March 1, 2019

Submitted electronically via email to fiduciaryduty@sos.nv.gov and dfoley@sos.nv.gov

Diane Foley
Nevada Secretary of State's Office
Securities Division
2250 Las Vegas Boulevard North
Suite 400
North Las Vegas, Nevada 89030

Re: January 18, 2019 Notice of Draft Regulations and Request for Comment on draft fiduciary regulations to be added to Chapter 90 of the Nevada Administrative Code

Dear Ms. Foley:

On behalf of the American Benefits Council (the "Council"), I am writing today with respect to the above referenced Notice of Draft Regulations and Request for Comment. We very much appreciate the opportunity to comment.

The Council represents more than 250 of the nation's Fortune 500 companies and many other major employers, as well as organizations that support employers of all sizes. Collectively our members either directly sponsor or provide services to more than 100 million Americans participating in employer-sponsored retirement and health plans.

As we all know, there has been a broad public policy discussion over the last several years about the fiduciary status and obligations of financial professionals with respect to retirement plans and IRAs. We support a national fiduciary standard that applies in a consistent manner to all ERISA plans. Such consistency is critical to our members, many

of whom maintain national retirement plans, which cannot and do not vary state to state.

We were concerned by the enactment in 2017 of a Nevada law that on its face would clearly apply to ERISA plans,[1] thus disrupting the national administration of retirement plans and setting a precedent for further disruption in other states. It had been our hope that the regulations would reflect the fact that ERISA preempts state fiduciary regulation of ERISA plans.

The proposed regulation certainly took a step in the right direction by ***generally*** defining a fiduciary as one who provides advice with respect to "securities." For this purpose, the term "securities" is defined to exclude interests in an ERISA plan. However, the proposed regulation extended the definition of a fiduciary to also include advice that is not limited to securities and thus clearly applies to ERISA plans. For example, the definition of investment advice triggering fiduciary status includes information regarding "a personalized investment strategy." This is so broad that it could sweep in call center assistance to millions of 401(k) plan participants across the country. As you are aware, employers have engaged rigorous protocols to prevent call centers from providing anything other than "investment education".

It is also troubling that the legislative history underlying the Nevada statute reveals that a key motivation for enactment was the need to bolster the protections for ERISA plans and IRAs in case the Department of Labor ("DOL") fiduciary rule, as revised by the Obama Administration, was weakened. (The DOL rule was later invalidated by the Fifth Circuit.) In this regard, we are concerned first that there is a perception that the court case invalidating the revised rule left plan participants and plan sponsors without a robust fiduciary rule under ERISA. Also, we are concerned that that the Nevada rule, without an exemption for ERISA-covered retirement plans, may adversely affect the plan sponsors' ability to communicate effectively, prudently and fairly with their employees who are the plan participants, as the Council described in comment letters submitted to DOL.

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[1] The Nevada law extends a fiduciary duty of care to broker-dealers, broker-dealer sales representatives, and certain investment advisers who provide investment advice to clients. The definition of a "client" to which the rule applies includes "a person who receives advice from a financial planner." NRS 628A.010(1). A "financial planner" includes, in relevant part, "a person who for compensation advises others upon the investment of money." NRS 628A.010(3). A "person" is defined broadly to mean, "except as expressly provided in a particular statute or required by context," a natural person or any type of business organization (including a corporation, partnership, or unincorporated organization). NRS 0.039.

We are very concerned about the possibility of ERISA plans being subject to state laws. The state rules will inevitably be different. In some cases, this will lead to a need to comply with the most stringent rule and to modify plan operations repeatedly. ***This could, for example, cause an entire national plan to be modified because one city adopted a new stringent rule, followed by many other modifications as other states or cities adopt slightly different rules.*** In other cases, this will lead to unintended results. For example disclosures could be lengthy and confusing by reason of the need to comply with numerous different disclosure rules. Not only will these rules be different from one another, there is no assurance that the rules will not directly conflict. For example, one state might require advice regarding an employee's entire financial situation; another state might preclude such advice from someone who does not hold certain licenses; and DOL could find a problem with retirement advice that takes into account non-retirement needs.

Fortunately, there is a very straightforward solution in the law. State fiduciary rules, like the one enacted in Nevada and like the proposed regulation, are clearly preempted by ERISA. ERISA's powerful preemption provision expressly reflects Congress's unambiguous intent for the federal government to regulate all matters relating to retirement plans, including the provision of investment advice. ERISA defines who is a fiduciary, details that standard of care, and creates its own enforcement mechanisms through DOL, the IRS, and federal courts.

States cannot, and therefore should not attempt to, add any new or additional requirements to that comprehensive system if their regulation "relates to" an employee benefit plan. ERISA's "savings clause," under which preemption does not apply to state laws regulating insurance, banking, or securities, would not prevent preemption. The case law on ERISA's savings clause interprets it very narrowly. In the case of insurance, the Supreme Court has explained that the savings clause is not applicable unless a state law is "specifically directed toward" the regulation of insurance.[2]

Applying similar logic to the carve-out for securities and banking regulation, it is difficult to argue that ERISA's savings clause would protect a state fiduciary rule like Nevada's from federal preemption. This is because Nevada's rule is primarily focused on the provision of investment advice, rather than the regulation of insurance, banking, or securities.

[2] *Kentucky Association of Health Plans, Inc. v. Miller*, 538 U.S. 329, 334 (2003).

In short, laws like Nevada's proposed regulation would clearly be preempted, in order to avoid exactly the situation that ERISA preemption was intended to prevent: a patchwork of state and local laws applying to national retirement plans.

We ask you to clarify in final regulations that the regulations have no application to ERISA plans, consistent with clear ERISA preemption principles. We thank you for your consideration of the issues addressed in this letter.

Sincerely,

Jan Jacobson
Senior Counsel, Retirement Policy
American Benefits Council