ACLI
Financial Security for Life

Testimony to the U.S. Department of Labor on Proposed Regulation

“Improving Investment Advice for Workers & Retirees”

September 3, 2020

On behalf of

The American Council of Life Insurers

Good morning.

My name is Jim Szostek. I’m Vice President and Deputy for Retirement Security at the American Council of Life Insurers.

ACLI is the leading trade association driving public policy and advocacy on behalf of the life insurance industry. 90 million American families rely on the life insurance industry for financial protection and retirement security.

ACLI member companies protect retirement savers’ financial well-being through annuities, the only product available that guarantees income throughout retirement.

To secure the benefits of guaranteed lifetime income in retirement, it is critical that retirement savers retain access to both fiduciary and non-fiduciary services.

ACLI has been actively engaged in working toward a harmonized federal and state best interest standard of care for financial professionals. ACLI also seeks the appropriate application of fiduciary requirements to those who are paid to provide impartial investment advice.

I’m with you today to express ACLI’s concerns with the Department’s commentary in the preamble to the proposal.

This commentary could be understood to broadly impose fiduciary obligations in a manner similar to the Department’s 2016 fiduciary regulation.

Before it was vacated by the Fifth Circuit Court of Appeals, that regulation’s fiduciary-only elitist approach restricted access to professional guidance that retirement savers with low and moderate balances want and need.

We are concerned that retirement savers will once again be denied the choice of nonfiduciary services. This would negatively impact Americans with low and moderate retirement balances who typically engage financial professionals on a transactional basis and may not have the wherewithal to secure fiduciary services.

In a memorandum to the Secretary of Labor in 2017, the President made clear that one of the priorities of his Administration is to empower Americans to make their own financial decisions and to facilitate their ability to save for retirement. We are concerned that the Department's actions are inconsistent with this priority and, in fact, restrict the ability of American to save for retirement.

Before the 2016 regulation was vacated by the Fifth Circuit Court of Appeals, it was evident that the regulation's fiduciary-only approach was harming retirement savers with low and moderate balances as it restricted their access to nonfiduciary financial professionals.

Unfortunately, the Department's commentary regarding the "five-part test" in the preamble to the proposed class exemption acts to revert us back to that vacated regulation, casting doubt as to whether a financial professional can ever offer nonfiduciary services to retirement savers.

Contrast this with the SEC's Regulation Best Interest efforts. The SEC imposed a best interest standard of care on non-fiduciary financial professionals. The National Association of Insurance Commissioners, a standard-setting organization led by the nation's state insurance regulators, also revised its annuity transaction model regulation to incorporate a similar best interest standard of care. The states are beginning to adopt this new standard. ACLI applauds and supports this work.

However, of greater import to the Department's work here regarding those with a fiduciary duty, the SEC clarified when a person is subject to the Investment Advisers Act and thus subject to a fiduciary duty under common law.

To date, the Department's efforts do not align well with the SEC's work.

It is reasonable to read the five-part test, a definition of "rendering investment advice" as an articulation of what it means to be in the business of providing individualized investment advice consistent with the Investment Advisors Act of 1940.

However, mere satisfaction of the five-part test is not and must not be indicative of a fiduciary relationship. The Department's analysis of the "five-part test" within the framework of ERISA's definition of fiduciary is incomplete and, therefore, incorrect.

Like the construct under the Advisors Act, to be in the business of providing individualized investment advice, ERISA places fiduciary status on a person who renders investment advice "for a fee." As stated by the Fifth Circuit in its ruling vacating the 2016 regulation, the phrase "investment advice for a fee" and similar phrases generally referenced a fiduciary relationship of trust and confidence between the adviser and client.

Unfortunately, it is reasonable to conclude from the Department's commentary in the Preamble that it is the Department's view that when a person meets the conditions of the five-part test and the person receives some form of compensation from somebody for any reason, the person is an investment advice fiduciary.

The Department makes its view clear in the Preamble with the following example: "a broker-dealer who satisfies the five-part test with respect to a Retirement Investor, advises that Retirement Investor to move his or her assets from a Plan to an IRA, and receives any fees or compensation incident to distributing those assets, will be a fiduciary subject to ERISA … with respect to the advice regarding the rollover."

This interpretation is not at all consistent with statutory text of ERISA and the Fifth Circuit's decision vacating the 2016 Fiduciary regulation.

The relevant statutory text directs that a person is a fiduciary to the extent "he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so[.]"

The statute thus appropriately ties fiduciary status to circumstances in which a fee is paid “for” advice, that is, the person is in the business of providing investment advice, the same rule we find under the Investment Advisers Act.

Yet, the Department’s example fails to include any inquiry as to whether the compensation is paid for the advice.

This interpretation of ERISA repeats a significant error in the 2016 Fiduciary Regulation.

As the Fifth Circuit put it, “DOL’s interpretation conjoins ‘advice’ with a ‘fee or other compensation, direct or indirect,’ but it ignores the preposition ‘for,’ which indicates that the purpose of the fee is not ‘sales’ but ‘advice.’”

ERISA seeks to ensure that when plans, plan participants and beneficiaries hire an investment adviser and pay that adviser a fee to provide investment advice, the adviser has a duty of loyalty to the investor commensurate with that of a fiduciary under common law.

It is inappropriate and beyond the scope of the law to apply such a duty to an insurance agent who is paid a commission by an insurance company only when an insurance product is sold, not when recommendations are made.

Sales recommendations in which a commission is paid only when there is an investment transaction cannot and must not be viewed the same as investment advice under a relationship in which compensation is paid regardless of whether the advice leads to action. Transactional compensation, in and of itself, must not trigger fiduciary status under ERISA. Simply put, the commission payment is for the sale of the product not for the provision of investment advice.

Such a clear articulation of ERISA from the Department would remove all doubt for both financial professionals and retirement savers.

It would also align the Department’s efforts with those of the SEC.

The Investment Advisers Act of 1940 predates the adoption of ERISA.

Thus, it is wholly appropriate to examine the SEC’s views on when someone is or is not in the business of providing individualized investment advice.

The SEC has explained that brokers whose rendering of investment advice is “solely incidental” to their business and free of any special charges shall not be deemed an “investment adviser” for purposes of the Advisers Act.

This aligns with the plain text of ERISA and the 5th Circuit’s ruling, absent special compensation for the rendering of investment advice, no fiduciary relationship is formed.

The Department should be clear, the ultimate fiduciary inquiry turns first on whether the person is paid compensation “for” advice rather than “for” sales or other services. This would properly sync up the Department’s efforts with those of the SEC.

Such clarity will ultimately serve retirement savers. There should be no doubt as to the duties owed to them by those they engage. The Department’s view of ERISA’s fiduciary definition must provide such clarity to retirement savers and the regulated community.