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Working for America's Retirement

August 6, 2020

Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW, Ste. 400
Washington DC 20210
via Federal eRulemaking Portal at www.regulations.gov

Re: Improving Investment Advice for Workers & Retirees – Proposed Class Exemption Application No. D-12011 – Docket ID number: EBSA–2020–0003

Dear Department of Labor:

The American Retirement Association (ARA) appreciates the opportunity to submit our comments on the proposed class exemption entitled "Improving Investment Advice for Workers & Retirees" (Proposal).[1] As explained in further detail below:

- **The ARA supports the application of an ERISA fiduciary standard to rollover advice provided to plan participants;**
- **The ARA requests clarification that in the context of Pooled Employer Plans (PEPs), Pooled Plan Providers (PPPs): (1) are not excluded from exemptive relief under the Proposal even though PPPs are named fiduciaries as required by statute; and (2) are not ERISA fiduciaries solely by reason of marketing the PEP and its investment platform to employers who are independent of the PPP; and**
- **The ARA believes that the Department should consider, in a separate proceeding, revisiting elements of the "five-part test" for fiduciary investment advice; in particular, we believe that the "regular basis" prong of the test should be reconsidered.**

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system –the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). The ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, the ARA has nearly 30,000 individual members who provide consulting and administrative services to the sponsors of retirement plans. The ARA and its underlying affiliate

[1] 85 Fed. Reg. 40,834 (July 7, 2020).

organizations are diverse but united in their common dedication to the success of America's private retirement system.

Our comments are divided into three categories. First, we comment on the position described in the preamble to the Proposal on the treatment of advice on rollovers as fiduciary investment advice. Second, we request clarification of how specific provisions of the proposed exemption would apply to Pooled Employer Plans (PEPs), a form of multiple employer plan established by last year's SECURE Act[2] which will be effective on January 1, 2021. Last, we comment on the current status of the so-called "five-part test" for fiduciary investment advice that was formally reinstated by a notice published on the same day as the proposed class exemption.[3]

1. Plan Participant Rollovers

- **The ARA supports the application of an ERISA fiduciary standard to rollover advice provided to plan participants.**

As an association representing ERISA plan fiduciaries, the ARA supports the application of an ERISA fiduciary standard to advice provided to plan participants regarding rollovers, as described in the preamble to the Proposal, replacing the Department's previous position on rollover advice as described in the *Deseret* advisory opinion (Advisory Opinion 2005-23A)[4]. We thank the Department for providing clarity on the ability of a 401(k) plan advisor to work with plan participants on rollover transactions under a fiduciary standard. This is particularly germane for plan sponsors as they encounter participants' needs for sources of reliable information when considering rollovers. As an added benefit, by emphasizing the importance of an advisor on rollovers who make diligent and prudent efforts to obtain information about the existing plan and the participant's interests in the plan, the exemption may serve to point participants to the current plan advisor when seeking advice on rollovers. The current plan advisor would be familiar with the terms and features of the plan and generally would be better positioned to advise on the benefits of keeping retirement account balances in the plan.

The Proposal describes a number of expected practices with regard to rollover transaction advice, including the information to be provided to the plan participant and the factors that the advisor should consider in making a rollover recommendation. As our members work through these matters, we may follow up with the Department regarding the possibility of additional clarifying guidance.

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[2] The Setting Every Community Up for Retirement Enhancement Act, enacted as part of the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019).
[3] Conflict of Interest Rule – Retirement Investment Advice: Notice of Court Vacatur, 85 Fed. Reg. 40,589 (2020).
[4] December 7, 2005.

2. Application of the Conditions of the Proposed Class Exemption to PEPs and Pooled Plan Providers (PPPs)

- **The ARA requests clarification that in the context of Pooled Employer Plans (PEPs), Pooled Plan Providers (PPPs): (1) are not excluded from exemptive relief under the Proposal even though PPPs are named fiduciaries as required by statute; and (2) are not ERISA fiduciaries solely by reason of marketing the PEP and its investment platform to employers who are independent of the PPP.**

As described in the ARA's comment letter on the Department's Request for Information Regarding Prohibited Transactions Involving Pooled Employer Plans Under the SECURE Act and Other Multiple Employer Plans, the ARA is interested in working with the Department to make PEPs a viable and meaningful retirement savings vehicle.

Given the ARA's view that PEPs will be an important means for expanding the availability of retirement savings programs to U.S. employees, we want to make sure that the conditions for providing fiduciary investment advice described in the proposed exemption notice will not adversely impact the growing interest of our members in sponsoring and supporting these types of plans. Our specific concerns are as follows:

- *Named Fiduciary/Plan Administrator Exclusion:* The proposed exemption excludes (in Section I(c)(1)) coverage of any Investment Professional, Financial Institution, or affiliate that is "a named fiduciary or plan administrator with respect to the Plan that was selected to provide advice to the Plan by a fiduciary who is not independent of the Financial Institution, Investment Professional, and their affiliates."

The PPP that establishes the PEP is required by statute (Section 3(42)(B)(i) of ERISA, as amended by the SECURE Act) to be both a named fiduciary and the plan administrator of the PEP, and to set up the plan with itself in these roles under the terms of the plan document. The PPP and its affiliates may further be designated under the plan document and related agreements to provide various services to the plan and plan participants, possibly including investment advice. This raises the question of whether a PPP and its Investment Professionals will be subject to this exclusion and thereby precluded from providing advice for additional compensation, including rollover advice, to the employers/plan sponsors or plan participants under the terms of the exemption.

In point of fact, the participating employers, as the "plan sponsors" and as fiduciaries with respect to the portion of the PEP attributable to their respective employees (see Sections 3(43)(D) ("Treatment of Employers as Plan Sponsors") and 3(43)(B)(iii) (fiduciary role)), would select the PPP as named fiduciary and plan administrator of, and (as applicable) advice provider to, their respective portions of the plan. So while the ARA believes that, assuming the participating employers are independent of the PPP, the selection by those employers of the PPP to provide

investment advice to the plan and its participants should be sufficient to avoid this exclusion, how this fits into the exemption language may be unclear due to the PEP statutory requirements.

This issue could be addressed by clarifying in this condition of the exemption that, in the PEP context, the PPP (or an affiliate of the PPP) is considered to have been selected to provide advice by an independent fiduciary if the advice services are covered by the terms of the PPP's (or affiliate's) agreement with the participating employers, and can thereby avoid being excluded from relief under the exemption.

- *Investment Menu Offering:* In a PEP, the PPP would generally have a role in the selection of the menu of investment options to make available to the plan participants, which would be approved by the participating employers as a function of their selection of the particular PEP. As such, the investment menu would, in the first instance, more appropriately be treated as a product feature than investment advice.

While the 2016 final regulation on fiduciary investment advice included a specific carve-out for the marketing or making available of a platform of investment options (29 C.F.R. section 2510.3-21(b)(2)(i)), there is no such guidance under the reinstated five-part test. We believe it would be appropriate for the Department to clarify how the concept of fiduciary investment advice applies in this context, taking into account that the participating employers are to be treated under the statute as having a fiduciary role for certain purposes. The objective of the clarification would be to make clear that the PPP would not be considered to be providing fiduciary investment advice under the five-part test solely by reason of marketing the PEP and its associated investment platform to employers who are independent of the PPP.

We acknowledge that the PPP could still be a fiduciary with respect to monitoring and eliminating/ replacing investment options on the menu on an ongoing basis, depending on whether the structure of the PEP has the PPP performing these functions in a fiduciary capacity.

3. Reconsideration of "Regular Basis" Element of Five-Part Test

- **The ARA believes that the Department should consider, in a separate proceeding, revisiting elements of the "five-part test" for fiduciary investment advice; in particular, we believe that the "regular basis" prong of the test should be reconsidered.**

While the Department has, in accordance with *Chamber of Commerce of the United States v. U.S. Department of Labor,* 885 F.3d 360 (5th Cir. 2018), reinstated the five-part test for fiduciary investment advice, we believe that the Department should consider, in a separate proceeding, revisiting elements of the test going forward. In particular, the ARA's long-standing position has been that the "regular basis" element of the test, requiring that advice be part of an ongoing

relationship, is too narrow, for the reasons described in the Department's 2016 notice adopting the final regulation. That is, we share the concern that the regular basis element fails to draw appropriate distinctions between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not. After all, advice provided on a one-time basis may be in connection with a significant investment transaction for a plan or may be specialized advice for a single, unusual and complex transaction. Plan officials without specialized expertise in financial matters sufficient to evaluate the transaction on their own may rely on the advisor's expertise in entering into that transaction, making the protections provided by ERISA's fiduciary duties all the more important. Nevertheless, the advisor may not be treated as an ERISA fiduciary because the advice was not part of a "regular basis" relationship. As the Department stated in its 2016 notice, there is no statutory basis for the "regular basis" requirement and its effect can be to undermine the protective goal of ERISA's fiduciary responsibility provisions.[5]

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The ARA very much appreciates the Department's commitment to safeguarding workplace retirement savings plans of America's workers, and would welcome the opportunity to further discuss with you the issues described in this comment letter. Please feel free to contact Allison Wielobob, ARA General Counsel, at AWielobob@USARetirement.org. Thank you for your time and consideration.

Sincerely,

/s/ Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/ Will Hansen, Esq.
Chief Government Affairs Officer
American Retirement Association

/s/ Allison Wielobob
General Counsel
American Retirement Association

[5] *See* 81 Fed. Reg. 20946, 20,949 & 20,955 (Apr. 8, 2016).