January 6, 2020

Office of the Secretary of the Commonwealth
Attn: Proposed Regulations – Fiduciary Conduct Standard
Massachusetts Securities Division
One Ashburton Place, Room 1701
Boston, MA 02108

Re: Comments on Proposed Fiduciary Conduct Standard

Dear Secretary Galvin:

On behalf of the American Benefits Council ("the Council"), I am writing to provide comments on the rule proposal published in December 2019, "Fiduciary Conduct Standard for Broker-Dealers, Agents, Investment Advisers, and Investment Adviser Representatives."

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

The proposal would have a significant effect on ERISA plans. The proposal contains an exemption for any person acting as an ERISA fiduciary to a plan or its participants or beneficiaries. But, for example, if a broker-dealer is providing recommendations to an ERISA plan or participant, but not acting as an ERISA fiduciary, the proposal imposes a fiduciary duty on that broker-dealer. This is, in our view, preempted by ERISA and would have a very significant effect on ERISA plans if it were not preempted. For example, the proposal would apply an entire set of new rules to, for example, the call centers that serve millions of ERISA plan participants.

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Over the last several years, there has been a broad public policy discussion about the fiduciary status and obligations of financial professionals providing investment advice. And with the issue moving to the state legislatures and regulators, we are concerned that state action on this matter could quickly evolve into a major threat to the workability of employee benefit plans maintained by large multi-state plan sponsors because different states' rules will inevitably adopt standards different from each other and different from the federal standards imposed through ERISA.

ERISA explicitly protects employee benefit plans from this type of disruption. ERISA Section 514 states that, except as otherwise provided by law, ***ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."*** This express and powerful preemption language reflects Congress' unambiguous intent for the federal government to regulate all matters relating to employer-sponsored retirement plans, including any fiduciary standards triggered by the provision of investment advice. ERISA defines who is a fiduciary, details that applicable standard of care and creates its own enforcement mechanisms through DOL, the IRS and federal courts. States cannot add any new or additional requirements to that comprehensive system if their rules "relate to" an employee benefit plan.

As the Supreme Court has repeatedly affirmed, ERISA preempts state laws that have an "impermissible connection with ERISA plans," which has been interpreted to mean any "state law that governs a central matter of plan administration or interferes with nationally uniform plan administration."[1] This includes any state regulation purporting to define when a fiduciary relationship exists.

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 (1) "specifically directed toward" the regulation of insurance and (2) the state law "substantially affect[s] the risk pooling arrangement between the insurer and the insured.[2] Thus, the insurance carve-out from ERISA preemption would not extend to protect state rules seeking to regulate advice regarding insurance products that relate to an ERISA-covered plan because any such regulation would not affect the risk pooling arrangement between the insured and the insurer.

Applying similar logic to the carve-out for securities and banking regulation, it is difficult to argue that ERISA's savings clause would protect the proposal. This is because the kind of rules envisioned by the proposal focus on the provision of investment advice, rather than the regulation of insurance, banking, or securities.

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[1] *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (internal quotations and citations omitted).

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

If not for ERISA's strong federal preemption provisions, the state-by-state regulation of employee benefit plan fiduciaries would cause untold disruption to national or regional plans that today operate uniformly. 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 more stringent rule than had previously existed, 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. In addition, similarly situated employees in different locations could be treated differently.

Not only will the state 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 the Department of Labor could find a problem with retirement advice that takes into account non-retirement needs. These sorts of problems could lead to less information and less availability of innovative programs.

Accordingly, the Council urges the Massachusetts Securities Division to exclude ERISA-covered plans, participants and beneficiaries from the scope of any forthcoming fiduciary duty rules. Not only is this approach consistent with sound public policy, but it is also clear that federal law clearly preempts any state regulation designed to impose fiduciary duties on financial professionals with regard to their interactions with ERISA-covered plans, participants and beneficiaries.

We thank you for your consideration of our request.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy