 my strong opposition to the new Proposed Class Exemption and related rulemaking on investment advice. These rules would put the retirement security of millions of American workers and retirees at risk by exposing them to conflicted retirement investment advice with no meaningful protections to limit the harmful impact of those conflicts of interest. I therefore urge you to rescind the Proposed Class Exemption along with the related rulemaking. Instead, the Department of Labor should begin the rulemaking anew to ensure that retirement savers are protected.

I. Statement of Interest

I have represented workers and retirees in employee benefits matters for over 30 years. My firm has litigated ERISA fiduciary claims related to the fees charged to 401(k) plan participants, including claims arising from proprietary products.

feinberg
jackson
worthman
& wasow

II. Background

For many people, the account balance in their 401(k) plan or Individual Retirement Account (IRA) represents the bulk of their personal savings. Ensuring that they keep as much as their hard-earned money as possible is crucial for their retirement security. In ERISA, Congress recognized that self-dealing always injures participants and beneficiaries and categorically prohibited such transactions.[1] Conflicted investment advice is unequivocally self-dealing and thus Congress categorically prohibited such advice through the prohibited transaction rules due to the negative impact on participants and beneficiaries.

III. The Proposed Exemption Is Not Protective of Participants and Beneficiaries from the Self-Dealing of Conflicted Advice.

A. The Department of Labor should not defer to the SEC because DOL is required to provide more protection for retirement savers versus the SEC's retail investors.

At the time of ERISA's enactment, Congress was aware of 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 and beneficiaries, specifically because there were no substantive fiduciary standards.[2] ERISA's standards are far higher than those of the securities or insurance laws because ERISA's role is to protect an individual's retirement benefits.[3] Indeed, nothing in the text, history, or structure of ERISA demonstrates any congressional purpose or design to thwart compliance with ERISA's fiduciary duty requirements merely because a fiduciary complies with federal securities laws or other federal or state regulatory schemes.[4]

This proposed exemption is largely deferential to the Securities and Exchange Commission's (SEC's) Regulation Best Interest (Regulation B-I). Regulation B-I was not drafted to protect investors from the harmful impact of conflicts of interest within the

---

[1] *Comm'r v. Keystone Consol. Indus*., 508 U.S. 152, 160 (1993). *See 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),
[2] H.R. Rep. No. 93-533, reprinted at 1974 U.S.C.C.A.N. 4639, 4642.
[3] *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S.359, 375 (1980).
[4] *Cf. 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.").

broker-dealer business model. Instead, it preserves the brokerage industry's ability to engage in a variety of practices that are profitable for brokers but harmful for investors. Regulation B-I uses the meaningless "best interest" standard. In adopting this regulation the SEC explicitly acknowledged that it is not a fiduciary standard. Indeed, under Regulation B-I's non-fiduciary "best interest" standard, the brokers have no obligation to recommend the investments they reasonably believe are the best available option for the investor from among those they have available to recommend. Instead, they have essentially unfettered discretion to decide for themselves how to comply with the best interest standard.

The Department of Labor has now adopted this "best interest" standard for investment advice, completely ignoring ERISA's sole interest fiduciary standard. To add insult to injury, the Department has extended the meaningless "best interest" standard to all types of investment advisers and products, including insurance products, such as variable annuities.

The purpose of ERISA was to provide **more** protection for participants than state and federal law did at the time of ERISA's enactment.[5] Accordingly, compliance with the regulations of the SEC, state insurance, or related agencies or organizations is not protective of participants and beneficiaries in ERISA plans or IRAs and should not give ERISA fiduciaries a pass on their ERISA fiduciary duties.[6]

B. The conditions of the Proposed Exemption are inadequate to protect participants and beneficiaries.

The Proposed Exemption provides conditions that are inadequate to protect participants and beneficiaries. They do not even begin to mitigate the injury from self-dealing that conflicted investment advice causes.

The Exemption's requirement of reasonable compensation does not require the adviser to recommend investments with the lowest fees, does not require the adviser to explain to the retirement saver the reasons the adviser is recommending an investment that generates more compensation for the adviser, and does not explain how to measure reasonable compensation. This is not protective of participants and beneficiaries.

---

[5] 29 U.S.C. § 1001.
[6] If this was true, then such compliance could eliminate all ERISA liability related to any ERISA fiduciary's investment decision.

feinberg jackson worthman & wasow

The Exemption does not specifically include omissions in the "materially misleading statements about the investment transaction and other relevant matters." *Varity, Amara,* and *Footlocker* all illustrate the impact that omissions can have on a participant.

The Exemption only requires two disclosures, "prior to engaging in the transaction": an acknowledgement that the adviser is a fiduciary, and a written description of services to be rendered and the material conflicts of interest of the adviser. These are the only disclosures. Given the amounts of money involved for the individual, these disclosures are not adequate.[7]

The Department permits the "fox to guard the henhouse." It envisions a self-regulatory regime where the advisers and their Institution establish, maintain, and enforce write policies and procedures to ensure that there is compliance only with the Impartial Conduct Standards. It provides no substantive direction concerning these policies and procedures, except that they must be prudent. For an exemption to be protective of participants and beneficiaries, more is required than a mere description.

Finally, for those millions of Americans who save for retirement through IRAs, the Proposed Exemption provides 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. Neither advisers nor their firms will have any incentive to comply with the Exemption's requirements when advising IRA investors. There is no downside for them.

The Proposed Exemption fails to adequately mitigate the self-dealing caused by conflicted investment advice. Essentially, the DOL is permitting most conflicted practices to continue without any brakes and provides no protections for participants and beneficiaries.

Conclusion

By limiting the entities and individuals who would be considered fiduciaries, exempting those that meet that narrowed fiduciary definition, and providing little in the way of protections, the Department has fashioned a classic "heads, I win; tails, you lose" scenario for retirement investors and ERISA participants. Under the Proposed Class

[7] I note that the Department in its 2016 Regulatory Analysis found that disclosures alone were ineffective to mitigate the impact of conflicted advice.

Exemption, there are insufficient and inadequate protections for participants and beneficiaries. The Department should rescind the rulemaking package and begin anew.

I appreciate the opportunity to share my views on these important issues to ensure that participants and beneficiaries have the information they need to make informed decisions about their retirement benefits. If you have any questions, please feel free to contact me at the email address below.

Sincerely,

FEINBERG, JACKSON, WORTHMAN & WASOW LLP

By /s/
Dan Feinberg
dan@feinbergjackson.com