Request to Testify Regarding Fiduciary Rule—
Collateral Impact on Employer Plan Fiduciaries and Sponsors

The Department's statements in the preamble to the Noticed of Proposed Class Exemption (the "PTE") that rollover communications often may be subject to the fiduciary standard has generated considerable comments from the financial services industry and retirement investor advocates. Unlike those comments, Covington & Burling LLP's ("Covington") does not take a position, pro or con, on the merits of the Department's rollover proposal. Rather, we seek to engage with the Department to support the overall goal of ensuring that rollover recommendations are in the best interest of plan participants and beneficiaries—without diverting retirement plan resources to policing financial institutions' compliance with the Department's final guidance.

The Department's rollover position raises questions as to whether retirement plan fiduciaries and sponsors will be put in the position of policing financial institutions' compliance with the Department's final rule regarding rollover communications when the financial institution also happens to be a service provider to the retirement plan. Left unanswered, there may be collateral—and likely unintended—consequences for employer plan fiduciaries and sponsors in the form of uncertain monitoring obligations, new regulatory burdens, and potential litigation risk. Our comment and testimony address ways these consequences can be avoided—so that a final fiduciary rule can effectively serve the best interests of plan participants and beneficiaries without detracting from employer-sponsored retirement plan fiduciaries' statutorily-bound objective of maximizing the funds available to pay retirement benefits.[1]

The following outline of oral testimony articulates (1) the impact of the Department's proposal on employer plan fiduciaries and sponsors of varying size and negotiating power, (2) the steps the Department could take to address this impact, and (3) why our recommendations will make the Department's final fiduciary rule more effective.

We believe that these issues merit exploration at the upcoming Hearing on Improving Investment Advice for Workers & Retirees. We respectfully request the opportunity to testify in the earliest available time slot.

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Outline of Testimony

1. The Department's rollover proposal creates unanswered questions for employer plan fiduciaries and sponsors that should be answered to allow the proposal to work effectively, without compromising the health of the retirement plan system.

    a. Statements in the preamble to the Noticed of Proposed Class Exemption (the "PTE") indicating that rollovers often may be subject to the fiduciary standard

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[1] *See* ERISA §§ 403(c), 404(a); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.).

result in a significantly changed landscape for many retirement plan service providers, which have historically taken the position that rollover recommendations do not constitute fiduciary investment advice. In light of this new position, such service providers will have to weigh whether some or all of their rollover communications satisfy the Department's five-part test for identifying fiduciary investment advice. Service providers that acknowledge fiduciary status under this test will have to satisfy the conditions of the PTE.

b. This changed legal landscape raises questions about the monitoring obligations of employer plan fiduciaries.

    i. Where service providers acknowledge fiduciary status and avail themselves of the PTE, does the Department contemplate that employer plan fiduciaries will need to police their service provider's compliance with ERISA's fiduciary standards and the PTE? If yes, the task of doing so would place an enormous burden on retirement plan fiduciaries and on plan resources. For example, policing service provider compliance could well require plan fiduciaries to review recordings, transcripts, and/or notes of communications between participants and service provider employees, as well as to review service provider documentation as to why each individual rollover recommendation is in the retirement investor's best interest. The substantial time and expense necessary to engage in such oversight would deplete plan resources and detract from the plan's mission of maximizing the funds available to pay retirement benefits.

    ii. Where service providers do not acknowledge fiduciary status with respect to some, or all, rollover recommendations, does the Department contemplate that employer plan fiduciaries will need to assess the legal merits of these positions? Reviewing, questioning, and, potentially, challenging service provider legal positions would require substantial plan resources and serve little purpose. The Department or a court may engage in a fact-intensive inquiry to determine if a service provider rollover recommendation is subject to the fiduciary standard. However, an employer plan fiduciary should not be required to do so. Employer plan fiduciaries are not in a position to divine how the Department or a court would interpret Department rollover regulations and guidance in a given circumstance and should not be forced to take sides in a hypothetical legal dispute.

c. The burdens arising from these unanswered questions are especially pronounced for retirement plans of small businesses.

    i. Such plans do not have the resources to conduct the oversight described above (assuming service providers would be amenable to providing the information necessary to conduct such oversight).

ii. Some larger plans might be able to reduce their oversight responsibilities by using their bargaining power to prohibit service providers from making rollover recommendations, altogether, or to limit the time, location, method, or circumstances in which their service providers may make rollover recommendations. However, smaller businesses are far less likely to have leverage sufficient to extract such concessions.

iii. In the absence of additional guidance from the Department, fiduciaries and sponsors of plans that lack sufficient bargaining power may be forced to decide between accepting insufficiently mitigated co-fiduciary liability risk or forgoing use of service providers unwilling or unable to demonstrate compliance with the legal obligations described above. It is possible that sponsors of such plans may prefer plan termination to either of these alternatives.

2. The Department should address these burdens by making clear that employer plan fiduciaries and sponsors are not required to scrutinize, and potentially, second-guess, the legal and factual positions of their service providers concerning rollover communications.

    a. Covington's comment letter proposes a safe harbor to accomplish this goal. Under Covington's proposed safe harbor, employer plan fiduciaries could satisfy their obligations under ERISA by having their service providers provide an annual certification to the plan that: (1) the service provider acknowledges that its rollover recommendations constitute fiduciary investment advice and that such advice satisfies all relevant obligations under the PTE, including the obligation to provide investment advice that is in the best interest of participants; or (2) the service provider acknowledges either that its rollover communications do not constitute fiduciary investment advice, or that it is not providing investment advice of any kind with respect to rollovers.

    b. The certification approach described in Covington's comment provides flexibility to address the needs of employer plan fiduciaries and sponsors in a variety of circumstances.

        i. Fiduciaries of plans lacking sufficient resources or bargaining power can be expected to rely on the safe harbor certifications offered by service providers.

        ii. Other plans that negotiate restrictions or limitations on service provider rollover recommendations also would be covered under the safe harbor.

3. Covington's safe harbor recommendation supports the Department's goal of ensuring that advice concerning rollovers is in the retirement investor's best interests, while at the same time, promoting a healthy retirement plan system.

a. The certification safe harbor ensures that plan resources will not be needlessly diverted to policing legal positions of service providers.

b. This approach is consistent with the Department's regulatory approach. It will require service providers to take clear and identifiable positions regarding their rollover communications. These clear positions could assist with any future compliance review.

c. In addition, the certification safe harbor approach avoids a bifurcated regulatory structure that would require fiduciary oversight based only on the happenstance that a rollover recommendation comes from a plan service provider. In practice, it is common for a financial institution that is unaffiliated with the plan to make a rollover recommendation to a retirement plan participant. In such cases, the financial institution must still comply with the PTE if it acknowledges fiduciary investment advice status — but the employer plan fiduciary does not have an obligation under Title I of ERISA to monitor the third-party's rollover recommendation. If employer plan fiduciary involvement in monitoring the legal positions of non-service provider financial institutions is not necessary to protect retirement investors in those circumstances, such involvement should not be necessary to protect retirement investors when the financial institution making the recommendation happens to be a plan service provider.

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Other Requested Information

(1) The name of the person desiring to serve as a witness: Jason Levy

(2) The organization or organizations represented, if any: Covington & Burling LLP

(3) Contact information (address, telephone, and email): 850 Tenth Street, NW Washington, DC 20001; (202) 662-5287; jmlevy@cov.com

(4) The date of the comment letter or hearing request submitted by the person or organization concerning the proposed exemption: Covington submitted its comment on August 6, 2020. We respectfully request to testify at the earliest available time slot on September 3, 2020. We also could testify if necessary at any other time on September 3 or on September 4, 2020 (or such other time designated by the Department).