PENSION RIGHTS CENTER
PROTECTING AND PROMOTING RETIREMENT SECURITY
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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., N.W.
Suite 400
Washington, D.C. 20210

Re: Application No. D-12011
Improving Investment Advice for Workers & Retirees

To Whom It May Concern:

On behalf of the Pension Rights Center,[1] we submit the following comments on the proposed class exemption "Improving Advice for Workers and Retirees." Our comments primarily address three concerns: first, the provision in the proposed exemption that would allow financial advisers to give advice so long as the adviser meets a vague, non-fiduciary standard of acting in the best interests of the participant; second, the proposed exemption's failure to condition the exemption's availability to advisers of IRA owners on the adviser's consent to be sued; and third, and perhaps most important, the rush to push through this exemption to final form without addressing related fiduciary issues and, particularly given the complex issues raised by the exemption, without permitting adequate time to prepare comments that thoroughly explore those issues. We also ask that the Department hold public hearings on the proposed exemption.

Background on Comments

The Department of Labor engaged in a multi-year project, in which regulations on the definition of financial advice under ERISA and related issues to replace an earlier 1975 regulation were proposed, then in light of comments and a multi-day hearing, re-proposed along with proposed prohibited transaction exemptions, and finally adopted (with additional changes) in 2016 (along with the new prohibited transaction exemptions). Ultimately, a panel of the Fifth Circuit Court of Appeals, in a 2-1 vote, held that the 2016 regulation exceeded the Department's authority and finding their provisions non-severable, vacated the entire regulation not only within the jurisdiction of the Fifth Circuit but for the entire nation. The Department did not appeal the panel's decision. Thus, two judges out of a randomly selected panel of three judges, undid the Department's multi-year project to protect participants in employee benefit plans.

On July 7, 2020, the Department, as a follow-up to its more than seven-year regulatory project described above, published two new items in the Federal Register that further addressed questions of investment advice for plans, participants and IRA investors. At the same time, the

[1] The Pension Rights Center is a Washington, D.C. nonprofit consumer organization that has been working for more than four decades to protect and promote the retirement security of American workers, retirees, and their families. The Center provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, the public, and the courts. We have previously commented on issues related to this prohibited transaction exemption before the Department and as invited witnesses at a congressional hearing. See footnote 2, *infra*.

Department proposed the prohibited transaction exemption on which comments were invited, it also announced that it was formally reestablishing the 1975 regulation on the meaning of investment advice. That regulation, which had little basis in either common linguistic usage or in the language of ERISA, was rendered obsolete by the shift from defined benefit pension plans with pooled and professionally managed investments to self-directed defined contribution plans and individual retirement accounts. The 1975 regulation failed to protect the tens of millions of American workers and retirees whose retirement savings are invested in such plans.

Rather than begin a project to address the 1975 regulations' lack of fidelity to the language of ERISA and obsolescence to the changed world of retirement savings, the Department formally gave new life to those regulations and issued a prohibited transaction exemption that weakened the protections retirement plan participants previously had when they received investment advice from a fiduciary.[2]

Best Interest Standard Under the Proposed Exemption Does Not Provide Adequate Protection of a Retirement Investor

The proposed exemption would permit fiduciary investment advisers to engage in otherwise prohibited transactions if they satisfy a best-interest rather than a fiduciary standard. An investment adviser would satisfy the best-interest standard if the advice first, "reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of a like enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor,"[3] and second, if the investment adviser "does not place [the adviser's] financial or other interests ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interest to [the adviser's] own." [4]

This is a non-fiduciary standard of behavior that provides scant protection to a participant relying on investment advice. The first part of the exemption is nothing more than a restatement of the general duty of ERISA prudence, which a fiduciary would have to satisfy even if not covered by a prohibited transaction exemption. Thus, it offers no protection that the participant or IRA owner would not have in any event. It is also a standard that by its general "standards" language can require a full-scale factual adjudication to determine whether a fiduciary qualified for the exemption in the first place.

The second part of the exemption apparently allows the investment adviser to give consideration to its own financial interest so long as that interest plays only an equal part in the financial advice he or she provides. This is not a standard that satisfies ERISA's duty of loyalty—indeed, the prohibited transaction exemption here not only exempts the fiduciary investment adviser from

[2] We addressed these issues in great detail in our comments on the Department's proposed 2011 regulations, which we ask the Department to consider part of these comments. See Joint Comments of the Pension Rights Center and the National Employment Lawyers Association, dated February 3, 2011, available at http://www.pensionrights.org/sites/default/files/docs/prcnelacommentsondefinitionoffiduciaryproposedrule.pdf.

[3] This part of the standard is borrowed from the 2016 Best Interest Contract Exemption.

[4] This part of the standard is materially different than the 2016 exemption, which provided that the advice must be given "without regard to the financial or other interests of the Adviser.."

the prohibited transaction rules, it also dilutes the general ERISA fiduciary standard of loyalty to the participant, which is beyond the scope of the exemption process.

IRA Owners Are Not Able to Enforce the Exemption

Individuals who provide services to IRAs are fiduciaries subject to the excise tax imposed on fiduciaries who violate the prohibited transaction rules. These rules cannot be enforced by individual retirement investors, which is a significant reason why the 2016 prohibited transaction exemption required that the contract including the exemption requirements must be enforceable against the financial institution whose agents provides the advice. The proposed exemption includes no similar requirement, which will render even the exemption's attenuated protections unenforceable by those IRA owners who will be without access to ERISA participant remedies.

The Rush to Approve the Exemption Will Subvert Adequate Regulatory Consideration.

The Department proposed this exemption on July 7, 2020, with comments due on August 6. These regulations are complex. They raise issues about whether they are consistent with ERISA's fiduciary standards and whether they inadvertently undermine ERISA's duty of loyalty. They also raise difficult questions about the relationship between ERISA and securities, banking and insurance laws and to what extent they converge and to what extent they reflect different concerns and require different standards. The exemption also presupposes that the 1975 regulations are a correct interpretation of the statute, which for reasons that we have previously addressed in comments submitted to the Department is itself questionable.[5] We believe regulations should follow thorough and robust consideration of the appropriateness of the 1975 regulations to today's retirement savings environment and, in any event, require more than 30 days to permit the general public to adequately comment.

As noted in the initial paragraph of these comments, we request that the Department hold a public hearing to examine the issues above. We would discuss the issues raised in these comments.

Thank you.

Sincerely,

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[5] See footnote 2.

(for identification purposes only)